UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
TERRE HAUTE DIVISION

YAHYA (JOHN) LINDH,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:14-cv-00142 JMS-WGH
	)	
WARDEN, FEDERAL CORRECTIONAL INSTITUTION, TERRE HAUTE, INDIANA, in his official capacity,	)	
	)	
Defendant.	)	

Memorandum in Support of Motion for Summary Judgment

Introduction

The *awrah* is the area between the navel and knees that male Muslims, by virtue of their religion, generally cannot expose to view by others. To do so is a sin. But, as a condition of being able to receive non-contact visits with his family, where the visits occur via telephone through solid plexiglass, the plaintiff Yahya (John) Lindh must be subjected to a strip search. The search – featuring a visual inspection of the prisoner's scrotum and anus – is not only intrusive and demeaning, it is also unnecessary as the visits are not only non-contact, but are intensely supervised by both a correctional officer and audio and video surveillance. Nevertheless, it is the policy of the unit where Mr. Lindh is confined, the Communications Management Unit at the Federal Correctional Institution in Terre Haute ("CMU"), that prisoners must be subject to a strip search in order to have a non-contact visit. Given that the policy imposes a substantial burden on Mr. Lindh's sincere religious exercise without justification, it violates the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1.

Mr. Lindh also assert that strip-search policy violates the Fourth Amendment as it is unreasonable. Second Amendment Complaint ¶41 (Dkt. 42). However, this argument is foreclosed at the district court level by *King v. McCarty*, 781 F.3d 889 (7th Cir. 2015), and is made in this memorandum solely to preserve it for any future appeal.

Summary judgment standard

Under Rule 56 the party moving for summary judgment is entitled to judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Rule 56(a), Fed. R. Civ. P. The Rule requires that the moving party identify "those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once this burden is satisfied, the non-moving party bears the burden of demonstrating that there are, in fact, genuine issues of material fact. *Harney v. Speedway SuperAmerica, LLC.*, 526 F.3d 1099, 1104 (7th Cir. 2008). "If no genuine issues of material fact exist, the sole question is whether the moving party is entitled to judgment as a matter of law." *Logan v. Commercial Union Insurance Co.*, 96 F.3d 971, 978 (7th Cir. 1996).

Statement of undisputed material facts

The CMU

The CMU is a self-contained, general population unit. (Defendant's Answer [Dkt. 47] to Second Amended Complaint [Dkt. 42] ["Answer"] ¶¶ 9, 12). As a self-contained unit, all meals, religious services, and educational, recreational, vocational, and administrative programming and activities take place within the CMU. (*Id.* ¶ 13). However, it is a general housing unit, although it does contain a number of cells reserved for special housing. (*Id.*). It was opened in 2006 and contains 56 cells, six of which are reserved for special housing. (*Id.* ¶ 11; Deposition of Captain

Vincent Rigsby, Attached as Exhibit 1 to Plaintiff's Motion for Summary Judgment ["Rigsby"] at 10, lines 19-21[1]). Prisoners are single celled in the unit. (Rigsby at 10, lines 22-25). The CMU is reserved for male prisoners only. (*Id.* at 11, lines 1-2).

Visitation in the CMU

Prisoners within the CMU have the right to periodic "social visits," defined as visits that are not with attorneys or law enforcement. (*Id.* at 11, lines 13-25 – 12, lines 1-7). In the CMU, pursuant to an institutional supplement, prisoners may have two social visits a month for up to four hours a month on Saturday, Sunday, or Monday unless a different day is authorized in advance. (*Id.* at 11, lines 13-23).

All social visits at the CMU are non-contact, with no physical contact possible between visitors and prisoners. (Complaint ¶ 16; Rigsby at 13, lines 1-15). Only one social visit can take place in the CMU at a time. (Rigsby at 13, lines 23-25 – 14, lines 1-5). The visitor and prisoner are placed in separate rooms that are separated by a clear plexiglass window without any opening and with bars on the prisoner side. (*Id.* at 14, lines 6-13; Stipulation Concerning Photographs [Dkt. 54] ["Photo Stip."] ¶¶ 2-7 and Exhibits 2-7 to the Stipulation). The prisoner and his visitor communicate by talking through telephone receivers. (Rigsby at 14, lines 14-16; Photo. Stip ¶¶ 4-7 and Exhibits 4-7 to the Stipulation). Both the prisoner and the visitor sit and the prisoner must stay seated during the visit. (Photo Stip. ¶¶ 4-7and Exhibits 4-7 to the Stipulation; Rigsby at 48, lines 1-3).

The visits are supervised in various ways. There is a desk outside the door to the room in which the visitor sits for a correctional officer who will remain immediately outside the visiting rooms during the visit. (Answer ¶ 20; Rigsby at 18, lines 10-19). The room where the visitor sits

[1] Captain Rigsby testified as the designated of defendant Warden pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. (Rigsby at 7, lines 19-25 – 8, lines 1-12, Exhibit 1 to Rigsby).

has a door made entirely of plexiglass and the officer can therefore look in and see the visitor and see through the plexiglass window separating the visitor and prisoner to observe the prisoner. (Rigsby at 18, lines 20-25 – 19, lines 1-6; Photo Stip. ¶¶ 1-2, Exhibits 1-2 to Stipulation). During the visits the supervising correctional officer will also get up and get a closer view of the prisoner through a smaller window in the door to the room where the prisoner is located. (Rigsby at 18, lines 13-18; Photo Stip. ¶¶ 1, 2, Exhibit 1-2 to Stipulation).

The phones, which the prisoner and visitor must use to talk to each other, are live-monitored and the conversations are recorded by persons outside of the CMU. (Rigsby at 20, lines 1-25 – 21, lines 1-7, 22, lines 23-25 – 23, lines 1-2). Similarly, there is a camera or cameras in the visiting areas that show both the visitor and prisoner and that produce a live feed that can be monitored and is also recorded. (*Id.* 21, lines 12- 25 – 22, lines 1-5).[2] There is at least one camera on the visitor side that is pointed toward the area where the prisoner is required to sit during his visit. (Second Declaration of Yahya (John) Lindh, Exhibit 2 to plaintiff's Motion for Summary Judgment [Lindh Second Dec.] ¶ 14).

The search policy in the Bureau of Prisons

Federal regulations specify four types of searches of prisoners. A search through electronic devices, such as metal detectors or body imaging devices, does not require a prisoner to remove his or her clothes and may be done routinely or randomly. 28 C.F.R. § 552.11(a). A pat search is a search of the prisoner's clothing and personal effects using the hands. 28 C.F.R. § 552.11(b). It also does not require the prisoner to remove his or her clothes and can be done on a routine or random basis. *Id.* The practice of the Bureau of Prisons ("BOP") during a pat down is not to touch

[2] Although Captain Rigsby opined that monitoring through the cameras would be limited by the camera angle (Rigsby at 21, lines 18-19), he also noted that he has not seen the videos taken by the cameras or camera in the visiting room. (*Id.* at 46, lines 22-25 – 47, lines 1-2). His testimony concerning the limitations imposed by angles of the cameras is thus inadmissible speculation.

the groin or buttocks area, but to touch around the crotch area. (Deposition of Lt. Randall Mosley, Exhibit 3 to Plaintiff's Motion for Summary Judgment ["Mosley"] at 15, lines 4-8, at 19, lines 1-15).

A visual search is one that results in a "visual inspection of all body surfaces and body cavities." 28 C.F.R. § 552.11(c). The BOP does not officially use the term "strip search," but the terms "visual search" and "strip search" are used interchangeably. *See, e.g.,* Exhibit 5 to Rigsby (stating that "staff will submit the inmate to a visual (strip) search"). A prisoner subjected to such a search will remove all clothing, and the officer will then inspect his or her body, including in and around the ears, in the mouth and nose, and both sides of the hands. (Rigsby at 24, lines 20-25 – 25, line 1). The prisoner will then be required to run his or her fingers through his or her hair. (*Id.* at 24, lines 24-25). A male prisoner will have to lift his genitals in a manner visible to the officer and then bend over and squat so his anal region can be observed. (*Id.* at 25, lines 1-9). He will have to also show the officer his feet. (*Id.* at 25, lines 10-11). These visual or strip searches are performed by officers who are of the same gender as the prisoner. (*Id.* at 27, lines 7-11).

Regulations provide that visual searches may occur:

> where there is reasonable belief that contraband may be concealed on the person, or a good opportunity for concealment has occurred. For example, placement in a special housing unit . . . , leaving the institution, or re-entry into an institution after contact with the public (after a community trip, court transfer, or after a "contact" visit in a visiting room) is sufficient to justify a visual search.

28 C.F.R. § 552.11(c)(1). As noted, the CMU is not a special housing unit, and its prisoners do not leave the unit. (*See also* Rigsby at 29, lines 2-12).

The fourth type of search recognized by the regulation is a digital or simple instrument search that may be performed only by qualified health personnel with the approval of the Warden or Acting Warden if there is reasonable belief that the prisoner has concealed contraband in or on

his or her person. 28 C.F.R. § 552.11(d).

Searches of prisoners prior to visitation in the CMU

From the time that the CMU opened in December of 2006 until the fall of 2012, the practice in the CMU was to subject CMU prisoners who had social visits to, at most, a pat-down search prior to the visit. (Lindh Second Dec. ¶ 9). Sometimes, there was not even a pat-down search. (*Id.*). And at times prisoners were allowed to take things into the visits such as coffee. (*Id.).*

However, on October 31, 2012, Stanley Lovett, then a Captain at FCI Terre Haute, issued a memorandum requiring that prior to all social visits in the CMU prisoners have a visual or strip search conducted in conjunction with a search by a hand-held metal detection device before the prisoners are secured in the non-contact visitation area. (Deposition of Associate Warden Lovett, Exhibit 4 to Motion for Preliminary Injunction ["Lovett"] at 8, lines 8-16, Exhibit 1 to Lovett; Rigsby at 36, lines 1-4, Exhibit 5 to Rigsby). The memorandum also provides that prisoners cannot take anything to or from the visits except a comb, handkerchief, and a plain wedding band. (Lovett Exhibit 1). After the memorandum issued, there was a period of time when the prisoners were subject to the strip search both before and after their non-contact social visits. (Lindh Second Dec. ¶ 10). However, in February of 2013, Captain Lovett reissued his memorandum from the prior October, but noted that "[d]ue to visits being non-contact, the inmates do not require a visual search prior to being released back to the Unit." (Exhibit 4 to Rigsby).

In his original memorandum Captain Lovett stated that the reason for the change in policy was "[i]n order to maintain the integrity, along with the safety and security of the CMU, and due to a normal pat search not detecting pictures or a written note on an inmates (*sic*) person." (Exhibit 1 to Lovett; Exhibit 5 to Rigsby). He indicated that there was a general concern motivating the policy change because it was "clear that staff were not able to detect messages concealed on paper

or written directly on an inmate's skin." (Exhibit 1 to Lovett at ¶ 8).

The one specific event that Captain Lovett recalls as justifying the policy change requiring strip searches occurred shortly before the memorandum's issuance when a prisoner was able to bring a photograph into a visit. (Exhibit 1 to Lovett ¶ 8). Although Captain Lovett stated in a declaration that the prisoner "was able to conceal" the photograph (*id.*), he actually has no personal knowledge that the photograph had been hidden by the prisoner. (Lovett at 17, lines 2-6). The incident was discovered because staff listening to the prisoner and visitor conversation heard discussions about the photograph. (*Id.* at 17, lines 7-10). There are apparently no documents concerning the incident. (Rigsby at 41, lines 1-25 – 46, lines 1-12) (summarizing all incidents justifying the strip-search policy and not mentioning the photograph incident). Captain Lovett was uncertain as to whether the video devices and the cameras in the visiting area at the CMU have been changed in any way since this incident. (Lovett at 17, lines 16-20).

The other specific incidents that have been cited as justifying the strip-search policy are not specific to non-contact visits in the CMU. One concerned another prisoner who prior to being reassigned to the CMU in 2010 admitted that he had written notes to show to his visitors because he knew that in the facility where he was then located there were no video cameras that could record his actions. (Rigsby at 44, lines 21-15 – 45, lines 1-3). Another incident occurred in August of 2013, after the policy change, when a prisoner prevailed upon another prisoner to bring with him a note to a contact visit with an attorney in which the first prisoner sought legal representation. (Exhibit 6 to Rigsby[3]**).** The note was discovered during a pat-down search in the pants pocket of the second prisoner before his visit. (*Id.***;** Rigsby at 43, lines 2-5). A final supporting incident occurred recently and involved a prisoner in the secured housing area in the CMU who became

[3] Only the first page of this exhibit is included.

disruptive after recreation and who was detected, with a metal detector, as having something in his mouth that he refused to disgorge. (Mosley at 7, lines 3-7, at 12, lines 7-14). A pat-down search had not disclosed anything, but a visual search that was then performed disclosed handwritten notes in his underwear. (*Id.* at 12, lines 18-25 – 15, lines 1-10).

Therefore, at the current time the prisoner will show up for his visit and be taken to a small restroom immediately adjacent to the room where he will sit for his visit and a strip search will be performed in the restroom. (*Id.* at 25, lines 12-25 – 26, lines 1-13; Photo Stip. ¶¶ 1, 8, Exhibits 1, 8 to the Stipulation). The prisoner will then be allowed to go to the room for his visit. (Rigsby at 26, lines 14-23).

Other than the CMU (and its sister-Communications Management Unit in Illinois), there is no other prison within the BOP where prisoners are subject to visual searches before non-contact visits. (Rigsby at 36, lines 20-25 – 37, lines 1-12). This includes the "super-max" prison in Florence, Colorado, the most restrictive unit within the federal system, where prisoners have non-contact visits without strip searches. (Rigsby at 37, lines 17-25 – 38, lines 1-12; Lindh Second Dec. ¶ 17). The CMU strip-search policy is "unique." (Rigsby at 37, lines 9-10).

Yayha (John) Lindh

Mr. Lindh has been a prisoner within the BOP since 2003 and has been confined within the CMU since October of 2007. (Lindh Second Dec. ¶¶ 2-4). During the time of his confinement within the CMU he has had social visits – exclusively with family members – and he expects to continue to have social visits. (*Id.* ¶¶ 5-6).

Mr. Lindh was present in the CMU during the period, ending in the fall of 2012, when prisoners having the non-contact social visits were subject to, at most, a pat-down search before the visit. (*Id.* ¶ 9). And, sometimes, not even a pat-down search preceded the visits. (*Id.*).

Now he is subject to the strip-search procedure noted above before his non-contact visits. (*Id.* ¶ 12), This includes a search of his clothing. (*Id.*) The pants that he is issued by the BOP contain back pockets, but no side pockets. (*Id.* ¶ 13).

Mr. Lindh has frequently been in the prisoner-side of the visitation area and is aware that the prisoner can be seen by the correctional officer who is able to see into the visitation area. (*Id.* ¶ 15). If the prisoner stands and attempts to obstruct any camera view this will be immediately detected by the officer and by those persons monitoring the camera feed. (*Id.*).

At an earlier stage in his incarceration, Mr. Lindh was confined in the "supermax" in Florence, Colorado and was held in a unit for prisoners with Special Administrative Measures – requirements imposing additional restrictions above and beyond those imposed on other prisoners, even other prisoners in the supermax. (*Id.* ¶ 17). He had restrictions on his ability to communicate. (*Id.*). Yet, even in this high-security setting he was allowed to have non-contact visits without a strip search. (*Id.*). Instead, he was required to walk through some sort of electronic monitor prior to his visit and there was not even a pat-down search. (*Id.*).

As a general matter, Mr. Lindh finds the strip searches to be cruel, inhuman, and degrading. (*Id.* ¶ 18). However, the searches are particularly problematic to Mr. Lindh as he is a practicing Muslim who attempts to observe and follow as many precepts of Islam as is possible given his confinement. **(***Id.* ¶ 19). Both in the Qur'an and more specifically the Hadiths, which are a collection of statements by the Prophet, there is a prohibition against males exposing the area of their bodies between the navel and the knees. (*Id.* ¶¶ 20-22, and attachments to Lindh Second Dec.). This area is called the *awrah.* (Lindh Second Dec. ¶ 20). There is a slight difference of opinion among Islamic scholars about the exact location of the *awrah*, with some stating the area is from the navel to the knee, including the navel and knees, and with others indicating that the

navel and knee are not included in the proscribed area. (*Id.*). However, the general prohibition of not exposing the *awrah* to others is recognized among all Muslims and all Muslim sects and schools of thought. (*Id.* ¶ 22). The prohibition is commanded by God and a person who violates it has sinned. (*Id.* ¶ 23).

Islam recognizes exceptions to the prohibition. (*Id.* ¶ 24). This area of the body may be shown to one's spouse or for medical treatment or other circumstances of necessity. (*Id.*). Although Islam recognizes that if a Muslim is compelled by force or some other human behavior to violate religious requirements the Muslim is absolved of sin, Islam also teaches that if the compulsion can be challenged a challenge must be made. (*Id.* ¶ 26). Islam teaches that a person may not sit idly by in the face of wrongdoing and that if the person has the ability to seek to change what is wrong he or she must attempt to do so. (*Id.* ¶ 27).

Therefore, being required to undergo a strip search in order to have a non-contact visit violates and burdens Ms. Lindh's religious beliefs. (*Id.* ¶ 28). It requires him to engage in behavior that is a sin in Islam. (*Id.*).

Mr. Lindh would prefer to just have a pat-down search prior to his visits. (*Id.* ¶ 29). However, he would be willing to accept other restrictions in lieu of having to undergo a strip search. (*Id.*). For example, he is willing to be placed in hand and/or leg restraints during the visits so that it would be impossible to remove anything hidden in his clothes. (*Id.*). If he had leg restraints he would be unable to leave his seat during the visit. (*Id.*). He would also be willing, prior to his visit, to strip down to his BOP-purchased shorts that cover the *awrah* and demonstrate that he has nothing written on him or hidden on his arms, legs or torso. (*Id.*). If necessary, he is willing to jump up and down while in his shorts or shake his clothing to demonstrate that he is not hiding anything in the parts of his body hidden by his shorts. (*Id.*). The BOP has not proposed any

alternatives to strip-searching Mr. Lindh prior to his non-contact visits. (*Id.* ¶ 30).

Argument

I. The strip-search policy as applied to Mr. Lindh violates the Religious Freedom Restoration Act

A. An introduction to RFRA

RFRA, 42 U.S.C. § 2000bb, *et seq.*, was explicitly enacted "to restore the compelling interest test as set forth in *Sherbert* v. *Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). The statute reflects Congress's concern about the United States Supreme Court's holdings in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), both of which, in Congress' estimation, weakened traditional First Amendment protections. S. Rep. 103-11, 1993 U.S.C.C.A.N 1892, 1895-1901. *See also, e.g., Holt v. Hobbs*, __U.S.__, 135 S.Ct. 853, 859-60 (2015) (referring to RFRA's "sister statute" the Religious Land Use and Institutionalized Persons Act,42 U.S.C. § 2000cc, *et seq.*). RFRA therefore provides that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section." 42 U.S.C. § 2000bb-1(a). Subsection (b) states that "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b).

Under RFRA the plaintiff has the burden of persuasion of showing that a challenged practice creates a substantial burden on religious exercise, at which point the burden of persuasion shifts to the government to prove that the burden is necessitated by a compelling governmental

interest and that the restriction at issue is the least restrictive means to meet that interest. *See, e.g.*, *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1069 (9th Cir. 2008).

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that RFRA was not a valid exercise of Congress' powers under Section 5 of the Fourteenth Amendment to enforce the substantive portions of that amendment. *Id.* at 532-35. However, this holding did not disturb the constitutionality of RFRA when addressed to the United States, as opposed to those acting under color of state law, inasmuch as "legislation affecting the internal operations of the national government does not depend on § 5 [of the Fourteenth Amendment]; it rests securely on Art. I § 8 cl. 18." *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (holding that RFRA applies to the federal Bureau of Prisons). Therefore, "[e]very appellate court that has squarely addressed the question has held that the RFRA governs the activities of federal officers and agencies." *Id.*[4]

RFRA speaks of a "substantial burden" on religious exercise. As this Court has noted in an earlier decision concerning Mr. Lindh:

> While RFRA does not define substantial burden, the same definition of "substantial burden" applies under RFRA, RLUIPA, and the Free Exercise Clause. *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 814 (8th Cir.2008). In the context of the Free Exercise Clause, the Supreme Court has held that a government imposes a substantial burden when it "puts substantial pressure on an adherent to modify his behavior and violate his beliefs." *Thomas v. Review Bd.*, 450 U.S. 707, 718 (1981). The Seventh Circuit has recently defined a substantial burden as "one that necessarily bears direct, primary, and fundamental responsibility for rendering

[4] Congress responded to *Flores* by enacting the Religious Land Use and Institutionalized Persons Act ["RLUIPA"], 42 U.S.C. § 2000cc. RFRA and RLUIPA are "substantively identical with respect to prisoners' entitlements." *Whitfield v. Illinois Dep't of Corr.*, 237 Fed. Appx. 93, 94 (7th Cir. 2007). RLUIPA applies to state and local government and to those acting under color of state law. 42 U.S.C. § 2000cc-5(4). However, in order for RLUIPA to apply, the program or activity in question must receive federal financial assistance, affect interstate or foreign commerce, or involve land use regulations. 42 U.S.C. § 2000cc(a)(2). Because of their substantial similarity both RFRA and RLUIPA cases are relied on interchangeably in this memorandum.

> religious exercise ... effectively impracticable." *Koger v. Bryan*, 523 F.3d 789, 799 (7th Cir.2008) (internal citation omitted).

Lindh v. Warden, Fed. Corr. Inst., Terre Haute, Ind., No. 2:09-CV-00215-JMS-MJD, 2013 WL 139699, at *9 (S.D. Ind. Jan. 11, 2013).

B. Requiring Mr. Lindh to expose himself as a condition of having a non-contact visit substantially burdens his religious exercise motivated by a sincere religious belief

RFRA states that "the term 'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title." 42 U.S.C. § 2000bb-2(4). The latter statutory section, part of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-1, *et seq*., notes that "[t]he term 'religious exercise' includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Of course, "a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation." *Holt*, 135 S.Ct. at 862 (citing *Burwell v. Hobby Lobby Stores, Inc.*, __U.S.__, 134 S.Ct. 2751, 2774 n.28 (2014)).

This Court has previously noted that Mr. Lindh is a sincere adherent of Islam. *Lindh*, 2013 WL 139699, at * 9 (referring to a sincere belief in the necessity of group prayer). Mr. Lindh remains a practicing Muslim. The belief that the part of a Muslim's body defined as the *awrah* should not be exposed is hardly an idiosyncratic belief of Mr. Lindh's. Instead, it is a well-recognized precept of Islam. *See, e.g., United States v. Amawi*, No. 3:06CR719, 2008 WL 4427263, at *1 (N.D. Ohio Aug. 8, 2008) ("Defendant is a Muslim. Viewing of the naked body by a stranger violates Islamic religious taboos."); Islam Question and Answer, *Are the navel and the knee included in the 'awrah?*, https://islamqa.info/en/171584 (last visited Dec. 25, 2015). "The 'exercise of religion' involves 'not only belief and profession but the performance of (or abstention from) physical acts' that are 'engaged in for religion reasons.'" *Hobby Lobby*, 134 S.Ct. at 2770

(quoting *Smith*, 494 U.S. at 877). Mr. Lindh is being required to perform a physical act – a strip search – that is prohibited by his religious beliefs.

And, there is no doubt that being required to strip naked and expose himself imposes a substantial burden on his religious belief. In *Holt* the Supreme Court noted that requiring a prisoner to choose between engaging in conduct that violated his religious beliefs and engaging in conduct that violated a prison rule (growing a beard) "easily satisfied" the prisoner's burden to demonstrate a substantial burden on his religious belief. 135 S.Ct. at 862. Similarly, the challenged rule here makes the religious exercise of not exposing oneself "effectively impracticable," thus creating a substantial burden. *Koger*, 523 F.3d at 799. The only alternative for Mr. Lindh is to forego all visits. This is a substantial burden. After all, "a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (footnote omitted) (emphasis in original).

C. The Warden will not be able to sustain her burden to demonstrate that requiring Mr. Lindh to be strip-searched before his non-contact visits furthers a compelling governmental interest and is the least restrictive means to achieve that interest

Given that requiring Mr. Lindh to be strip searched before a non-contact visit substantially burdens Mr. Lindh's sincere religious beliefs, Mr. Lindh is entitled to judgment unless the Warden carries her burden of demonstrating both that this substantial burden furthers a compelling governmental interest and that it is the least restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1(b). The Warden will not be able to establish either of these statutory requirements.

1. The Warden will not be able to sustain her burden of showing

that the policy is justified by a compelling governmental interest

The justification for the policy here is clear – security. "It is undisputed that institutional security is 'the most compelling governmental interest in a prison.'" *Lindh*, 2013 WL 139699, at *11 (quoting *Ochs v. Thalacker*, 90 F.3d 293, 296 (8th Cir. 1996)). It is also cannot be denied that the CMU is a unique prison unit established to closely monitor the communications of prisoners who the BOP has determined are especially in need of strict supervision of all their communications. Therefore, the security interests regarding communications are particularly acute in the CMU. However, this does not change the fact that it simply is not sufficient for the Warden to claim a security concern and stop at that. Although courts must give "'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources,'" the deference is not unlimited. *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (quoting S.Rep. No. 103-111, 1993 U.S. Code Cong. & Admin. News 1892, 1899, 1900). Therefore, "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalization will not suffice to meet the act's requirements." S.Rep. No. 103-11, 1993 U.S. Code Cong. & Admin. News at 1900. As the Supreme Court recently noted, speaking of the identical RLUIPA requirements, "[p]rison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Holt*,135 S.Ct. at 864.

And what does that rigorous inquiry disclose here? The CMU was in operation for almost six years prior to the change in the strip-search policy. During that time there is one, undocumented, example of a prisoner bringing something into his visit – a photograph – that prison

authorities now assert he was not supposed to bring into the visiting room. However, it is unclear if there was even a pat-down search prior to that prisoner bringing the photograph into the visiting room and there is no evidence that he was trying to hide the photograph. While the recent non-visitation incident of a prisoner hiding writings in his underwear demonstrates that such subterfuge is a possibility, it is not a possibility that has ever been documented regarding prisoners visiting in the CMU. Perhaps this is because of the extraordinary and intense supervision to which visitation is subjected at the CMU.

RFRA "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenge law to the person – the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 134 S.Ct. at 2779 (internal quotation marks and citation omitted). Therefore, it is incumbent upon the Warden to demonstrate that allowing Mr. Lindh to visit with his relatives, as these are his only visitors, without first undergoing a strip search, poses some sort of security risk. "RFRA requires that the Warden 'must do more than merely assert a security concern.'" *Lindh*, 2013 WL 139699, at *13 (quoting *Murphy v. Missouri Dept. of Corrections*, 372 F.3d 979, 988 (8th Cir.2004)). The Warden will not be able to support her contention that the strip-search requirement, as applied to Mr. Lindh, is justified by security concerns.

2. The Warden will not be able to establish that the strip-search requirement is the least restrictive means of advancing her security concerns

Even if the compelling interest standard is met here, the strip-search policy as applied to Mr. Lindh still fails because it is not the least restrictive alternative for the Warden to utilize to satisfy her articulated security concerns. This is fatal under RFRA and requires that summary judgment be entered for Mr. Lindh.

The Supreme Court has stressed that "[t]he least-restrictive-means standard is exceptionally demanding," requiring a defendant to "show[] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby*, 134 S.Ct. at 2780. "'[I]f a less restrictive means is available for the Government to achieve its goals, the Government must use it.'" *Holt*, 135 S.Ct. at 864 (quoting *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000)).

Among other things, the focus on less restrictive alternatives means that the Warden must have actually considered a lesser alternative to the strip-search requirement.

> "In determining the least restrictive means, 'the Government must consider and reject other means before it can conclude that the policy chosen is the least restrictive means.'" *Williams v. Secretary Pennsylvania Dep't of Corrections*, 450 Fed. App'x 191, 195 (3d Cir. 2011) (quoting *Washington v. Klem*, 497 F.3d 272, 277 (3d Cir. 2007)); *see also, e.g., Shakur v. Schirro*, 514 F.3d 878, 890 (9th Cir. 2008) ("[A] prison 'cannot meet its burden to prove least restrictive alternative unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'") (internal citation omitted).

Lindh, 2013 WL 139699, at *14.

The Warden has made no attempt to accommodate Mr. Lindh's sincere religious beliefs by considering lesser alternatives to the strip-search requirement. Although it is not Mr. Lindh's responsibility to suggest alternatives here, *see, e.g., Willis v. Commissioner, Indiana Department of Correction*, 753 F. Supp. 2d 768, 779 (S.D. Ind. 2010) ("Under RLUIPA, it is not the plaintiff's burden to show that reasonable alternatives *do* exist – it is the DOC's burden to show that reasonable alternatives do *not* exist." [emphasis in original]), Mr. Lindh has suggested alternatives to the strip search to satisfy the BOP's concerns. He is willing to be chained into the visitation area so that even if he did somehow manage to hide something on his body he would not be able to access it. Or, he is willing to strip to his shorts demonstrating that he has nothing hidden or written on his torso, arms, or legs and he is willing to jump up and down to demonstrate that he

has nothing hidden in his shorts. There are undoubtedly other alternatives as well. The BOP has ignored these lesser alternatives and therefore will not be able to satisfy its burden under RFRRA.

In *Holt* the Supreme Court found it relevant that the Arkansas correctional authorities failed to show why it was necessary to ban facial hair where both the BOP and the vast majority of state correctional systems allow prisoners to have facial hair. *Id.* at 866. "'While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction.' . . . That so many other prisons allow inmates to grow beards while ensuring prison safety and security suggests that the Department could satisfy its security concerns through a means less restrictive." *Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 414, n.14 (1974).

Similarly, the BOP cannot answer why Mr. Lindh must be subject to strip searches now when he was not subject to them when he was confined in the BOP's most restrictive unit in Florence, Colorado. It is no answer to assert that the CMU is a unique unit designed to closely monitor prisoners' communications. The question is what possible justification does the BOP have to conduct strip searches of Mr. Lindh when they were not deemed necessary when he was subject to special administrative measures addressed to his communications in the most restrictive unit within the federal system. (Rigsby at 38, lines 4-12). This certainly "suggests that the [BOP] could satisfy its security concerns through a means less restrictive." *Holt*, 135 S.Ct. at 866.

II. Although the argument is foreclosed by *King v. McCarty*, the strip-search policy also violates the Fourth Amendment

In *King v. McCarty*, the Seventh Circuit, by a 2-1 decision, held that a strip search of a prisoner that does not involve any physical intrusion into his or her body does not represent a "search" and therefore the Fourth Amendment is not implicated. 781 F.3d at 900-01. Judge Hamilton, dissenting, noted that the decision was contrary to decisions from every other circuit in

the country, with the exception of the Federal Circuit, which had not ruled on the question.

> All of the other courts of appeals except the Federal Circuit (which would rarely if ever have occasion to consider the question) have said that prisoners retain *some* diminished degree of protection against unreasonable bodily searches and/or have allowed such challenges to go forward. As best I can tell, no other circuit applies the categorical rule that my colleagues apply, finding no Fourth Amendment protection against strip-searches or nudity. See, e.g., *Sanchez v. Pereira–Castillo,* 590 F.3d 31, 44–48 (1st Cir. 2009) (vacating dismissal of prisoner's Fourth Amendment claim based on abdominal surgery to obtain evidence); *Nicholas v. Goord,* 430 F.3d 652, 658 (2d Cir. 2005) ("prisoners retain a right to bodily privacy," but DNA testing did not violate Fourth Amendment); *Russell v. City of Philadelphia,* 428 Fed.Appx. 174, 178 (3d Cir. 2011) (prisoner stated claim challenging strip-search under Fourth Amendment but failed to exhaust administrative remedies); *Bushee v. Angelone,* 7 Fed.Appx. 182, 184 (4th Cir. 2001) (vacating dismissal of prisoner's challenge to reasonableness of strip-search); *Hutchins v. McDaniels,* 512 F.3d 193, 196 (5th Cir. 2007) (reversing dismissal of prisoner's Fourth Amendment claim based on strip-search); *Stoudemire v. Michigan Dep't of Corrections,* 705 F.3d 560, 575 (6th Cir. 2013) (affirming denial of qualified immunity against prisoner's Fourth Amendment claim challenging strip-search); *Seltzer–Bey v. Delo,* 66 F.3d 961, 963 (8th Cir. 1995) (reversing summary judgment and remanding prisoner's Fourth Amendment claim challenging strip-search); *Nunez v. Duncan,* 591 F.3d 1217, 1226–28 (9th Cir. 2010) (affirming summary judgment for defendants on merits of prisoner's Fourth Amendment claim; he presented no evidence that strip-search was unreasonable); *Farmer v. Perrill,* 288 F.3d 1254, 1260 (10th Cir. 2002) (affirming denial of qualified immunity against prisoner's challenge to strip-search); *Moton v. Walker,* 545 Fed.Appx. 856, 860 (11th Cir. 2013) (affirming grant of qualified immunity while noting that prisoners "retain a constitutional right to bodily privacy"); *Kaemmerling v. Lappin,* 553 F.3d 669, 686 (D.C. Cir. 2008) (affirming dismissal of prisoner's challenge to DNA testing because past case established its reasonableness).

Id. at 903-04 (7th Cir. 2015) (Hamilton, J., dissenting). In *Turkmen v. Hasty*, 789 F.3d 218 (2d Cir. 2015), decided after *King*, the Second Circuit was confronted with a qualified immunity claim by federal correctional officials in litigation brought by Muslims arrestees who had been detained in the maximum special housing unit at the federal Metropolitan Detention Center in Brooklyn after the September 11th attacks and who alleged that they had been subjected to unreasonable strip searches. *Id.* at 226-27, 260. Among other things, the prisoners were "strip searched every time they were taken from or returned to their cells, including after non-contact attorney visits, when 'physical contact between parties was prevented by a clear partition.'" *Id.* at 260. The court

concluded that at the time that this occurred in 2001 "'it was clearly established that even the standard most favorable to prison officers required that strip and body-cavity searches be rationally related to legitimate government purposes.'" *Id.* at 261 (quoting *Iqbal v. Hasty*, 490 F.3d 143, 172 (2d Cir. 2007), *rev'd on other grounds*, 556 U.S. 662 (2009)). Qualified immunity was therefore denied.

Indeed, long prior to *King*, the Seventh Circuit commented on the unreasonableness of strip searches of prisoners who have non-contact visits. In *Bono v, Saxbe*, 620 F.2d 609 (7th Cir. 1980), the court noted that it was:

> particularly concerned with the strip searches of inmates before and after non-contact visits with family and friends. Guards handcuff the inmates before they leave the Control Unit and escort them to the visitation area. The inmates are separated from the visitors by plexiglass, and guards observe these visits. We do not believe that the rationale announced in Bell v. Wolfish, supra, justifies these strip searches. Thus, the Supreme Court in Wolfish relied on the possibility of contraband being brought into the prison during contact visits to justify the use of strip searches. Those contact visits were not closely supervised by guards. Wolfish should not be extended to the facts of this case without a showing that there is some risk that contraband will be smuggled into Marion during non-contact, supervised visits, or that some other risk within the prison will be presented. Since defendants do not discuss the searches in their brief, we are not in a position to dispose of the issue and, therefore, the district court should consider it on remand.

Id. at 617 (footnotes omitted).

It is, of course, true, as noted above, that communications and the monitoring of communications are of particular concern in the CMU. These concerns are accommodated by the one-to-one direct monitoring of visits by a correctional officer and the audio and video monitoring of all visits. It is simply not reasonable to require that all non-contact visits be preceded by a strip search even if there is absolutely no reason to believe that the prisoner will attempt to bring contraband into his visit.

However, this argument is completely foreclosed by *King v. McCarty* and Mr. Lindh makes it solely to preserve his right to raise it on appeal.

Conclusion

RFRA creates an "expansive protection for religious liberty." *Holt*, 135 S.Ct. at 860. The burden imposed on Mr. Lindh's religious exercise cannot be justified by the BOP's security rationale and the BOP cannot demonstrate that there are no lesser alternatives to the strip-search policy as applied to Mr. Lindh. There are no contested issues of material fact and Mr. Lindh is entitled to summary judgment enjoining the strip-search policy as applied to him.

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Certificate of Service

I hereby certify that on this 25th day of January, 2016, a copy of the foregoing was filed electronically with the Clerk of this Court. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system and the parties may access this filing through the Court's system.

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