Case No. 08-2100

United States Court of Appeals for the First Circuit

ANTWAN CRAWFORD; DARRICK WILSON; ANTHONY TUCKER

Plaintiffs

MAC S. HUDSON; DERRICK TYLER

Plaintiffs-Appellees

v.

HAROLD W. CLARKE, Commissioner of the Massachusetts Department of Correction

Defendant-Appellant

MICHAEL MALONEY; KATHLEEN DENNEHY

Defendants

On Appeal From the United States District Court for the District of Massachusetts

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BRIEF OF PLAINTIFFS-APPELLEES MAC S. HUDSON AND DERRICK TYLER

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Plaintiffs-Appellees Mac Hudson and Derrick Tyler ("Plaintiffs") respectfully request that this Court hear oral argument as this appeal concerns the scope of a permanent injunction aimed at remedying Defendant-Appellant Harold W. Clarke ("the Commissioner")'s established violation of Plaintiffs' rights. Moreover, while Plaintiffs disagree for reasons set forth below, the Commissioner claims that this appeal concerns the proper application of the Religious Land Use and Institutionalized Persons Act of 2000[1]—an important but relatively new civil rights statute on which little caselaw exists in this circuit. Plaintiffs further request oral argument in order to answer any questions that the Court may have and to address any new points that the Commissioner may raise in reply to this brief.

[1] 42 U.S.C. §§ 2000cc, et seq.

JURISDICTIONAL STATEMENT

The District Court has subject matter jurisdiction over this civil action pursuant to 28 U.S.C. § 1331 because Plaintiffs-Appellees Mac Hudson and Derrick Tyler ("Plaintiffs") brought the action under, *inter alia*, the First and Fourteenth Amendments to the United States Constitution as well as 42 U.S.C. §§ 1983 and 2000cc-1. The District Court also has subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(4) because 42 U.S.C. §§ 1983 and 2000cc-1 are Acts of Congress providing for the protection of civil rights.

This Court has subject matter jurisdiction over Defendant-Appellant Harold W. Clarke ("the Commissioner")'s appeal of the District Court's June 19, 2008, Order denying his motion for reconsideration, pursuant to 28 U.S.C. § 1291. However, as set forth below (pp. 15–22), pursuant to Federal Rules of Appellate Procedure 3 and 4,[2] this Court lacks jurisdiction to consider the Commissioner's apparent challenge to the initial validity of the permanent injunction set forth in the District Court's April 11, 2008, Final Judgment. The Commissioner's jurisdictional statement correctly sets forth the relevant filing dates.[3]

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[2] The text of this brief shall refer to Federal Rules of Appellate Procedure as "Appellate Rule [rule number]" and Federal Rules of Civil Procedure as "Civil Rule [rule number]."

[3] See Brief of the Appellant ("App. Br.") at 1

STATEMENT OF THE ISSUE PRESENTED

After a six-day trial, the District Court entered an injunction tailored to the violation of federal law that it found. The Commissioner then sought reconsideration of the injunction's scope based upon facts and legal argument known to him during trial but never submitted to the District Court before it entered judgment. Did the District Court act within its considerable discretion when it denied reconsideration?

STATEMENT OF THE CASE

Messrs. Hudson and Tyler, along with three other Massachusetts Department of Correction ("DOC") inmates, filed this case *pro se* in late 2001.[4] They did so seeking to remedy the DOC's denial to them of, *inter alia*, three core components of the exercise of their Muslim religious faith: (1) Halal meals, (2) rugs on which to perform their five daily Salats (prayers), and (3) access to weekly Jum'ah services[5] as part of a community of Muslims even when confined to segregated units within DOC facilities.[6] Prior to filing, Plaintiffs spent at least one and one-

[4] See RA 4, 22

[5] Jum'ah services are "the Friday Islamic prayer services conducted by an imam on behalf of a community of Muslims." RA 42, ¶ 6. Such services are obligatory for Muslims. RA 23 n.4.

[6] See RA 22–25

half years attempting to remedy these denials through the DOC's internal grievance processes.[7]

Plaintiffs generally are satisfied with the Commissioner's recounting of the procedural history of this case from inception through the District Court's August 31, 2006, Order that granted their motion for reconsideration, denied the Commissioner's motion for summary judgment, and scheduled trial.[8] They only add that their May 26, 2005, First Amended Complaint, like its predecessor, stated claims and sought declaratory and injunctive relief that applied to the DOC system as a whole; they did not limit the scope of their claims or their prayers for relief to the Massachusetts Correctional Institution at ("MCI-") Cedar Junction, where they happened to be housed at the time.[9]

The District Court heard evidence and argument over the course of a six-day bench trial that began on January 8, 2007, and concluded on February 1, 2007.[10] The evidence received at trial was not limited to MCI-Cedar Junction; both parties also submitted evidence of system-wide DOC policies and practices as well as

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[7] See RA 27

[8] See App. Br. at 2–4

[9] See Supplemental Record Appendix of Appellees ("Supp. RA") 15

[10] See RA 14–15

matters specific to other DOC facilities.[11] The District Court issued its Findings of Fact, Rulings of Law, and Order After a Non-Jury Trial on March 5, 2008, concluding that, *inter alia*, the DOC's denial of inmate access to Jum'ah services via closed-circuit television ("CCTV") violated the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[12]

The District Court's March 5th Order directed Messrs. Hudson and Tyler to submit a Proposed Form of Judgment.[13] They did so on March 17, 2008, using language that made it clear that the RLUIPA violation that the District Court had found with respect to Jum'ah service access, and thus the declaratory and injunctive relief that the District Court was awarding, extended beyond MCI-Cedar Junction: "Whenever Plaintiffs are housed in Special Management Units, including Ten Block,[14] Defendant shall provide Plaintiffs with closed circuit television sets that shall display, through sound and images, a live broadcast of communal Jum'ah

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[11] See, e.g., Hall Testimony, Supp. RA 22–30 [Tr. III/54-59, 65-67]; Marshall Testimony, Supp. RA 31–32 [Tr. III/87–88]; Hallett Testimony, Supp. RA 34–47 [Tr. IV/68-77; 80-82]; Mitchell Testimony, Supp. RA 55 [Tr. V/122]

[12] 42 U.S.C. § 2000cc-1; see RA 39–40

[13] See RA 40

[14] Special Management Units ("SMUs") are "separate housing area[s] from general population within [DOC] institutions in which inmates may be confined for reasons of administrative segregation, protective custody, or disciplinary detention." 193 Mass. Code Regs. 423.06 (1995); see RA 91. The SMU at MCI-Cedar Junction is colloquially known as "Ten Block." See RA 23, n.3.

services … ."[15] On March 24, 2008, the Commissioner counter-proposed language that expressly limited the District Court's declaratory and injunctive relief to Ten Block at MCI-Cedar Junction: "Whenever Plaintiffs are housed in the Ten Block Special Management Unit at MCI-Cedar Junction, Defendant shall provide Plaintiffs with closed circuit broadcasts via sound and images, of a live broadcast of communal Jum'ah services … ."[16] Both Plaintiffs and the Commissioner then submitted memoranda in support of their respective proposals, each expressly arguing the scope of relief issue.[17]

The District Court issued its Final Judgment on April 11, 2008, rejecting the Commissioner's proposed narrow construction of permanent injunctive relief:

> 8. "Special Management Units" shall mean separate housing areas apart from the general population within DOC institutions in which inmates are confined for reasons of administrative segregation, protective custody, or disciplinary detention.
>
> 9. "Ten Block" is the name commonly used to describe the Special Management Unit at the DOC's MCI-Cedar Junction facility.
>
> …
>
> 18. Whenever Plaintiffs are housed in the Special Management Unit, Defendant shall provide access to a closed circuit television set that displays, through sound and images, a live broadcast of such

[15] See Supp. RA 85, ¶ 13

[16] See Supp. RA 92, ¶ 17

[17] See Supp. RA 94–99 (Plaintiffs' Memorandum); Supp. RA 100–109 (Defendant's Memorandum)

> communal Jum'ah services as are regularly held on each and every Friday for the duration of their incarceration (absent a legitimate emergency or the unavailability of an authorized Imam, in which case Defendant may broadcast prerecorded Jum'ah services). Defendant will have thirty (30) days from the date of entry of this Judgment to comply with this provision.[18]

On April 16, 2008, the Commissioner filed what he titled a "Request for Clarification of Final Judgment" in which he asked the District Court to add the words "in Ten Block" after the phrase "the Special Management Unit" in paragraph 18 to limit that paragraph's reach accordingly.[19] After Plaintiffs filed an opposition to the Commissioner's request, the District Court responded on April 28, 2008, by confirming that paragraph 18 of its Final Judgment applied to any SMU to which the Commissioner might assign either Plaintiff during the remainder of his sentence.[20]

On May 12, 2008, the Commissioner filed a motion for reconsideration of Final Judgment, again renewing his request that the District Court limit the scope of its Jum'ah service injunction to Ten Block at MCI-Cedar Junction.[21] The Commissioner attached to his motion a six and one-half page affidavit signed by the DOC's Director of Resource Management that raised purported cost, delay, and

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[18] RA 41–45

[19] See RA 46–47

[20] See RA 51

[21] See RA 53–60

administrative difficulty obstacles associated with providing CCTV access to Jum'ah services to inmates in SMUs other than Ten Block—none of which he had submitted at trial or at any time prior to Final Judgment.[22] In his motion, the Commissioner argued that the District Court's permanent injunction violated RLUIPA insofar as it extended beyond Ten Block because the District Court had not considered the additional concerns raised in the director's May 12th affidavit.[23] The Commissioner simultaneously filed a motion to stay enforcement of the permanent injunction with respect to units other than Ten Block, which the District Court granted the following day.[24]

Plaintiffs filed an opposition to the Commissioner's motion for reconsideration on May 23, 2008,[25] and the District Court heard argument on June 19, 2008.[26] Immediately following the hearing, the District Court issued an electronic Order denying, without prejudice, the Commissioner's motion for

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[22] See RA 61–68

[23] See RA 55–60. The Commissioner also hinted at, but did not develop, an argument that the District Court's injunction might violate the Prison Litigation Reform Act of 1995, 18 U.S.C. § 3626, ("the PLRA") for the same reason. See RA 58–59; see also infra at 46–48 (arguing that the Commissioner's perfunctory mention of the PLRA in his motion for reconsideration was insufficient to preserve the argument for this appeal).

[24] See RA 17

[25] See RA 69–72

[26] See RA 17–18, 73–86, 87

reconsideration: "Denied without prejudice. Hudson is currently confined in general population at the Old Colony Correctional Facility. Accordingly, there is no actual controversy appropriate for judicial resolution. The stay on the Final Judgment is lifted."[27]

The Commissioner filed his Notice of Appeal on July 17, 2008, appealing only "from the Order denying Defendant's Motion for Reconsideration of Final Judgment with Regard to Broadcast of Jum'ah Services in Special Management Units Other Than Ten Block, entered in this action on June 19, 2008."[28] The Commissioner also filed a motion to further stay enforcement of the District Court's permanent injunction with respect to units other than Ten Block pending the appeal, which the District Court denied on August 18, 2008.[29]

STATEMENT OF THE FACTS

Messrs. Hudson and Tyler were at the time of trial, and still are, "serving lengthy custodial sentence[s]" in the custody of DOC.[30] The DOC has the unbridled discretion to transfer them between its facilities at any time and for any

[27] See RA 18, 87

[28] See Supp. RA 103

[29] See RA 18–19 (Docket Nos. 131, 133)

[30] RA 28, ¶¶ 1–2

reason.[31] The DOC enjoys similarly broad discretion to transfer Messrs. Hudson and Tyler into and out of segregated units within those facilities, including SMUs.[32]

At the time of the trial, Mr. Hudson had been incarcerated for approximately seventeen years of a life sentence, during which the DOC had transferred him between Souza-Baranowski Correctional Center in Shirley, Massachusetts, and MCI-Cedar Junction in Walpole, Massachusetts, among other facilities.[33] The DOC has since transferred Mr. Hudson to Old Colony Correctional Center in Bridgewater, Massachusetts, where he now resides.[34]

At the time of trial, Mr. Tyler had been incarcerated for approximately seventeen years of a life sentence, during which the DOC had transferred him between Old Colony Correctional Center in Bridgewater, Massachusetts; MCI-Norfolk in Norfolk, Massachusetts; MCI-Shirley in Shirley, Massachusetts; North Central Correctional Institution in Gardner, Massachusetts; and MCI-Cedar

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[31] See Mass. Gen. Laws c. 127, § 97; see also App. Br. at 17

[32] RA 89–96

[33] Supp. RA 18 [Tr. II/14–15]

[34] RA 69

Junction in Walpole, Massachusetts.[35] Mr. Tyler now resides at MCI-Cedar Junction.[36]

At various times during their incarceration, the DOC has confined both Mr. Hudson and Mr. Tyler to segregated units within its facilities.[37] While they were confined in such units, the DOC denied Messrs. Hudson and Tyler access to and participation in weekly Jum'ah services, both in-person and via CCTV.[38] Both Mr. Hudson and Mr. Tyler sincerely believe that participation in such services as part of a community of Muslims is required by their religious faith.[39]

SUMMARY OF THE ARGUMENT

The District Court was correct to deny the Commissioner's motion for reconsideration of the scope of its permanent injunction and certainly did not clearly abuse its discretion in so doing. Through that motion, the Commissioner improperly sought a second bite at the apple to introduce evidence and arguments that he had known about, but had chosen not to submit, at trial.

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[35] Supp. RA 19–20 [Tr. II/69–70].

[36] RA 69

[37] RA 28, ¶¶ 1–2

[38] RA 32, ¶¶ 17–18

[39] RA 28–29, ¶ 6

During the six-day bench trial, Messrs. Hudson and Tyler met their RLUIPA-imposed burden of proving that the DOC's policy denying them live access to weekly Jum'ah services while they were housed in segregated units substantially burdened the exercise of their sincerely-held religious belief that participation in such services as part of a community of Muslims is obligatory. The Commissioner presented evidence aimed at countering that showing but, at least with respect to access via CCTV broadcasts, he ultimately failed to carry his RLUIPA-imposed burden of proving that his department's policy was the least restrictive means of furthering any compelling governmental interest.[40] Neither Plaintiffs' Amended Complaint nor the evidence presented at trial was limited in scope to the SMU at MCI-Cedar Junction known as Ten Block where they had been housed at the time of the violation. Thus, the District Court correctly found that denying Plaintiffs access to Jum'ah services via live CCTV violated RLUIPA no matter where the Commissioner chose to house them, and it tailored its permanent injunction accordingly.

[40] See Spratt v. Rhode Island Dep't of Corrs., 482 F.3d 33, 38 (1st Cir. 2007) (once a RLUIPA plaintiff proves that a prison policy substantially burdens the exercise of his sincerely-held religious belief, an institutional defendant must prove that the policy is the least restrictive means of achieving a compelling governmental interest to avoid a ruling that the policy violates RLUIPA)

After the District Court issued its Final Judgment, the Commissioner repeatedly sought to narrow the scope of the permanent injunction. He based his third and final attempt (his May 12th motion for reconsideration) on facts and legal arguments that he had known about, but chosen not to submit, at trial or anytime prior to the entry of judgment. These facts and arguments focused on supposed financial, technical, and administrative obstacles to providing CCTV access to Jum'ah services to nine segregated units located in DOC facilities other than MCI-Cedar Junction. The District Court could have flatly rejected the Commissioner's attempt at supplementation as untimely because a motion for reconsideration "is not appropriately used to present new issues or evidence."[41] Instead, the District Court simply ruled that no actual controversy existed as to the specifics of such other DOC units that was ripe for judicial review because neither Mr. Hudson nor Mr. Tyler was, or imminently would be, housed in any of those units.

The Commissioner now tries to challenge both the validity *ab initio* of the District Court's permanent injunction and the propriety of the District Court's denial of his motion to reconsider that injunction's scope. Only the latter is truly and properly before this Court. Appellate Rule 3 denies this Court jurisdiction

[41] Jorge Rivera Surillo & Co. v. Falconer Glass Indus., Inc., 37 F.3d 25, 29 (1st Cir. 1994) (declining to consider arguments raised for the first time on a Civil Rule 59(e) motion to alter or amend judgment)

over any challenge to the April 11th Final Judgment because the Commissioner specifically limited his Notice of Appeal to the June 19th Order denying reconsideration (see infra pp. 16–18). Appellate Rule 4 also denies this Court jurisdiction over any assault on the April 11th Final Judgment because the Commissioner did not file his Notice of Appeal until more than ninety days after the District Court entered that judgment, and his two intervening motions (both of which he now characterizes as arising under Civil Rule 59(e)) did not toll Appellate Rule 4's thirty-day deadline long enough to excuse his late filing (pp. 18–22).

Even if this Court rules that it has jurisdiction over the April 11th Final Judgment, that Order was not an abuse of the District Court's discretion. The Commissioner now claims that the District Court erred only by failing to include in its analysis facts and argument that were not even in the record until his May 12th motion for reconsideration—more than a month later. Thus, they cannot be the basis for any challenge to the propriety or validity of the April 11th Final Judgment (pp. 26–28). On the record then before it, the District Court properly applied RLUIPA and, in so doing, met the PLRA's requirements (pp. 29–30).

As to the June 19th Order denying reconsideration of the injunction's scope, which is properly before this Court, the Commissioner cannot establish that the

District Court clearly abused its discretion. The District Court's stated basis for that decision—lack of a case or controversy that was ripe for review—was supportable given that the Commissioner's supplemental offering consisted of facts specific to facilities at which neither Mr. Hudson nor Mr. Tyler was, or imminently would be, housed (pp. 32–38). Moreover, the Commissioner has waived any argument under the PLRA because he never developed it before the District Court (pp. 46–48). Finally, and most importantly, the Commissioner had no right to reconsideration based on additional facts and argument aimed at the compelling governmental interest/least restrictive means portion of the RLUIPA analysis when ***he*** had the burden of proof on those issues at trial and simply chose not to introduce such facts and argument (pp. 38–46). Civil Rule 59(e) "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have been presented to the district court prior to the judgment."[42]

In sum, the District Court issued an injunction that was just broad enough to remedy the RLUIPA violation that it found—to "correct the violation of the Federal right" at issue, as the PLRA requires.[43] The Commissioner's proposed

[42] Aybar v. Crispin-Reyes, 118 F.3d 10, 16 (1st Cir. 1997) (quoting Moro v. Shell Oil Co., 91 F.3d 872, 876 (7th Cir. 1996))

[43] See 18 U.S.C. § 3626(a)(1)(A)

narrowing—to cover only MCI-Cedar Junction—would render the injunction toothless. The Commissioner has the unbridled discretion to transfer Mr. Hudson and Mr. Tyler between DOC facilities and units whenever he chooses (and, indeed, already has done so with Mr. Hudson). Under the Commissioner's proposal, he could free himself from the District Court's injunction at will simply by making such a transfer and thereby forcing Mr. Hudson and/or Mr. Tyler to start the administrative grievance and litigation process anew despite their success in this case. Neither RLUIPA, nor the PLRA, nor basic principles of equity would countenance (much less require) such a result (pp. 48–50). The District Court did not clearly abuse its discretion by avoiding such an outcome when it declined to narrow the injunction's scope.

ARGUMENT

I. The Commissioner's Appeal is Limited to the District Court's June 19th Denial of Reconsideration Because This Court Lacks Jurisdiction Over Any Challenge to the District Court's April 11th Final Judgment.

The Commissioner frames the issue before this Court as "[w]hether the District Court erred in failing to limit prospective relief with respect to plaintiffs' access to closed-circuit television broadcasts of Jum'ah services to the Special Management Unit of MCI-Cedar Junction"[44] and begins his argument by stating that "[t]he District Court's Final Judgment … failed to comply with the

[44] App. Br. at 1–2

requirements of the PLRA … and RLUIPA."[45] But the District Court's April 11th Final Judgment is not actually before this Court—only its June 19th Order denying reconsideration is. That is because: (1) the Commissioner identified only the June 19th Order in his Notice of Appeal,[46] and (2) that Notice of Appeal was untimely as to the April 11th Final Judgment.[47]

*A. **Appellate Rule 3 Precludes Jurisdiction Over the April 11th Final Judgment Because the Commissioner's Notice of Appeal Referenced Only the June 19th Denial of Reconsideration.***

Appellate Rule 3(c)(1)(B) provides that "[t]he notice of appeal must … designate the judgment, order, or part thereof being appealed." The Supreme Court has held that, while somewhat flexible, this requirement ultimately is "jurisdictional in nature" and "noncompliance is fatal to an appeal."[48] This Court has enforced that rule by refusing to consider challenges to district court orders that appellants failed to identify within their notices of appeal.[49]

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[45] App. Br. at 10–11

[46] See Fed. R. App. P. 3(c)(1)(B)

[47] See Fed. R. App. P. 4(a)(1)(A)

[48] Smith v. Barry, 502 U.S. 244, 248, 112 S. Ct. 678, 682, 116 L. Ed. 2d 678, 685 (1992); Torres v. Oakland Scavenger Co., 487 U.S. 312, 315–18, 108 S. Ct. 2405, 2408–09, 101 L. Ed. 2d 285, 290–91 (1988) (superseded on other grounds as stated in, e.g. Flaherty v. Gas Research Inst., 31 F.3d 451, 458 (7th Cir. 1994))

[49] See, e.g., Constructora Andrade Gutiérrez, S.A. v. American Int'l Ins. Co. of Puerto Rico, 467 F.3d 38, 43–45 (1st Cir. 2006)

As set forth above, the District Court entered Final Judgment on April 11, 2008. After seeking and receiving confirmation that the permanent injunction contained within that judgment was not restricted to Ten Block at MCI-Cedar Junction, the Commissioner moved for reconsideration of the Final Judgment on May 12, 2008, based on additional evidence that he had declined to submit at trial. The District Court denied that motion on June 19, 2008, and the Commissioner filed his Notice of Appeal on July 17, 2008.

But the Commissioner's Notice of Appeal never mentions the District Court's April 11th Final Judgment.[50] Instead, it specifically confines itself to "the Order denying [the Commissioner's] Motion for Reconsideration of Final Judgment with Regard to Broadcast of Jum'ah Services in Special Management Units Other Than Ten Block, entered in this action on June 19, 2008."[51] In this circuit and others, "[t]he general rule is that '[i]f an appellant … chooses to designate specific determinations in his notice of appeal—rather than simply appealing from the entire judgment—only the specified issues may be raised on appeal.'"[52] In particular, this Court has held that "an appeal from the denial of a

[50] See Supp. RA 103

[51] Supp. RA 103

[52] Constructora Andrade Gutiérrez, 467 F.3d at 43 (quoting United States v. Universal Mgmt. Servs., Inc., 191 F.3d 750, 756 (6th Cir. 1999))

[Civil] Rule 59(e) motion is not an appeal from the underlying judgment."[53] Thus, pursuant to Appellate Rule 3, this Court lacks jurisdiction to consider the Commissioner's challenge to the initial validity of the April 11th permanent injunction and should confine its review to the District Court's June 19th denial of reconsideration.

B. Appellate Rule 4 Also Denies This Court Jurisdiction Over the April 11th Final Judgment Because the Commissioner's Notice of Appeal Was Not Timely As To That Judgment.

This Court also lacks jurisdiction over the Commissioner's arguments that the District Court's injunction was void *ab initio* because the Commissioner failed to appeal that injunction within the required timeframe. Appellate Rule 4(a)(1)(A) provides that, "[i]n a civil case, except as provided in [Appellate] Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by [Appellate] Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." It is well settled that Appellate Rule 4's deadlines are mandatory and

[53] Mariani-Giron v. Acevedo-Ruiz, 945 F.2d 1, 3 (1st Cir. 1991) (finding no jurisdiction to review underlying judgment dismissing complaint because appellants limited their notice of appeal to district court's denial of motion to set aside that judgment)

jurisdictional[54]—an appellant's failure to abide by them requires dismissal even if no party so requests.[55]

The District Court entered its Final Judgment on April 11, 2008. Thus, unless one of the specified exceptions to Appellate Rule 4(a)(1)(A) applies, the Commissioner's notice of appeal challenging any aspect of that judgment was due no later than May 11, 2008, and his July 17, 2008, Notice of Appeal was more than two months too late to do so.

The only arguably-applicable exception to Appellate Rule 4(a)(1)(A) covers certain post-judgment motions filed in the district court, including Civil Rule 59(e) motions to alter or amend judgment.[56] The Commissioner filed a request for clarification of the District Court's Final Judgment on April 16, 2008, and a motion for reconsideration of that judgment on May 12, 2008. The Commissioner now

[54] Bowles v. Russell, 551 U.S. 205, ---, ---, 127 S. Ct. 2360, 2363, 2366, 168 L. Ed. 2d 96, 102, 105 (2007)

[55] In re Perry Hollow Mgmt. Co., 297 F.3d 34, 38 (1st Cir. 2002) (citing Acevedo-Villalobos v. Hernandez, 22 F.3d 384, 387 (1st Cir. 1994), for the proposition that this Court "lacks jurisdiction over late appeals")

[56] See Fed. R. App. P. 4(a)(4)(A)(iv)

characterizes both as Civil Rule 59(e) motions and argues that each one reset Appellate Rule 4(a)(1)(A)'s thirty-day clock.[57]

Even assuming that the Commissioner is correct to characterize both as motions arising under Civil Rule 59(e) (as opposed to non-motion requests or motions under Civil Rule 60(b)), he is incorrect as to their tolling effect. His April 16th request for clarification resulted in no change to the District Court's Final Judgment—the District Court simply confirmed that it had indeed meant what it had already said when it resolved the parties' dispute over the form of judgment and defined the scope of its permanent injunction to include SMUs generally, not just Ten Block. A court-issued clarification of judgment does not suspend or restart Appellate Rule 4's clock unless it "alters matters of substance or resolves some genuine ambiguity."[58] Moreover, the District Court issued that clarification on April 28, 2008. Thus, even if the Commissioner's April 16th request did extend the Appellate Rule 4 deadline, it did so to no later than May 28, 2008, rendering the July 17th Notice of Appeal still more than fifty days late.

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[57] The Commissioner filed his request for clarification as a "letter/request" and not as a motion pursuant to Civil Rule 59(e). RA 16 (Docket No. 111); see RA 46–47. Only now does the Commissioner attempt to re-categorize it as a Civil Rule 59(e) motion, in an attempt to rescue his untimely appeal.

[58] See Airline Pilots Ass'n v. Precision Valley Aviation, Inc., 26 F.3d 220, 223 n.2 (1st Cir. 1994)

The Commissioner's May 12th motion had no effect on the Appellate Rule 4 clock for two reasons. First, it was untimely. Civil Rule 59(e) provides that "a motion to alter or amend a judgment must be filed ***no later than 10 days*** after the entry of the judgment."[59] The Commissioner filed his May 12th motion more than ***thirty*** days after the District Court entered Final Judgment. Such an untimely Civil Rule 59(e) motion does not toll Appellate Rule 4.[60]

Second, the Commissioner characterizes the May 12th Civil Rule 59(e) motion as his second such filing (counting the April 16th request for clarification as his first). "[O]nly the first [Civil] Rule 59(e) motion tolls the time to appeal from the judgment, unless the judgment is subsequently altered … [o]therwise a litigant could extend the time to appeal indefinitely simply by filing successive [Civil] Rule 59(e) motions."[61] Therefore, the Commissioner's May 12th motion did not toll Appellate Rule 4 even if it was timely.

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[59] (Emphasis added)

[60] See García-Velázquez v. Frito Lay Snacks Caribbean, 358 F.3d 6, 8–9 (1st Cir. 2004) (dismissing appeal as untimely because Civil Rule 59(e) motion filed one day beyond ten-day time limit did not toll Appellate Rule 4).

[61] Borrero v. City of Chicago, 456 F.3d 698, 700–01 (7th Cir. 2006) (Posner, J.) (internal citations omitted); accord Aybar, 118 F.3d at 13–15 (finding no jurisdiction to review district court's original judgment because appellant relied on successive Civil Rule 59(e) motions to toll Appellate Rule 4 filing deadline); accord Johnson v. Teamsters Local 559, 102 F.3d 21, 29–30 (1st Cir. 1996) (same)

This Court has explained that "a timely appeal from an order denying a motion for reconsideration brought other than in conformity with [Civil] Rule 59(e) does not resurrect the appellant's expired right to contest the merits of the underlying judgment, nor bring the judgment itself before the court of appeals for review."[62] In short, while the Commissioner's Notice of Appeal was timely as to the decision at which he expressly targeted it—the District Court's June 19th denial of his motion for reconsideration—it was untimely as to the underlying Final Judgment that he only now attempts to impugn. Accordingly, this Court lacks jurisdiction over that aspect of the Commissioner's challenge.

II. Even if This Court Finds Jurisdiction Over the April 11th Final Judgment, That Judgment Stands Because the Commissioner Has Effectively Conceded That the District Court Did Not Abuse Its Discretion on the Record Then Before It.

Should this Court rule, despite the arguments set forth above, that it has jurisdiction over the District Court's April 11th Final Judgment, there still is no basis on which to upset that judgment. The District Court based its judgment and injunction on a RLUIPA analysis.[63] Enacted pursuant to Congress's Spending Clause authority, RLUIPA requires, *inter alia*, that government institutions that

[62] Airline Pilots Ass'n, 26 F.3d at 223–24 (internal quotation marks and original brackets omitted); accord Rodriguez-Antuna v. Chase Manhattan Bank Corp., 871 F.2d 1, 2 (1st Cir. 1989)

[63] See, e.g., RA 36–39

accept federal money to help fund correctional operations (such as the DOC) must be more scrupulous in protecting inmate religious exercise than the United States Constitution would otherwise demand.[64] More specifically, RLUIPA provides, *inter alia*, that:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to [a state or local correctional] institution … even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.[65]

The resulting test for a RLUIPA violation requires the institutionalized plaintiff to prove a substantial burden on the exercise of his or her sincerely-held religious belief, after which the burden shifts to ***the government defendant*** to show that that burden (1) furthers a compelling governmental interest and (2) is the least restrictive means of doing so.[66] "Mere[] assert[ion]" of a compelling interest will not suffice—this Court has held that, once a RLUIPA plaintiff has made the required substantial burden/sincerely-held belief showing, "[a] prison '***cannot*** meet its burden to prove least restrictive means unless it demonstrates that it has actually

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[64] See Spratt, 482 F.3d at 41 n.12; see Charles v. Verhagen, 348 F.3d 601, 606–09 (7th Cir. 2003)

[65] 42 U.S.C. § 2000cc-1(a)

[66] Spratt, 482 F.3d at 38

considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'"[67]

Over the course of a six-day trial, Messrs. Hudson and Tyler proved that the DOC's policy of denying them live access to Jum'ah services whenever it confined them in segregated units substantially burdened the exercise of their sincerely-held religious belief.[68] The District Court then (appropriately) shifted the burden to the Commissioner.[69] The Commissioner attempted to counter Plaintiffs' showing by relying solely on DOC policies and practices that denied inmate access to televisions while confined in SMUs and the reasons underlying those policies (the temporary nature of SMU detention, purported security risks associated with having a television in an inmate's cell, and the desire to avoid any incentive for inmates to seek SMU detention).[70] He offered no other evidence in support of his burden to show a compelling governmental interest and the least restrictive means of furthering it.

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[67] Spratt, 482 F.3d at 39, 41 (quoting Murphy v. Missouri Dep't of Corrs., 372 F.3d 979, 988 (8th Cir. 2004) and Warsoldier v. Woodford, 418 F.3d 989, 999 (9th Cir. 2005)) (emphasis added)

[68] RA 39, ¶¶ 8–9

[69] RA 39, ¶¶ 10–11

[70] See Supp. RA 50–54 [Tr. V/94–99]

The District Court ruled that, while the Commissioner had met his burden to show that denying Messrs. Hudson and Tyler ***in-person*** attendance at Jum'ah services while they were confined in SMUs was the least restrictive means to promote the compelling interests of prison discipline and security, he had failed to meet his burden with respect to denying them participation by means of live CCTV.[71] Accordingly, the District Court found that denial of live CCTV access to Jum'ah services constituted a RLUIPA violation and entered judgment enjoining such access.[72] Because the Plaintiffs' showing applied with equal force no matter where they were housed and the Commissioner offered no evidence that his countervailing concerns differed across facilities, the District Court did not so limit the scope of its injunction.[73]

The Commissioner now claims to attack the validity of the District Court's April 11th Final Judgment, but the points set forth in his brief do not actually do so. They are premised entirely on facts and argument that he knew of at the time of trial but declined to present to the District Court until his May 12th motion for reconsideration—more than a month after judgment entered.[74] Thus, the

[71] See RA 39, ¶¶ 10–11

[72] See RA 43, ¶ 15

[73] See RA 43, ¶ 18; RA 51

[74] See RA 53–68

Commissioner implicitly concedes that the District Court did not abuse its discretion in crafting its Final Judgment on the record that was before it on April 11th.

A. ***The Commissioner's Assignments of Error on Appeal Do Not Implicate the April 11th Final Judgment Because They Rely Entirely On Facts and Argument that the Commissioner Introduced Only After That Judgment Entered.***

In his May 12th motion for reconsideration, the Commissioner submitted additional facts that he had chosen not to submit at trial.[75] These focused on additional purported obstacles to providing CCTV access to Jum'ah services that were specific to segregated units in DOC facilities other than MCI-Cedar Junction.[76]

The Commissioner's arguments on appeal rely exclusively on those "new" facts. Boiled down to its basics, his argument proceeds as follows:

(1) Wiring segregated units in DOC facilities other than MCI-Cedar Junction for CCTV access to Jum'ah services would take time, cost money, and cause construction-related administrative disruption.[77]

(2) Because the DOC does not wish to spend the time and money or endure the administrative disruption that would be required, the

[75] See RA 53–68

[76] See RA 53–68

[77] See App. Br. at 16

Commissioner's ability to transfer Messrs. Hudson and Tyler between facilities for safety or other reasons is circumscribed.[78]

(3) The District Court failed to sufficiently consider these cost, disruption, and security concerns in its RLUIPA analysis before it defined the scope of the RLUIPA violation (and, thus, its permanent injunction) to extend beyond MCI-Cedar Junction.[79]

(4) Therefore, the District Court's injunction is broader than either RLUIPA or the PLRA allow to the extent that it extends beyond MCI-Cedar Junction.[80]

For that reason, the Commissioner's arguments on appeal do not even implicate the validity of the District Court's April 11th Final Judgment. ***None*** of the supposed evidence of cost, delay, administrative disruption, or threats to institutional safety on which the Commissioner bases his arguments to this Court was in the record as of April 11th because the Commissioner, by his own admission, chose not to submit any of it at trial.[81] Thus, even if this Court finds that it has jurisdiction over the April 11th Final Judgment, it cannot adopt any of

[78] See App. Br. at 17–18

[79] See App. Br. at 18–22

[80] See App. Br. at 11, 18–19

[81] See RA 57

the Commissioner's PLRA or RLUIPA arguments that purport to challenge that judgment without making an untenable ruling: that the District Court abused its discretion by failing to consider evidence that the party who had the burden of proof declined to put before it prior to its ruling.[82]

[82] To be clear, Messrs. Hudson and Tyler do not concede that cost, delay, administrative disruption, or purported security concerns arising therefrom constitute compelling governmental interests for purposes of RLUIPA. To the contrary, to count any of those as a sufficient basis on which to impose substantial burdens upon inmates' sincerely-held religious beliefs would render RLUIPA a nullity—the First Amendment already prescribed rational basis review of burdens on inmate free exercise of religion and RLUIPA was designed to provide more robust protection at those facilities that receive federal funds. See Spratt, 482 F.3d at 41 n.12; see also Sherbert v. Verner, 374 U.S. 398, 406, 83 S. Ct. 1790, 1795, 10 L. Ed. 2d 965, 972 (1963) (to demonstrate a compelling governmental interest, "no showing merely of a rational relationship to some colorable state interest would suffice … [o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation [of the established right]") (quoting Thomas v. Collins, 323 U.S. 516, 530, 65 S. Ct. 315, 323, 89 L. Ed. 430 (1945)) (overruled on related, but separate, grounds as stated in, e.g. Terrell v. Montalbano, C.A. No. 7:07-cv-00518, 2008 U.S. Dist. LEXIS 84260, at *21 n.2, 2008 WL 4679540, at *8 n.2 (W.D. Va. Oct. 21, 2008))

B. ***The District Court Did Not Abuse Its Discretion Because Its April 11th Injunction Complied With Both RLUIPA and the PLRA on the Evidentiary Record Then Before It.***

Even were this Court to review the scope of the District Court's April 11th Final Judgment, it should do so only for abuse of discretion.[83] There was no such abuse of discretion.

First, the Commissioner has waived any PLRA-based challenge to the Final Judgment. He made no suggestion that the scope of the District Court's Jum'ah service access injunction violated the PLRA until his May 12th motion for reconsideration (and even then, only in perfunctory fashion insufficient to preserve the issue for appeal, as discussed below at pp. 46–48).[84]

Moreover, ***on the record then before it***, the District Court appropriately conducted the RLUIPA analysis and, through that analysis, made the "need-narrowness-intrusiveness" findings that both the PLRA and Civil Rule 65

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[83] See Esso Std. Oil Co. (Puerto Rico) v. Lopez-Freytes, 522 F.3d 136, 142–43 (1st Cir. 2008) ("the scope of [a permanent] injunction is reviewed for abuse of discretion"); see A.W. Chesterton Co. v. Chesterton, 128 F.3d 1, 5 (1st Cir. 1997) ("We review the district court's grant of a permanent injunction for abuse of discretion")

[84] See Morales Feliciano v. Rullán, 378 F.3d 42, 49 (1st Cir. 2004) ("It is a bedrock rule that when a party has not presented an argument to the district court, [he] may not unveil it in the court of appeals.") (quoting United States v. Slade, 980 F.2d 27, 30 (1st Cir. 1992)), cert. denied, 543 U.S. 1054, 125 S. Ct. 910, 160 L. Ed. 2d 776 (2005)

require.[85] The Commissioner admits as much when he concedes that the District Court made the required PLRA findings with respect to CCTV access to Jum'ah services in Ten Block.[86] If the District Court's findings were sufficient as to Ten Block, they were sufficient as to the entire DOC system because the Commissioner, whose burden it was to do so, put nothing into the evidentiary record that would differentiate other facilities from Ten Block on the issues of compelling governmental interest and least restrictive means. Thus, the District Court's findings and the Commissioner's concession apply equally to all DOC facilities and the District Court did not abuse its discretion.

III. The District Court Acted Well Within Its Considerable Discretion When It Denied the Commissioner's Motion for Reconsideration.

The Commissioner faces a near-insurmountable task in challenging the District Court's June 19, 2008, Order denying his motion for reconsideration. A Civil Rule 59 motion "is addressed to the discretion of the district court,"[87] and

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[85] See Morales Feliciano v. Calderon Serra, 300 F. Supp. 2d 321, 332 (D.P.R. 2004) (PLRA basically mimics longstanding Civil Rule 65 requirement of "need-narrowness-intrusiveness" findings before issuing injunctive relief), aff'd sub nom. Morales Feliciano v. Rullán, 378 F.3d 42; accord Gomez v. Vernon, 255 F.3d 1118, 1129 (9th Cir. 2001) ("[T]he [PLRA] merely codifies existing law and does not change the standards for determining whether to grant an injunction."), cert. denied, 534 U.S. 1066, 122 S. Ct. 667, 151 L. Ed. 2d 581 (2001); accord Smith v. Arkansas Dep't of Corr., 103 F.3d 637, 647 (8th Cir. 1996) (same)

[86] See App. Br. at 12

[87] Robinson v. Watts Detective Agency, Inc., 685 F.2d 729, 743 (1st Cir. 1982)

courts and leading commentators have called that discretion "broad" and "considerable."[88] Presumably for that very reason, this Court "will overturn a district court's denial of a motion for reconsideration only if the record evinces a clear abuse of discretion."[89]

On the record before this Court, the Commissioner cannot establish anything approaching such a failure on the District Court's part. The District Court's stated reason for its ruling—lack of ripeness—was justifiable. Moreover, other independently-sufficient bases, such as the Commissioner's misuse of a Civil Rule 59(e) motion to introduce facts and argument that he chose to omit at trial, also supported the District Court's decision.

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[88] E.g. Washington Mobilization Comm. v. Jefferson, 617 F.2d 848, 850 (D.C. Cir. 1980) (discussing Civil Rule 59(a) motion); e.g. 12 James Wm. Moore, Moore's Federal Practice § 59.30[4] (3d ed. 2008) (going on to note that reconsideration "is an extraordinary remedy, to be used sparingly in the interests of finality and conservation of judicial resources") (citing, *inter alia*, Edward H. Bohlin Co. v. Banning Co., 6 F.3d 350, 355–56 (5th Cir. 1993))

[89] Airline Pilots Ass'n, 26 F.3d at 227 (describing the required showing as a "steep climb" for the appellant); accord Vasapolli v. Rostoff, 39 F.3d 27, 36 (1st Cir. 1994) ("We review a trial court's decision denying a Rule 59(e) motion to alter or amend a judgment for manifest abuse of discretion"); accord Fragoso v. Lopez, 991 F.2d 878, 888 (1st Cir. 1993)

A. ***The District Court Was Well Within Its Discretion in Deciding that the Commissioner's Attempt to Narrow the Scope of the Permanent Injunction Was Not Ripe For Adjudication.***

The District Court ruled that the Commissioner's attempt to narrow the scope of the injunction presented no actual controversy that was ripe for review.[90] The Commissioner had sought to narrow the injunction's scope through the presentation of facility-specific evidence concerning segregated units in which neither Mr. Hudson nor Mr. Tyler then was, nor imminently would be, housed.[91] The District Court did not clearly abuse its discretion because neither factor in the ripeness analysis—(1) fitness for judicial review and (2) hardship to the parties if such review is withheld—favored the Commissioner.[92] To have any hope of establishing that the District Court clearly abused its discretion, the Commissioner

[90] See RA 87

[91] See RA 53–68

[92] See Doe v. Bush, 323 F.3d 133, 138 (1st Cir. 2003) (describing mechanics of ripeness inquiry) (quoting Abbott Labs. v. Gardner, 387 U.S. 136, 149, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)); see McInnis-Misenor v. Maine Med. Ctr., 319 F.3d 63, 70 (1st Cir. 2003) (same)

must demonstrate that ***both*** factors weigh in favor of immediate adjudication of his challenge.[93] He cannot do so.[94]

The fitness prong of the ripeness doctrine amply supports the District Court's decision. This Court has explained that the "basic function" of the ripeness doctrine is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements."[95] The District Court's ruling serves this purpose because the Commissioner may never transfer Mr. Hudson or Mr. Tyler to a special management unit other than Ten Block. Even if the Commissioner does do so, one cannot predict now which particular unit(s) may be involved.

Had the District Court permitted the Commissioner a second bite at the apple to show that denying Plaintiffs access to televised Jum'ah services is the least restrictive means to further a compelling government interest in at least certain DOC facilities, the Commissioner would have had to litigate physical and

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[93] Doe, 323 F.3d at 138; McInnis-Misenor, 319 F.3d at 70

[94] While this Court should apply the clear abuse of discretion standard of review to the District Court's denial of reconsideration generally, the District Court's decision will pass muster even if this Court reviews its ripeness determination *de novo*. See, e.g., Doe, 323 F.3d at 138.

[95] Doe, 323 F.3d at 138 (quoting Abbott Labs., 387 U.S. at 148, 87 S. Ct. 1507, 18 L. Ed. 2d 681); Rhode Island Ass'n of Realtors, Inc. v. Whitehouse, 199 F.3d 26, 33–34 (1st Cir. 1999) (quoting same)

financial constraints unique to as many as nine other SMUs.[96] Messrs. Hudson and Tyler almost certainly will not ever be assigned to ***all*** of those SMUs and may never be assigned to even one of them. This Court has clearly explained that the fact "[t]hat the future event may never come to pass augurs against a finding of fitness."[97]

Another basis for the fitness prong of the ripeness doctrine is "the recognition that, by waiting until a case is fully developed before deciding it, courts benefit from a focus sharpened by particular facts."[98] The District Court's decision is well-supported on this ground as well. Should the Commissioner assign either Mr. Hudson or Mr. Tyler to an SMU other than Ten Block during the remainder of his sentence, one simply cannot predict at this point which SMU that might be, when that assignment might take place, or what physical or financial circumstances might then exist.

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[96] See RA 61, ¶ 3

[97] McInnis-Misenor, 319 F.3d at 72; see also id. at 70 ("The critical question concerning fitness for review is whether the claim involves uncertain and contingent events that may not occur as anticipated or may not occur at all.") (quoting Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 536 (1st Cir. 1995)); accord, e.g., City of Fall River, Mass. v. FERC, 507 F.3d 1, 6 (1st Cir. 2007) ("the prospect of entangling ourselves in a challenge to a decision whose effects may never be felt in a concrete way by the challenging parties is an especially troublesome one") (internal quotation marks and citation omitted)

[98] Doe, 323 F.3d at 138 (citing Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 736, 118 S. Ct. 1665, 140 L. Ed. 2d 921 (1998))

This Court has stated that "[t]he baseline [fitness] question is whether allowing more time for development of events would 'significantly advance our ability to deal with the legal issues presented [or] aid us in their resolution.'"[99] Here, no need to revisit the RLUIPA analysis based upon the specific circumstances of other SMUs may ever arise and, as this Court has explained, "Federal courts cannot—and should not—spend their scarce resources on what amounts to shadow boxing."[100] Even if the Commissioner uses his total control of inmate transfers to engineer such an event, one cannot predict now which SMU will be involved or trust that the factual circumstances surrounding that SMU then will be the same as now. Since the Commissioner's argument "depends on future events that may never come to pass, or that may not occur in the form forecasted," his request to present further evidence in an attempt to narrow the injunction is unripe.[101] Thus, the District Court did not clearly abuse its discretion as to the fitness prong of the ripeness test.

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[99] Doe, 323 F.3d at 138 (quoting Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 82, 98 S. Ct. 2620, 57 L. Ed. 2d 595 (1978); additional citations omitted)

[100] McInnis-Misenor, 319 F.3d at 72 (quoting Ernst & Young, 45 F.3d at 537)

[101] See id. (quoting Ernst & Young, 45 F.3d at 537)

The hardship inquiry requires even less analysis. Hardship "typically turns upon whether the challenged action creates a direct and immediate dilemma for the parties."[102] There is no such dilemma here.

First, it is not as if the Commissioner must choose between complying with the District Court's injunction or exercising some fundamental civil right that he possesses.[103] He is merely seeking a second chance to put in additional evidence and argument concerning the compelling interest and least restrictive means elements of RLUIPA that he chose not to submit at trial.

Second, it is the Commissioner, not Messrs. Hudson or Tyler or anyone else, that has sole control over Messrs. Hudson's and Tyler's unit placements.[104] The Commissioner will only find himself in a position to have to comply with the District Court's injunction outside of Ten Block if and when he chooses to create that situation. He certainly does not "lack a realistic opportunity to secure

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[102] McInnis-Misenor, 319 F.3d at 70 (citations and internal quotation marks omitted); Rhode Island Ass'n of Realtors, 199 F.3d at 33 (same)

[103] Cf., e.g., Rhode Island Ass'n of Realtors, 199 F.3d at 34 (finding hardship where plaintiff association had to choose between complying with state law and engaging in Constitutionally-protected expression)

[104] See Mass. Gen. Laws c. 127, § 97; see also App. Br. at 17

comparable relief by bringing [his request] at a later time" when he alone controls the timeline.[105]

The Commissioner argues that the hardship prong favors present adjudication of his motion to narrow the injunction because his department will have to undertake a "time-consuming and costly process" to put itself in a position to provide closed-circuit television access to Jum'ah services in SMUs other than Ten Block.[106] But the time and cost required presumably differs markedly from facility to facility. To re-adjudicate the issue now, after a full trial on the merits, the District Court would have to take new evidence specific to each and every SMU within the DOC system to which Mr. Hudson or Mr. Tyler possibly ever could be assigned. The District Court prudently chose not to entertain this evidence now and instead to deal with specific issues—if any—as they arise.

In sum, the District Court correctly ruled that any *post hoc* attempt by the Commissioner to narrow the injunction based on unit-specific facts that he neglected to adduce at trial is unripe until such time, if any, as a particular SMU other than Ten Block becomes an issue. If such an event does occur—a contingency completely within the Commissioner's control—he remains free to

[105] Cf. Doe, 323 F.3d at 138

[106] App. Br. at 27

seek relief from the District Court's injunction at that time, when the specific unit (and purported constraints) at issue are known. To be clear, as argued in the next subsection, Messrs. Hudson and Tyler maintain that the Commissioner should not get a second bite at the evidentiary apple even at that point unless it is strictly limited to evidence not available to him at the time of trial. But regardless of how the District Court rules on that issue, there certainly is no pressing need to consider any additional evidence before such time as a controversy actually arises. Accordingly, the District Court's decision to deny the Commissioner's motion for reconsideration was eminently reasonable; the District Court did not clearly abuse its discretion.

B. ***The District Court Would Have Been Justified to Deny the Commissioner's Motion With Prejudice as He Improperly Sought to Raise Points That He Knew About But Withheld During Trial.***

The Commissioner used his Civil Rule 59(e) motion for reconsideration to bring before the District Court, for the first time, facts and argument that he knew about, but decided not to raise, prior to the entry of Final Judgment. This Court has clearly and repeatedly held that Civil Rule 59(e) "does not provide a vehicle for a party to undo its own procedural failures, and it certainly does not allow a party to introduce new evidence or advance arguments that could and should have

been presented to the district court prior to the judgment."[107] Where a party makes a "strategic choice" to rely on some evidence or arguments and omit others, "it must live with the consequences of that choice" rather than getting a second bite at the apple through reconsideration.[108] Thus, the Commissioner actually got better than what he deserved in the District Court's denial of his motion without prejudice on ripeness grounds—the District Court could have (and, in Plaintiffs' view, should have) denied the Commissioner's motion ***with*** prejudice for misuse of Civil Rule 59(e).

In his Motion for Reconsideration, the Commissioner countered that he did not realize that segregated units other than MCI-Cedar Junction's Ten Block were

[107] Aybar, 118 F.3d at 16 (quoting Moro, 91 F.3d at 876); accord, e.g., Jorge Rivera Surillo, 37 F.3d at 29 (declining to consider arguments raised for the first time on a Civil Rule 59(e) motion to alter or amend judgment because such a motion "is not appropriately used to present new issues or evidence"); accord, e.g., FDIC v. World Univ. Inc., 978 F.2d 10, 16 (1st Cir. 1992) (same)

[108] Marks 3-Zet-Ernst Marks GMBH & Co. KG v. Presstek, Inc., 455 F.3d 7, 17–18 (1st Cir. 2006)

at issue in this case until after trial.[109] That argument was disingenuous for three reasons.

First, Messrs. Hudson and Tyler have, since the beginning of this litigation, sought system-wide relief to remedy the DOC's violations of their RLUIPA rights. In their Amended Complaint, they requested that the District Court:

> Enter a permanent injunction ordering Defendant to allow plaintiffs to attend religious services without first having to register and allow plaintiffs to attend all Jumah services either in person or via closed-circuit television. [110]

There was no geographic limitation to their request. While Plaintiffs were housed at MCI-Cedar Junction at the time they amended their complaint, the DOC has transferred them to various other facilities throughout the course of this litigation—a fact that the Commissioner never suggested altered the scope of the requested relief. [111] Furthermore, Messrs. Hudson and Tyler named the Commissioner of the DOC, not the Superintendent of MCI-Cedar Junction, as the defendant in their

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[109] See RA 55. Not surprisingly, the Commissioner has toned down that contention on appeal, simply hinting that only Ten Block was at issue during trial and faulting the District Court for not considering facts about other facilities that were not in evidence. See, e.g., App. Br. at 12–15 and nn.4 & 5. He still offers no justification for ***his own*** failure to submit such evidence at trial when RLUIPA placed the burden of doing so on him. See Spratt, 482 F.3d at 38.

[110] Supp. RA 15

[111] See Supp. RA 18, 20 [Tr. II/15, 70]

Amended Complaint.[112] That fact, too, should have alerted the Commissioner that more was at issue than just a single facility.

Second, as the Commissioner himself points out repeatedly, he is in complete control over inmate transfers and such transfers are quite common.[113] He explains that "circumstances, both foreseen and unforeseen, may develop at any time which will require that one or both Plaintiffs be transferred to another prison."[114] At trial, Messrs. Hudson and Tyler each testified that he had experienced such transfers already during his incarceration,[115] and the DOC again transferred Mr. Hudson shortly after trial. The Commissioner was well aware at all times during this litigation that his department might change either Plaintiff's facility assignment at any time, and that he had the sole power to effect such changes. Thus, the Commissioner argues that Messrs. Hudson and Tyler sought only relief that they knew he could completely avoid at any time simply by transferring them.

Finally, the Commissioner's feigned ignorance is belied by the fact that he himself submitted at trial system-wide evidence concerning both denial of Jum'ah service access and denial of access to Halal meals (the second of three burdened

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[112] See Supp. RA 2, ¶6

[113] See App. Br. at 19, 27 (citing Mass. Gen. Laws c. 127, § 97)

[114] App. Br. at 27

[115] Supp. RA 18, 20 [Tr. II/15, 70]

religious beliefs on which Messrs. Hudson and Tyler brought their RLUIPA claim). Concerning Jum'ah service access, the Commissioner presented two key witnesses: Lisa Mitchell and Timothy Hall, the latter a deputy commissioner overseeing multiple DOC facilities. Both Mr. Hall's and Ms. Mitchell's direct testimony focused not on features unique to MCI-Cedar Junction but rather on the DOC's system-wide policy banning televisions in SMUs and the reasons therefor: (1) the temporary nature of SMU detention, (2) the security risks associated with having a television in an inmate's cell, and (3) the DOC's desire to avoid any incentive for inmates to seek SMU detention.[116] Ms. Mitchell also testified specifically to the SMU practices regarding televisions at Old Colony Correctional Center ("OCCC").[117] John Marshall, the Assistant Deputy Commissioner of the DOC, also testified as to SMU practices in different facilities, including Souza–Baranowski Correctional Center and OCCC.[118] Mr. Marshall testified that, as Assistant Deputy Commissioner, he helped create a universal SMU policy to alleviate any differences in SMU policies among various facilities.[119] Thus, the testimony regarding SMU policy at the DOC applied equally to all SMUs; it was not limited to Ten Block.

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[116] See Supp. RA 50–54 [Tr. V/94–98]; Supp. RA 28–30 [Tr. III/65–67].

[117] See Supp. RA 55 [Tr. V/122]

[118] See Supp. RA 31–32 [Tr. III/87–88]

[119] See Supp. RA 31–32 [Tr. III/87–88]

The same is true with respect to the Commissioner's evidence concerning access to Halal meals. In an (unsuccessful) effort to satisfy RLUIPA's compelling interest/least restrictive means test, the Commissioner offered the testimony of DOC food services coordinator Christopher Gendreau. Mr. Gendreau testified about kitchen conditions and staffing at Southeastern Correctional Center ("SECC") in Bridgewater, Massachusetts—a facility at which neither Mr. Hudson nor Mr. Tyler then was housed.[120] Mr. Hall also testified on direct examination about his experiences with food preparation at MCI-Norfolk and the ability of that facility to accommodate Halal meals.[121] The Commissioner also submitted testimony concerning its system-wide policy to deny Halal meals to inmates and its system-wide religious services review process, which evaluates all inmate religious services claims regardless of facility. (Curiously, the Commissioner does not dispute that the District Court's injunction commanding the provision of Halal meals—arising from the same Amended Complaint, based on evidence from the same trial, and set forth in the same Final Judgment as the injunction addressing Jum'ah service access—covers facilities other than MCI-Cedar Junction.)

Messrs. Hudson and Tyler also introduced substantial evidence concerning facilities other than MCI-Cedar Junction. On cross examination, Allison Hallett,

[120] Supp. RA 48–49 [Tr. V/22–3]

[121] Supp. RA 22–27 [Tr. III/54–59]

the chairperson of the DOC's systemwide Religious Services Review Committee ("RSRC"), testified as to that committee's decision to deny Halal meals to inmates at OCCC, SECC, MCI-Norfolk, and MCI-Shirley.[122] Plaintiffs also introduced exhibit numbers 52 and 53, which covered five different facilities. These exhibits documented various requests from inmates seeking Halal meals, as well as the recommendations of various superintendents on those requests.[123] Plaintiffs introduced these documents to show that several superintendents from different facilities could not identify any security reasons for prohibiting Halal meals to inmates at their facilities.[124] The Commissioner's suggestion that he had no notice that other facilities might be included in the District Court's analysis is directly contradicted by the substantial evidence relating to other facilities that both parties presented at trial.

In his brief, the Commissioner relies heavily on the District Court's finding that both the Departmental Disciplinary Unit ("DDU") and SMU at MCI-Cedar Junction were pre-wired for CCTV to suggest that the District Court focused only

[122] Supp. RA 34–46 [Tr. IV/68–77, 80–82]

[123] Supp. RA 56–81

[124] Supp. RA 56–81

on facts specific to MCI-Cedar Junction in reaching its decision.[125] It was Plaintiffs, however, that introduced this evidence regarding the wiring at MCI-Cedar Junction in an attempt to refute the Commissioner's argument that he had a compelling security reason for banning televisions in SMUs generally. The juxtaposition of the DDU policy allowing televisions and the SMU policy barring televisions demonstrated a gaping hole in the Commissioner's policy rationales. As the District Court stated in finding for Plaintiffs, "the DOC has not suggested any meaningful distinction between inmates confined in the DDU, who are permitted closed-circuit access to Jum'ah services, and inmates in the SMU, who are not." [126] Thus, the inclusion of such Ten Block-specific evidence in the record does not support the Commissioner's argument that the entire case concerned ***nothing but*** Ten Block. It should not be surprising that Messrs. Hudson and Tyler submitted some evidence specific to MCI-Cedar Junction during trial—both were confined there at that time.

For all of these reasons, the Commissioner cannot now stick his head into the sand and claim that he never had an opportunity to present countervailing evidence concerning facilities other than MCI-Cedar Junction. Neither Mr.

[125] See App. Br. at 13 (citing only one page of Plaintiffs' cross-examination of Lisa Mitchell to support the Commissioner's contention that ***all*** of the trial evidence was limited to MCI-Cedar Junction)

[126] RA 39, ¶ 11

Hudson nor Mr. Tyler nor the District Court prevented him from presenting such evidence. He simply chose not to do so and now must live with the consequences of that decision.[127]

C. The Commissioner Has Waived Any Argument Based Upon the PLRA.

In his brief, the Commissioner relies heavily on the PLRA, arguing that the District Court failed to make required findings and to give due regard to certain considerations.[128] But he made only fleeting reference to the PLRA before the District Court. This Court has explained that "[i]t is a bedrock rule that when a party has not presented an argument to the district court, [he] may not unveil it in the court of appeals."[129] Moreover, even where mentioned,

> issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.[130]

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[127] See Marks, 455 F.3d at 17–18

[128] See App. Br. 11–18

[129] Morales Feliciano v. Rullán, 378 F.3d at 49 (quoting Slade, 980 F.2d at 30)

[130] United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (internal citations omitted); accord, e.g., Morales Feliciano v. Rullán, 378 F.3d at 49 n.4; accord, e.g., McCoy v. Massachusetts Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991) ("It is hornbook law that theories not raised squarely in the district court cannot be surfaced for the first time on appeal.")

The Commissioner's sole mention of the PLRA in his motion for reconsideration consisted of just the sort of perfunctory reference that this Court has condemned: two sentences that did nothing more than quote the language of the statute and cite two cases confirming that language.[131] The Commissioner's PLRA "argument" reads (in full):

> Furthermore, the Prison Litigation Reform Act ("PLRA"), 18 U.S.C. § 3626 holds that "[t]he court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1). The court must give "substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.* *See Feliciano v. Rullan*, 378 F.3d 42, 50–51 (1st Cir. 2004); *Oluwa v. Gomez*, 133 F.3d 1239 (9th Cir. 1998) ("before granting prospective injunctive relief, the trial court must make the findings mandated by the PLRA"). [132]

The Commissioner never once even argued that the District Court ***had not made*** the required findings with respect to any portion of its injunction—he simply referenced the statute's language, string-cited two cases applying it, and moved on. His perfunctory, off-hand reference to the PLRA left the District Court to do his

[131] See RA 58–59; see, e.g., McCoy, 950 F.2d at 22 (ruling that party's "passing mention" of argument in the district court that consisted of two sentences and one citation was "the merest of skeletons" and insufficient to preserve the argument for appeal)

[132] RA 58–59

work—to "create the ossature for the argument, and put flesh on its bones."[133] Accordingly, the Commissioner has waived his PLRA argument.[134]

IV. Equity Demands That This Court Not Narrow the District Court's Injunction as Any Such Narrowing Would Preclude Effective Relief.

The Supreme Court has held that, "[o]nce a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[135] District courts have been vested with broad equitable power to remedy wrongs, and the Commissioner's proposed narrowing of the permanent injunction would strip the District Court of that power in this case.

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[133] See Zannino, 895 F.2d at 17

[134] To the extent that this Court deems the Commissioner to have forfeited rather than waived his PLRA argument, and thus reviews for plain error, the District Court committed no such "clear or obvious" error that "seriously impaired the fairness, integrity, or public reputation of judicial proceedings." See Morales Feliciano v. Rullán, 378 F.3d at 49 (quoting United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001)). It correctly based the findings supporting its Final Judgment on the record then before it, and it appropriately (perhaps too gently) rejected the Commissioner's attempt to shoehorn additional facts into the evidentiary mix through his motion for reconsideration.

[135] Hills v. Gautreaux, 425 U.S. 284, 297, 96 S. Ct. 1538, 1546, 47 L. Ed. 2d 792, 803 (1976) (quoting Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15, 91 S. Ct. 1267, 1276, 28 L. Ed. 2d 554, 566 (1971)); accord Morales Feliciano v. Rullán, 378 F.3d at 50 ("equity is flexible and … the boundaries of permissible relief are broad") (citing Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc., 527 U.S. 308, 322, 119 S. Ct. 1961, 144 L. Ed. 2d 319 (1999))

The District Court declared that the DOC's refusal to provide live broadcasts of Jum'ah services to inmates housed in SMUs constitutes a substantial burden on Plaintiffs' sincerely-held religious beliefs.[136] The same burden exists whether Plaintiffs are in an SMU at MCI-Cedar Junction or at another DOC facility. It was the Commissioner's burden to present countervailing evidence of compelling governmental interest/least restrictive means. The evidence that he chose to present was insufficient to rebut or limit the effect of Plaintiffs' showing.[137] Thus, when it issued an injunction that applied system-wide, the District Court appropriately used its equitable power to remedy the RLUIPA violation that the record evidence established.

If this Court were to accept the Commissioner's invitation and limit the injunction to the SMU at MCI-Cedar Junction, it already would be ineffectual as to Mr. Hudson. Since trial, the Commissioner has transferred him from MCI-Cedar Junction to a different facility (OCCC), which also has an SMU.[138] Moreover, the Commissioner could completely free himself from the injunction and continue to violate Mr. Tyler's RLUIPA rights by similarly transferring him from MCI-Cedar Junction to any other DOC facility if and when the Commissioner wished to place

[136] See RA 43, ¶ 15

[137] See RA 39, ¶ 11

[138] See RA 69–70

him a segregated unit. Each Plaintiff would then be forced to commence a new, multi-year administrative and litigation process to vindicate his RLUIPA rights, after which the Commissioner could simply order further transfers. That result would not comport with the inherent equitable power of the District Court and, if allowed, would render the District Court's remedy ineffective to correct the violation it found. Equity demands otherwise.

CONCLUSION

The Commissioner asks this Court to rule that the District Court clearly abused its discretion when it merely ruled unripe his attempt to reopen the evidentiary record generated by a six-day bench trial so that he could add evidence that he had known about, but declined to submit, previously. Despite his failure to create jurisdiction to do so, he asks this Court to rule that the District Court also abused its discretion by crafting injunctive relief for his violation of federal law without considering evidence that he had chosen to withhold from its consideration despite his burden of proof on the issues in question. In sum, he asks this Court to limit the scope of Plaintiffs' remedy for his violation of federal law enough to allow him to avoid it completely, should he so choose. There can be but one reasonable response to these requests—to flatly reject them.

Messrs. Hudson and Tyler respectfully request that this Court affirm the

District Court's June 19, 2008, Order denying the Commissioner's motion for reconsideration and rule that it lacks jurisdiction over any challenge to the District Court's April 11, 2008, Final Judgment. Should this Court instead rule that it does have jurisdiction over the April 11, 2008, Final Judgment, Messrs. Hudson and Tyler respectfully request that it affirm that judgment as well.

Respectfully submitted,

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By their attorneys,

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Dated: February 23, 2009

CERTIFICATE OF COMPLIANCE WITH APPELLATE RULE 32(a)

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 11,516 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In accordance with Fed. R. App. P. 32(a)(7)(C)(i), I have relied upon Microsoft Office Word 2003's word count utility in making this certification.

2. This brief complies with the typeface requirements 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 that contains serifs (fourteen point Times New Roman font), using Microsoft Office Word 2003.

/s/ David Quinn Gacioch [original hand-signed]
David Quinn Gacioch (# 1131853)

Attorney for Plaintiffs-Appellees
Mac S. Hudson and Derrick Tyler

Dated: February 23, 2009

CERTIFICATE OF SERVICE

I hereby certify that, on this date, I personally served two copies of the Brief of Plaintiffs-Appellees Mac S. Hudson and Derrick Tyler as well as two copies of the Supplemental Record Appendix prepared by Plaintiffs-Appellees Mac S. Hudson and Derrick Tyler, on Richard C. McFarland, Esquire, counsel for Defendant-Appellant Harold W. Clarke, by hand delivering them to **[paper copy to be completed upon service]**, a responsible person working at Mr. McFarland's office at 70 Franklin Street, Suite 600, Boston, Massachusetts 02110-1300.

[original to be hand-signed upon service]
David Quinn Gacioch (# 1131853)

Attorney for Plaintiffs-Appellees
Mac S. Hudson and Derrick Tyler

Dated: February 23, 2009

ADDENDUM

From the U.S. Code Online via GPO Access
[www.gpoaccess.gov]
[Laws in effect as of January 3, 2006]
[CITE: 42USC2000cc-1]

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 21C--PROTECTION OF RELIGIOUS EXERCISE IN LAND USE AND BY INSTITUTIONALIZED PERSONS

Sec. 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

(Pub. L. 106-274, Sec. 3, Sept. 22, 2000, 114 Stat. 804.)

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FEDERAL RULES OF APPELLATE PROCEDURE

Effective July 1, 1968, as amended to December 1, 2008

TITLE I APPLICABILITY OF RULES

Rule 1. Scope of Rules; Title

(a) Scope of Rules.

(1) These rules govern procedure in the United States courts of appeals.

(2) When these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court.

(b) [Abrogated.]

(c) Title. These rules are to be known as the Federal Rules of Appellate Procedure.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

Rule 2. Suspension of Rules

On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).

(As amended Apr. 24, 1998, eff. Dec. 1, 1998.)

TITLE II. APPEAL FROM A JUDGMENT OR ORDER OF A DISTRICT COURT

Rule 3. Appeal as of Right—How Taken

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d).

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal.

(3) An appeal from a judgment by a magistrate judge in a civil case is taken in the same way as an appeal from any other district court judgment.

(4) An appeal by permission under 28 U.S.C. §1292(b) or an appeal in a bankruptcy case may be taken only in the manner prescribed by Rules 5 and 6, respectively.

(b) Joint or Consolidated Appeals.

(1) When two or more parties are entitled to appeal from a district-court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant.

(2) When the parties have filed separate timely notices of appeal, the appeals may be joined or consolidated by the court of appeals.

(c) Contents of the Notice of Appeal.

(1) The notice of appeal must:

(A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X";

(B) designate the judgment, order, or part thereof being appealed; and

(C) name the court to which the appeal is taken.

(2) A pro se notice of appeal is considered filed on behalf of the signer and the signer's spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.

(3) In a class action, whether or not the class has been certified, the notice of appeal is sufficient if it names one person qualified to bring the appeal as representative of the class.

(4) An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

(5) Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.

(d) Serving the Notice of Appeal.

(1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal and of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

(2) If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice.

(3) The district clerk's failure to serve notice does not affect the validity of the appeal. The clerk must note on the docket the names of the parties to whom the clerk mails copies, with the date of mailing. Service is sufficient despite the death of a party or the party's counsel.

(e) Payment of Fees. Upon filing a notice of appeal, the appellant must pay the district clerk all required fees. The district clerk receives the appellate docket fee on behalf of the court of appeals.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 25, 1989, eff. Dec. 1, 1989; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 1994, eff. Dec. 1, 1994; Apr. 24, 1998, eff. Dec. 1, 1998.)

[Rule 3.1. Appeal from a Judgment of a Magistrate Judge in a Civil Case] (Abrogated Apr. 24, 1998, eff. Dec. 1, 1998)

Rule 4. Appeal as of Right—When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) **Multiple Appeals.** If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with

Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) **Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) **Time for Filing a Notice of Appeal.**

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) **Filing Before Entry of Judgment.** A notice of appeal filed after the court announces a decision, sentence, or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) **Effect of a Motion on a Notice of Appeal.**

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order—but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)—becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective—without amendment—to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) **Motion for Extension of Time.** Upon a finding of excusable neglect or good cause, the district court may—before or after the time has expired, with or without motion and notice—extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) **Jurisdiction.** The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure

35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. §1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

Rule 5. Appeal by Permission

(a) Petition for Permission to Appeal.

(1) To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action.

(2) The petition must be filed within the time specified by the statute or rule authorizing the appeal or, if no such time is specified, within the time provided by Rule 4(a) for filing a notice of appeal.

(3) If a party cannot petition for appeal unless the district court first enters an order granting permission to do so or stating that the necessary conditions are met, the district court may amend its order, either on its own or in response to

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(B) the court grants other relief not described in this subdivision (b).

(c) TIME OF ENTRY. For purposes of these rules, judgment is entered at the following times:

(1) if a separate document is not required, when the judgment is entered in the civil docket under Rule 79(a); or

(2) if a separate document is required, when the judgment is entered in the civil docket under Rule 79(a) and the earlier of these events occurs:

(A) it is set out in a separate document; or

(B) 150 days have run from the entry in the civil docket.

(d) REQUEST FOR ENTRY. A party may request that judgment be set out in a separate document as required by Rule 58(a).

(e) COST OR FEE AWARDS. Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 59. New Trial; Altering or Amending a Judgment

(a) IN GENERAL.

(1) *Grounds for New Trial.* The court may, on motion, grant a new trial on all or some of the issues — and to any party — as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) *Further Action After a Nonjury Trial.* After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) TIME TO FILE A MOTION FOR A NEW TRIAL. A motion for a new trial must be filed no later than 10 days after the entry of judgment.

(c) TIME TO SERVE AFFIDAVITS. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 10 days after being served to file opposing affidavits; but that period may be extended for up to 20 days, either by the court for good cause or by the parties' stipulation. The court may permit reply affidavits.

(d) NEW TRIAL ON THE COURT'S INITIATIVE OR FOR REASONS NOT IN THE MOTION. No later than 10 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may

grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) MOTION TO ALTER OR AMEND A JUDGMENT. A motion to alter or amend a judgment must be filed no later than 10 days after the entry of the judgment.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Feb. 28, 1966, eff. July 1, 1966; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 60. Relief from a Judgment or Order

(a) CORRECTIONS BASED ON CLERICAL MISTAKES; OVERSIGHTS AND OMISSIONS. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) TIMING AND EFFECT OF THE MOTION.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. §1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) BILLS AND WRITS ABOLISHED. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007.)

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

MAC HUDSON,
DERICK TYLER,
Plaintiffs,

v. **C.A. No. 01-12145-RGS**

HAROLD W. CLARKE,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that Harold W. Clarke, Commissioner of the Massachusetts Department of Correction, defendant in the above named case, hereby appeals to the United States Court of Appeals for the First Circuit from the Order denying Defendant's Motion for Reconsideration of Final Judgment with Regard to Broadcast of Jum'ah Services in Special Management Units Other Than Ten Block, entered in this action on June 19, 2008.

Dated: July 17, 2008

Respectfully submitted,

NANCY ANKERS WHITE
Special Assistant Attorney General

/s/ Richard C. McFarland
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CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) on 07/17/08.

/s/ Richard C. McFarland
Richard C. McFarland