STEPHEN L. PEVAR
American Civil Liberties Union Foundation
32 Grand Street
Hartford, Connecticut 06106
(860) 293-1559

JENNIFER HORVATH
American Civil Liberties Union of Wyoming
PO Box 20706
1603 Capitol Avenue, Suite 510
Cheyenne, Wyoming 82003
(307) 637-4537

ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF WYOMING

JOSEPH MILLER, and HURIE PURDIMAN, JR. Plaintiffs, vs. MICHAEL MURPHY and, ROBERT LAMPERT, in their official and individual capacities, Defendants.	Civ. No. 08-CV-090B PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION, AND BRIEF IN SUPPORT

INTRODUCTION

Plaintiffs Joseph Miller and Hurie Purdiman, Jr., are Muslim prisoners incarcerated in the Wyoming State Penitentiary ("WSP"). They file this motion in an effort to immediately halt further violations of rights guaranteed them by the

Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 114 Stat. 804, 42 U.S.C. § 2000cc.

Defendant Michael Murphy is the Warden of WSP, and Defendant Robert Lampert is the Director of the Wyoming Department of Corrections ("WDOC"). These prison officials adopted, and their subordinates at WSP enforce, a policy known as the "twenty-minute" rule. This policy requires segregated prisoners to eat their meals within twenty minutes after delivery by guards. Food not eaten within twenty minutes will be confiscated and discarded.

The "twenty-minute" rule substantially burdens Plaintiffs' religion in violation of RLUIPA on those occasions when meals are delivered during one of Plaintiffs' religious exercises, that is, during their prayers or their religious fasting. On those occasions, Plaintiffs are faced with a "Hobson's choice": either they must violate their religious beliefs by abruptly terminating their religious exercise and choose to eat, or they must follow their conscience and complete their religious exercise, but forfeit their meal. On these occasions, in other words, Plaintiffs must relinquish their food in order to follow their faith.

Plaintiffs asked Warden Murphy in January 2008 to grant them an exemption from the "twenty-minute" rule when meals are delivered during a religious exercise, by allowing them extra time to eat their meals on those occasions. Warden Murphy denied that request, stating that "[f]or years now" the prison has maintained a policy that allows prisoners only "twenty (20) minutes to eat their meals" and no exceptions are allowed. *See* Letter of Warden Michael Murphy dated January 22, 2008 (attached as "Exhibit 1.")

For reasons explained below, Defendants' "twenty-minute" rule violates RLUIPA. Indeed, as the Supreme Court made clear in *Cutter v. Wilkinson*, 544 U.S. 709 (2005), RLUIPA was intended to eradicate *the very type of prison policy challenged here*. *See Cutter*, 544 U.S. at 716-17 & n.5 (noting that RLUIPA was enacted "[t]o secure redress for inmates who encountered undue barriers to their religious observances," citing as one example of an undue barrier a policy of forcing inmates to choose between completing a religious exercise and eating).

Before proceeding further, the Court should be aware of one additional set of facts. As just noted, Warden Murphy staunchly defended his "twenty-minute" rule as recently as January 22, 2008. As a result, the instant lawsuit was filed on April 3, 2008. After the complaint was filed, however, Plaintiffs learned that Warden Murphy had suddenly abandoned his "twenty-minute" rule ten days earlier, on March 24, 2008, when he issued Warden's Memorandum # 7-2008, a copy of which is attached as "Exhibit 2." This new rule is precisely the type of exemption that Plaintiffs had requested in January. Rather than require prisoners engaging in a religious exercise to consume their meals within twenty minutes, the new rule permits such persons to retain their meals until the next meal is served (which, of course, will be hours later). Thus, Warden Murphy repealed the "twenty-minute" rule, replacing it with a very accommodating policy.

The problem is--and the reason why Plaintiffs seek preliminary injunctive relief--many WSP employees continue to enforce the "twenty-minute" rule. On April 5, 2008, for instance, Correctional Officer Fuller confiscated meals served to Plaintiffs Miller and Purdiman. When Mr. Purdiman grieved the loss of his meal,

Officer Fuller cited the "twenty-minute" rule as the reason. (A copy of Officer Fuller's response is attached as "Exhibit 3.") Mr. Purdiman then asked his caseworker, Mr. Markum, if anything could be done to change the "twenty-minute" rule. Mr. Markum replied on April 7, 2008, stating that he is unable to change the rule. (A copy of Mr. Markum's statement is attached as "Exhibit 4.") On April 24, 2008, a supervisory officer, Corporal Paulsing, enforced the "twenty-minute" rule on a Jewish prisoner, David Jones. (*See* Declaration of David Jones, attached as "Exhibit 5," at 2.) As recently as May 8, 2008, an officer enforced the "twenty-minute" rule against Mr. Purdiman. (*See* Declaration of Hurie Purdiman, attached as "Exhibit 6.")

As discussed *infra*, the "twenty-minute" rule violates RLUIPA, and its continued enforcement is causing Plaintiffs to suffer irreparable injury. Plaintiffs respectfully move this Honorable Court to issue a preliminary injunction pursuant to Rule 65 of the Federal Rules of Civil Procedure enjoining all further enforcement of the "twenty-minute" rule. *See Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (holding that a prisoner was entitled to a preliminary injunction in a circumstance similar to the one faced here by the Plaintiffs). Frankly, a fitting injunction would be one that merely requires Defendants to implement *their own March 24 policy*, Warden's Memorandum # 7-2008. In other words, the Court need only order Defendants to do what Warden Murphy has stated that he wants to do, but which his subordinates have yet to implement with any consistency.

STATEMENT OF UNCONTESTED FACTS

1. Plaintiffs Joseph Miller and Hurie Purdiman, Jr. are prisoners of WSP. Both men have been followers of the Muslim faith for more than fifteen years. *See* Declarations of Hurie Purdiman, Jr., and Joseph Miller, attached respectively as "Exhibit 6" and "Exhibit 7." For reasons set forth in their Declarations, Plaintiffs pray five times each day and periodically engage in religious fasts from sunup until sundown. In addition, they receive special religious ("Halal") meals from WSP due to their religious dietary constraints.

2. Defendant Michael Murphy is the Warden of WSP. Defendant Robert Lampert is the Director of WDOC.

3. Based on Plaintiffs' information and belief, WDOC and WSP receive federal monies.

4. The events giving rise to this action commenced on December 23, 2007, when Defendants first began to enforce the "twenty-minute" rule against the Plaintiffs. On that date, Mr. Purdiman was assigned to C-Unit, where meals are served in a common area but are sometimes delivered directly to the prisoners' cells. Mr. Purdiman was engaged in a religious fast from sunup until sundown in observance of Zul-Hajjah, or The Pilgrimage. A guard delivered a meal to Plaintiff Purdiman in his cell. Some minutes later, two other guards came to his cell and told him that he "had better change [his] religion fast" because he only had a few minutes to eat due to a "new rule." Mr. Purdiman was then ordered to leave his cell while these officers conducted a search. When Mr.

Purdiman was allowed to return, he discovered that his meal had been confiscated. *See* Exhibit 6.

5. Plaintiff Miller, who was housed in a different unit than Mr. Purdiman on December 23, 2007, was likewise subjected to the "twenty-minute" rule for the first time on that date. Mr. Miller was unable to immediately eat his dinner for religious reasons when it was served. Twenty minutes after its delivery, an officer returned and confiscated his meal, explaining that, according to an email, prisoners with special religious meals were only permitted 20 minutes to eat. Mr. Miller subsequently had other meals confiscated after 20 minutes. *See* Exhibit 7.

6. On December 31, 2007, a guard delivered a Halal meal to Plaintiff Purdiman at approximately 4:00 p.m. Mr. Purdiman set aside the meal to eat it at the end of his fast at sundown. After 20 minutes, a guard confiscated his meal pursuant to the "twenty-minute" rule. Plaintiff Purdiman submitted an institutional grievance complaining about this confiscation. *See* Exhibit 6. WSP's Grievance Manager, Jason Bohl, responded to this grievance on January 16, 2008, acknowledging the existence of the unwritten "twenty-minute" rule and defending its strict enforcement. (Jason Bohl's Memorandum is attached as "Exhibit 8.")

7. Plaintiff Miller submitted a grievance to Warden Murphy regarding the "twenty-minute" rule. In a letter dated January 22, 2008, Warden Murphy responded to Plaintiff Miller's complaint, stating that, "[f]or years now, it has been the practice to allow WSP inmates twenty (20) minutes to eat their meals . . ." *See* Exhibit 1. Mr. Miller appealed the Warden's decision to the Deputy Director of WDOC, Steve Lindly. However, in a letter dated January 29, 2008, Mr. Lindly

affirmed the Warden's decision and upheld the strict enforcement of the "twenty minute" rule, stating that the Warden had "advised the staff to enforce the standard of 20 minutes to eat a meal." (Deputy Director Lindly's letter is attached as "Exhibit 10.")

8. Prisoners of other religious faiths also complained about the enforcement of the "twenty-minute" rule. Attached as "Exhibit 9" is the response that a Jewish prisoner received from WSP's acting chaplain, Sgt. Denise Neu, on January 28, 2008. Sgt. Neu defended the strict enforcement of the rule.

9. On March 24, 2008, Warden Murphy issued Warden's Memorandum # 7-2008, which repealed the "twenty-minute" rule and allows prisoners with special meals, including religious meals, to keep their meals until the next meal is delivered. *See* Exhibit 2.

10. On April 1, 2008, Director Lampert responded to Plaintiff Purdiman's grievance regarding the December 31 confiscation of his meal, and Mr. Purdiman received the response on April 7. According to Director Lampert, Warden's Memorandum # 7-2008 resolved the grievance. (Director Lampert's response is attached as "Exhibit 11.")

11. The "twenty-minute" rule, however, continues to be enforced, and many WSP employees either are unaware of the new rule or have chosen not to implement it. On April 5, 2008, Plaintiff Miller and Plaintiff Purdiman resided together in C-Unit. They received their Halal meal sacks, but the hot portion of the meal contained processed foods violative of their Halal diets, and these items should not have been included in the sacks. They showed the meals to Officer

Fuller and requested assistance in obtaining a new meal, but Officer Fuller refused to assist them. They then showed their meals to Sgt. Borah, who agreed to request new meals. While they waited for their religious meals to be delivered, all prisoners were sent to their cells to be counted. Both men left the untainted portion of their meals on a dining table and planned to retrieve it after "count." When "count" was completed, both men discovered that Officer Fuller had discarded their meals. *See* Exhibits 6 and 7. Plaintiff Purdiman sent an Inmate Communication Form (the first step in WSP's grievance process) to Officer Fuller. Officer Fuller replied that the "twenty-minute" rule required him to confiscate Mr. Purdiman's meal. *See* Exhibit 3. Plaintiff Purdiman then sent an Inmate Communication Form to his Caseworker, Mr. Markum, protesting the confiscation of his meal. Mr. Markum--apparently unaware, as was Officer Fuller, that the "twenty-minute" rule had been repealed two weeks earlier--stated that he could not change the "twenty-minute" rule. *See* Exhibit 4.

12. Prisoner Dan Goodrick first learned about Warden's Memorandum # 7-2008 when he received a copy of it on April 21, 2008, from counsel Stephen Pevar. He immediately showed it to Officer York. Officer York stated that he had never seen the Memorandum before. (Dan Goodrick’s Declaration is attached as "Exhibit 12.")

13. On April 24, 2008, a Jewish prisoner, David Michael Jones, received his religious (Kosher) meal sack at approximately 4:30 p.m. After Mr. Jones took the meal to his cell, Corporal Paulsing told him that he had to confiscate the meal pursuant to the "twenty-minute"rule. When Mr. Jones told Corporal Paulsing

about the change in policy due to the March 24 Memorandum, Corporal Paulsing responded that he had not seen any such Memorandum. *See* Exhibit 5.

14. Mr. Purdiman appealed the April 5 confiscation of his meal to Warden Murphy. In a response dated May 5, 2008, Warden Murphy acknowledged that "Officer Fuller probably should not have thrown away [Mr. Purdiman's] meal." (Warden Murphy's response is attached as "Exhibit 13.")

15. On May 8, 2008, Mr. Purdiman was served his Halal meal. When his housing unit was offered access to exercise a few moments later, he requested permission to store his religious meal in his cell, as Warden's Memorandum # 7-2008 would permit. Guards, however, denied that request, so Mr. Purdiman left the meal on the dining table. When he returned from exercise, he discovered that guards had confiscated his meal. *See* Exhibit 6.

ARGUMENT

1. The Legislative History and Remedial Purpose of RLUIPA

The legislative history of RLUIPA is clear and compelling. As the Supreme Court recognized in *Cutter*, "RLUIPA is the latest of long-running congressional efforts to accord religious exercise *heightened protection* from government-imposed burdens . . . ." *Id*., 544 U.S. at 714 (emphasis added). Ten years before RLUIPA's enactment, the Supreme Court had held in *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 878-882 (1990), that the First Amendment's Free Exercise Clause does not prohibit enforcement of otherwise valid laws of general application that burden religious conduct. *See Cutter* at 714. A wide variety of religious exercises were thus subject to

government prohibition as a result of "neutral" laws. In *Smith*, for instance, the Court held that a general prohibition on the possession of peyote could be applied to prohibit, without violating the Free Exercise Clause, Native Americans from possessing peyote for sacramental purposes.

The Court recognized in *Smith*, however, that the political branches of the federal and state governments were free to enact legislation that provided protections to religious exercise beyond those imposed by the Constitution. *Id*. at 890. Responding to that invitation, Congress enacted the Religious Freedom Restoration Act of 1993 (RFRA), 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* This prophylactic legislation sought to prohibit the state and federal governments from "substantially burden[ing]" a person's exercise of religion unless the government could demonstrate that the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *See* § 2000bb-1. RFRA, in short, imposes strict scrutiny when governmental action inhibits religious activity.

Congressional intent, however, was thwarted in part by the Supreme Court's decision in *City of Boerne v. Flores,* 521 U.S. 507 (1997). RFRA had been enacted pursuant to Congress' enforcement powers under section 5 of the Fourteenth Amendment. The Court held in *Boerne v. Flores* that those powers were insufficient to overcome the protections against federal authority afforded to states by the Tenth Amendment. RFRA, in other words, was applicable to the federal government but not to the states.

Congress again responded. After holding three years of hearings, *see Cutter*, 544 U.S. at 716, Congress enacted RLUIPA. This time, rather than invoking authority under the Fourteenth Amendment, Congress narrowed the scope of its prohibitions and invoked its authority under the Spending and Commerce Clauses. *See Cutter,* at 715. Whereas RFRA applies to *all* actions of government, RLUIPA applies to only two: Section 2 of the Act applies to land use regulations, *see* 42 U.S.C. § 2000cc, and Section 3 relates to religious exercises performed by institutionalized persons. *See* § 2000cc-1. Moreover, in order to remain within its constitutional boundaries under the Spending Clause, Congress limited the application of Section 3 to "a program or activity [in an institution] that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1).[1]

RLUIPA, the Supreme Court held in *Cutter*, is valid legislation. In reaching this conclusion, the Court illuminated RLUIPA's legislative history. In addition to discussing *Employment Division v. Smith* and *Boerne v. Flores*, the Court summarized the testimony elicited during the congressional hearings, during which numerous witnesses informed Congress that religious exercises by prisoners were often impeded or prohibited by unnecessary barriers. Among the examples cited by the Court were refusals to provide Muslim prisoners with Halal food, mistreatment or confiscation of religious items, and--especially relevant here--compelling prisoners to choose between eating meals and participating in religious exercises. *See Cutter*, at 716 n.5.

[1]All prisons in the United States, the Court noted in *Cutter*, receive Federal financial assistance. *See Cutter*, 544 U.S. at 716 n.4. Consequently, WSP must comply with RLUIPA, and the Plaintiffs are entitled to its protection.

RLUIPA was intended to protect institutionalized persons "who are unable to freely attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of religion." *Cutter*, at 721. RLUIPA, like RFRA, is designed to assist prisoners obtain information regarding, and to practice, their religion. *See Kikumura v. Hurley*, 242 F.2d 950, 961 (10th Cir. 2001) (citing Cong. Rec. S14,465, daily ed. Oct. 27, 1993, Statement of Orrin Hatch: "We should accommodate efforts to bring religion to prisoners.")

The vehicle employed by Congress to accomplish these remedial purposes under RLUIPA is the "compelling interest test," which imposes a higher level of scrutiny than the "reasonableness" test. *See Cutter*, at 712. In *Employment Division v. Smith*, the Court held that Free Exercise claims must be examined under the "reasonableness" test. Thus, RLUIPA subjects government actions which impact a prisoner's religious exercise to a "stricter standard of review" than under the Free Exercise Clause. *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008). RLUIPA affords confined persons "greater protection of religious exercise than what the Constitution itself affords." *Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006).

2. <u>The Burden of Proof under RLUIPA</u>

RLUIPA identifies which party has the burden of proof with respect to each element of a RLUIPA claim. Section 3 of the Act provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general

applicability" unless the government demonstrates that the 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(a). The Act further states that the plaintiff "bear[s] the burden of persuasion on whether the . . . government practice that is challenged by the claim substantially burdens the exercise of religion," after which the government must prove that the challenged regulation "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." *Id.* §§ 2000cc-1(a), 2000cc-2(b).

Thus, there are four essential elements to a RLUIPA claim; the plaintiff bears the burden of proving the first two, and the government the latter two. The plaintiff must demonstrate (1) that the activity in question is a religious exercise, and (2) that this exercise is being substantially burdened by defendant's actions. If the plaintiff carries that burden, the government must show that (1) the regulation in question serves a compelling governmental interest, and (2) that this regulation is the least restrictive means of achieving that interest. *Id.* §§ 2000cc-1(a), 2000cc-2(b). *See Smith v. Allen*, 502 F.3d 1255, 1276 (11th Cir. 2007); *Shakur v. Schiriro*, 514 F.3d at 889.

Significantly, RLUIPA defines "religious exercise" to include "*any* exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (emphasis added). *See Cutter*, at 715-16. Consequently, as the Tenth Circuit has recognized, a plaintiff need not prove that the exercise in question is *required* by the plaintiff's religion. *See Kikumura*, 242

F.3d at 961 ("Under the definition of 'religious exercise' in 42 U.S.C. § 2000cc-5(7)(A), however, a religious exercise need not be mandatory for it to be protected under" RLUIPA).[2]

In RLUIPA cases, therefore, the plaintiff need not prove that the practice being burdened is central to plaintiff's faith. Rather, the question is whether the exercise in question is religious and whether the government is substantially burdening *that* exercise. *See Cutter*, at 725 n.13 (stating that RLUIPA "bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion.") *See also Kikumura*, 242 F.3d at 961; *Greene v. Solano County Jail*, 513 F.3d 982, 986-87 (9th Cir. 2008); *Van Wyhe v. Reisch*, 536 F. Supp. 1110, 1125 (D.S.D. 2008) (holding that it was unnecessary to determine whether a religiously acceptable diet "is central to the exercise of [plaintiff's] religion" because that inquiry is irrelevant in RLUIPA cases).

3. Plaintiffs Miller and Purdiman Are Entitled To Prevail Under RLUIPA

(a) Plaintiffs satisfy their burden of proof

Plaintiffs easily satisfy their burden of proof on the first two elements of their RLUIPA claim. That is, (1) the activities in question--prayer and religious fasting--are religious exercises, and (2) forcing Plaintiffs to forfeit their meals in order to engage in those exercises is a substantial burden.

The declarations filed by Plaintiffs Purdiman and Miller establish that the Plaintiffs, like millions of other Muslims the world over, pray five times a day, with

[2]The plaintiff in *Kikumura* was a federal prisoner who sought relief under RFRA. The Tenth Circuit noted, however, that RLUIPA was equally as applicable to federal prisoners, and the court employed RLUIPA's definition of "religious exercise." Applying that definition, the court held that pastoral visits, although not required in order for the plaintiff to practice his religion, were nevertheless a "religious exercise" protected by RFRA and RLUIPA.

the timing of their prayers influenced by the rising and setting of the sun. *See* Exhibits 6 and 7. Prayer, of course, is an inherently religious exercise. *See, e.g., Engel v. Vitale*, 370 U.S. 421, 425 (1962); *Lee v. Weisman*, 505 U.S. 577, 587-93 (1992). Plaintiffs' Declarations also establish that on certain occasions (as during the entire month of Ramadan), Plaintiffs engage in religious fasting between sunrise and sunset, joining millions of other Muslims in that exercise. Many religions, including both the Muslim and Jewish religions, expect adherents to fast on particular occasions as an important aspect of their religious duties. Such fasting clearly is a religious exercise. Thus, Plaintiffs satisfy the first RLUIPA element: the exercises at issue are religious.

Plaintiffs also satisfy the second element because the "twenty-minute" rule substantially burdens these religious exercises by depriving Plaintiffs of food. It is as if Defendants enacted a rule stating: "Prisoners who wish to pray will be punished by a loss of food." That is the net effect of Defendants' "twenty-minute" rule.

These types of choices, in which adherents can remain faithful to their religious beliefs only by sacrificing a state benefit, have long been viewed as placing a substantial burden on religious practice. *See, e.g. Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (holding that the government placed a substantial burden on the religious exercise of a Seventh Day Adventist when she was denied unemployment compensation for refusing for religious reasons to work on Saturdays); *Thomas v. Review Board of Indiana Employment Security Div.*, 450 U.S. 707, 717-18 (1981) (holding that the state puts "substantial pressure on an

adherent to modify his behavior" when a state benefit can be obtained only if the adherent engages in conduct inconsistent with his faith); *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 141 (1987).

Based on this Supreme Court precedent--and given the broad remedial purposes of RLUIPA--courts in RLUIPA cases have broadly defined "substantial burden." *See Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) ("Congress intended to create a broad definition of substantial burden.") As the Third Circuit stated last year, summarizing the prevailing case law:

> For the purposes of RLUIPA, a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs.

Washington v. Klem, 497 F.3d at 280. *See also Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (stating that, "for RLUIPA purposes, a substantial burden on religious exercise occurs when a state or local government, through act or omission, puts substantial pressure on an adherent to modify his behavior and to violate his beliefs."); *Warsoldier v. Woodford*, 418 F.3d at 995-96 (same).

Defendants' "twenty-minute" rule places significant pressure on Plaintiffs Miller and Purdiman to abandon their religious beliefs. The rule forces these men to chose between options "that are mutually unacceptable." *See Shakur*, 514 F.3d at 889. On April 5, 2008, when Officer Fuller discarded Plaintiffs' meals after twenty minutes (despite the enactment two weeks earlier of Warden's Memorandum # 7-2008), Fuller punished these men for not eating within the

twenty-minute limitation, even though Plaintiffs could not have complied with that rule without violating their religious precepts.

The Ninth Circuit's decision in *Shakur* is instructive. In that case, prison officials gave a Muslim prisoner the choice between eating food that was religiously acceptable ("Halal") but which caused him gastric distress, and eating the prison's regular food that cured his medical problem but which violated his religious beliefs. Prison officials refused to offer other types of Halal food that were readily available and medically palatable to Mr. Shakur. The district court granted summary judgment to prison officials on Mr. Shakur's RLUIPA claim, but the Ninth Circuit reversed. Prison officials were giving Mr. Shakur a "Hobson's choice" that violated RLUIPA, requiring him to choose between eating and remaining faithful to his religious beliefs. *Id*., 514 F.3d at 890. This is precisely the choice the "twenty-minute" rule requires of Plaintiffs.

In numerous RLUIPA cases, courts have broadly applied the "substantial burden" test, finding various restrictions--including many far less onerous than the one at issue here--to be unacceptable burdens on religious exercise. *See Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008) (denying a prisoner the right to participate in a group religious service is a "substantial burden" under RLUIPA); *Washington v. Klem*, 497 at 278-81 (limiting prisoners to four religious books in their cells at one time is a "substantial burden"); *Spratt v. R.I. Dept. of Corrs.*, 482 F.3d 33, 38 (1st Cir. 2007) (denying prisoner the opportunity to preach to other prisoners is a "substantial burden"); *Lovelace v. Lee*, 472 F.3d 174, 187-88 (4th Cir. 2006) (denying a Muslim prisoner access to

Halal foods merely because prison officials had observed him eating non-Halal foods is a "substantial burden"); *Warsoldier*, 418 F.3d at 996 (forcing a prisoner to remain in his cell until he agreed to have his hair cut in a manner that violated his faith is a "substantial burden"). *See also Kikumura v. Hurley*, 242 F.3d 950, 961 (10th Cir. 2001) (denying a prisoner the opportunity to be visited by a pastor is a "substantial burden" under RFRA).

Defendants' "twenty-minute" rule punishes Plaintiffs for engaging in practices required by their religious precepts. The "twenty-minute" rule substantially burdens Plaintiffs' religious exercise by forcing Plaintiffs to choose between eating a meal and completing their religious activity. Accordingly, Plaintiffs have satisfied their burden of proof under RLUIPA, and are entitled to prevail unless the government can satisfy its burdens. In order to overcome Plaintiffs' *prima facie* case, Defendants must now demonstrate that the continued enforcement of their "twenty-minute" rule "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." *Id.* §§ 2000cc-1. *See Cutter*, at 712.

(b) <u>Defendants cannot satisfy their burden of proof</u>

Plaintiffs are willing to concede for the purposes of resolving the instant motion for preliminary injunctive relief that Defendants' "twenty-minute" rule satisfies a compelling governmental interest. The indisputable fact is that Defendants' "twenty-minute" cannot possibly survive the "least restrictive means" test. After all, Warden's Memorandum # 7-2008, adopted March 24, 2008, repealed the strict and burdensome "twenty-minute" rule and replaced it with a

completely accommodating standard that allows a prisoner engaged in a religious exercise to keep his meal until the next meal is served, hours hence. Consequently, *we know for certain* that the continued enforcement of the "twenty-minute" rule is not the least drastic means of accomplishing Defendants' compelling interests (and it probably never was).

Every application of the "twenty-minute" rule after March 24, 2008 on prisoners engaging in a religious exercise--and the record demonstrates that there have been several already--were clear violations of RLUIPA. The very existence of Warden's Memorandum # 7-2008 proves that the far more restrictive "twenty-minute" rule is unnecessarily burdensome and, hence, violative of RLUIPA. *See Shakur*, 514 F.3d at 887 (holding that where defendant prison officials already have a less drastic rule than the one under scrutiny but are refusing to apply it to the plaintiff, a RLUIPA violation seems obvious).

4. <u>Plaintiffs Are Entitled To Preliminary Injunctive Relief</u>

Guards should no longer be enforcing the "twenty-minute" rule, and yet some of them are still doing so. Under Tenth Circuit protocol:

> A movant is entitled to a preliminary injunction if he can establish the following: (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.

Kikumura, 242 F.3d at 955, citing *Country Kids 'N City Slicks, Inc. v. Sheen*, 77 F.3d 1280, 1283 (10th Cir. 1996). Clearly, Plaintiffs Miller and Purdiman are entitled to preliminary injunctive relief. First, Plaintiffs have a substantial

likelihood of success on the merits of their case. The existence of Warden's Memorandum # 7-2008 proves that Defendants' "twenty-minute" rule is indefensible under RLUIPA.

Second, Plaintiffs will suffer irreparable injury each time the "twenty-minute" rule is enforced against them because the rule deprives them of food. Each application of the rule burdens Plaintiffs' exercise of religion in violation of RLUIPA, and these violations cannot be adequately compensated monetarily. Thus, Plaintiffs will suffer irreparable injury by the continued enforcement of the "twenty-minute" rule. *See Kikumura*, 242 F.3d at 963 (reversing a district court's denial of a preliminary injunction to a prisoner seeking relief under RFRA, noting that "'the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily.'") (Citing *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). *Accord: Warsoldier*, 418 F.3d at 1001-02 (reversing a district court's denial of a preliminary injunction to a prisoner seeking relief under RLUIPA). Accordingly, Plaintiffs have satisfied the second prong of the test for a preliminary injunction.

The third and the fourth prongs of the preliminary injunction test also weigh in Plaintiffs' favor. Clearly, a preliminary injunction that does nothing more than order a public agency *to comply with its own policy* is unlikely to cause injury to that agency or to the public. Here, the only remedy Plaintiffs seek through this motion is enforcement of Warden's Memorandum # 7-2008. Defendants can hardly claim that such enforcement will cause them or the public to suffer some

injury, as the very promulgation of this policy indicates that they support its application.

Defendants are likely to claim that Plaintiffs' request for injunctive relief is moot because the "twenty-minute" rule was repealed and replaced it Warden's Memorandum # 7-2008. While it is true that the Warden's new rule, *if properly implemented*, should cure the defect in the old rule, it is also true that guards continue to enforce the "twenty-minute" rule. Having already suffered numerous violations of their rights, Plaintiffs should no longer remain at risk of additional injury. Accordingly, Plaintiffs' claim for injunctive relief is not moot, and Plaintiffs are entitled to the protection that only an injunction can provide. *See Skinner v. Uphoff*, 234 F. Supp.2d 1208, 1216 (D. Wyo. 2002) (holding that even though WDOC officials claimed to have implemented new rules, it remained unclear that these rules would be fully and immediately implemented, thus necessitating the issuance of injunctive relief). *Accord: Ginest v. Board of County Comm'rs of Carbon County, Wyoming*, 333 F. Supp.2d 1208-09 (D. Wyo. 2004).

Once federal violations have been shown, a request for injunctive relief must be granted unless "(1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation 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). The party alleging mootness has the burden of proof, and "the burden is a heavy one." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). *See generally Skinner*, 234 F. Supp. at 1216. Here, given that guards *continued* to enforce the

"twenty-minute" rule weeks after that rule was repealed, Defendants are in no position to claim that Warden's Memorandum # 7-2008 "completely and irrevocably eradicated the effects of the alleged violation" and that no similar violations will or can happen again. *See County of Los Angeles*, 440 U.S. at 631; *Ginest*, 333 F. Supp.2d at 1208-09.

CONCLUSION

The only baffling question in this entire case is this: Why did Warden Murphy and Deputy Director Steve Lindly staunchly defend in January 2008 a rule that so clearly violated RLUIPA, enacted in 2000? The answer to that question, however, is reserved for trial. At present, the only question before the Court is whether the Plaintiffs are entitled to a preliminary injunction to protect against further applications of Defendants' "twenty-minute" rule.

The answer to that question is obvious. Defendants' own documents demonstrate that prison guards--even weeks after Warden's Memorandum # 7-2008 was enacted--continued to enforce the "twenty-minute" rule against the Plaintiffs, causing Plaintiffs to suffer irreparable injury in violation of their rights under RLUIPA. Plaintiffs have suffered enough, and they are entitled to the protection of an injunction. Accordingly, Plaintiffs respectfully request that the Court issue preliminary injunctive relief, enjoining Defendants and all persons under their command from failing to apply Warden's Memorandum # 7-2008 instead of the Warden's "twenty-minute" rule.

Respectfully submitted this 29th day of May, 2008.

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Stephen L. Pevar

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Jennifer Horvath

CERTIFICATE OF SERVICE

I hereby certify that an exact copy of the foregoing document was sent by U.S. mail, postage prepaid, to Christine Cox, Office of the Attorney General, 2424 Pioneer, 2d Floor, Cheyenne, WY 82002, on the 29th day of May, 2008.

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Jennifer Horvath