

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RASHAD AHMAD REFAAT EL BADRAWI	:	CIVIL ACTION NO.
<i>Plaintiff</i>	:	3:07-CV-1074 (JCH)
	:	
v.	:	
	:	
DEPARTMENT OF HOMELAND	:	
SECURITY, et al.	:	
<i>Defendants</i>	:	NOVEMBER 4, 2010

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO
DEPARTMENT OF CORRECTIONS' MOTION FOR SUMMARY JUDGMENT***

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**Plaintiff respectfully requests oral argument regarding this motion.*

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INTRODUCTION

Rashad El Badrawi (“Plaintiff” or “Mr. El Badrawi”) brings this lawsuit to seek redress for the denial of his right to observe religious practices and his right to adequate medical care while he was an immigration detainee at the Hartford Correctional Center (“HCC”). Mr. El Badrawi entered HCC in the middle of Ramadan, the holy Islamic month during which Muslims are required to fast from dawn to sunset. An observant Muslim, Mr. El Badrawi had fasted every Ramadan of his adult life and had already been fasting for two weeks when he arrived at HCC. Intent on observing his faith, Mr. El Badrawi quickly asked an HCC official how he could join the Ramadan meal plan in order to continue his fast. The officer denied his request, stating that he could not be added to HCC’s Ramadan meal list because he arrived midway through the holiday. Undeterred, Mr. El Badrawi made repeated inquiries with prison officials and requested to speak with a Muslim chaplain. But HCC officials consistently responded that HCC policy did not permit anyone to join the list mid-month. When HCC officials finally granted Mr. El Badrawi’s request to speak to the Muslim chaplain, Ramadan had ended and the chaplain merely confirmed what the officers had told Mr. El Badrawi.

The record in this case demonstrates that denial of Mr. El Badrawi’s religious accommodations was the result of Defendants’ actions, not—as Defendants claim—to his own “apathy” and “neglect.” Defendants are not entitled to summary judgment because of multiple disputes of material fact that present genuine issues for trial. In particular, a jury could reasonably infer that:

- (1) In 2004, Defendants allowed a custom and practice at HCC to refuse to allow new inmates to join the Ramadan list mid-month. As a result, Defendants added no new inmates to the HCC Ramadan list in 2004. Over the next two years, as the policy

changed in 2005 to make an express exception for mid-holiday additions for new arrivals and in 2006 to better publicize this exception, that figure increased dramatically.

- (2) Even if formal HCC policy allowed inmates to join mid-month--which is subject to dispute—Mr. El Badrawi's right to religious exercise was substantially burdened because correction officers repeatedly denied his requests to join the list and did not provide any information to explain how he could join.
- (3) Defendants are themselves personally liable as they failed to train correction officers (a) how properly and correctly to answer inmates' questions about Ramadan meal accommodations; or (b) absent such training, that correction officers should *not* answer such questions at all. In fact, Defendant Lee specifically instructed correction officers to respond to religious inquiries, in contravention of the direction of Director of Religious Services for the Connecticut Department of Corrections. Thus, as a direct consequence of Defendants' conduct, correction officers denied Mr. El Badrawi his right to religious exercise.
- (4) After learning that new inmates had been denied the opportunity to join the Ramadan list in 2004, Defendants failed to (a) take steps to prevent future unconstitutional denials from occurring, and (b) create clear policies or train their employees to make inmates aware, through HCC's inmate handbooks or orientation, of how to join the Ramadan list using established processes.

Simply put, taking Mr. El Badrawi's uncontradicted declaration as true – as this Court must on the government's motion, either the Defendants allowed a custom to prohibit inmates from joining the list mid-month or Defendants personally took actions that led to un-trained

officials providing incorrect answers that denied Mr. El Badrawi his right to free exercise. Either way, the government's motion must fail.

In addition, for the first six days Mr. El Badrawi was at HCC, officials did not provide him with Asacol, medication he needs to control his Crohn's disease, a serious gastrointestinal disorder. In discovery, Plaintiff obtained documents that confirmed the delay in medication, his requests for medication, and his injuries, including rectal bleeding, as well as the policies that led to the failure to be able to provide medications in a timely fashion. Plaintiff has produced evidence from which a jury could reasonably infer that HCC personnel were deliberately indifferent to Mr. El Badrawi's serious medical need. Moreover, a jury could reasonably conclude that Defendant Lee was aware of complaints about delays in receiving medication at HCC, and yet was grossly negligent in training subordinates and allowed for the continuation of a policy that resulted in a denial of adequate medical care.

In sum, nearly every fact about HCC's 2004 Ramadan policies for new inmates is in dispute, and significant disputes exist regarding Mr. El Badrawi's medical claim. Moreover, Defendants' legal arguments run afoul of precedent and Congressional intent. Individual damages are plainly appropriate under RLUIPA pursuant to both the Spending and Commerce Clauses. Despite the fact that Congress expressly provided that RLUIPA must be construed broadly to protect religious exercise, Defendants attempt to argue that Mr. El Badrawi is not a "person" under the statute and should not be entitled to *any* form of damages.

To support their motion for summary judgment, Defendants rely on a number of flawed arguments. Despite the fact that no inmates joined the list mid-month in 2004, Defendants claim inmates were able to join at that time. Despite the fact that Mr. El Badrawi made repeated attempts to join the list to multiple HCC officials only to be repeatedly denied, Despite the fact

that Defendant Lee specifically was responsible for ensuring correction officers properly implemented DOC policies and instructed them to answer religious questions against DOC policy, Defendants claim he had nothing to do with religious matters. Despite the fact that Defendant Lee was responsible for the safety and security of his inmates, the Defendants claim he was not responsible when inmates endure severe pain due to delays in obtaining medication.

Because of the substantial evidence supporting Mr. El Badrawi's claims, and because this Court must disregard any evidence favorable to Defendants that a jury would not be required to believe, this Court should deny Defendants' motion.

FACTS AND PROCEEDINGS

On October 29, 2004, Rashad El Badrawi, a foreign national who had lawfully studied and worked in the United States for nearly eleven years was wrongfully arrested by federal immigration enforcement agents. Ex. 1 ¶¶ 1, 3. Later that day, Mr. El Badrawi was transferred to Defendant Lee's custody and detained at the HCC. Ex. 1 ¶ 3.

A. In 2004, Defendant Lee Had Ultimate Control At HCC, Defendant Pitts Supervised Religious Services and Defendant McGrail Supervised Food Services.

In October 2004, Defendant Lee was the Warden of HCC and was responsible for maintaining control of the facility, preserving the safety and security of the inmate population, and ensuring that Connecticut Department of Correction (DOC) policies and directives were properly implemented. *See* Ex. 3 at 21, 26-27, 100; Ex. 4 at 21.

As the Institutional Religious Facilitator at HCC in 2004, Defendant Pitts was responsible for coordinating religious services at HCC and implementing DOC's religious services directives. Ex. 5 at 9; Def. Ex. 11 (2003 Inmate Handbook) at 10. Any issue concerning religious services would "filter through the religious department." Ex. 5 (Pitts Depo.) at 9. In 2004,

Defendant Pitts was responsible for determining whether an inmate could receive Ramadan meal accommodations at HCC. *See id.* at 94.

Defendant McGrail supervised food service operations at HCC in 2004 and implemented DOC's food and nutrition policies. Food services handled requests for the provision of meals accommodating religious dietary restrictions—the “common fare diet.” *See* Ex. 6 (McGrail Depo.) at 37; Ex. 5 at 135. Although DOC policies required the Institutional Religious Facilitator, Defendant Pitts, to control the Ramadan meal accommodation lists, *see* Ex. 6 at 63; Ex. 5 at 94, in 2004 Defendant McGrail exercised power over inmates' Ramadan meal accommodations. *See* Ex. 7 at 108 (Imam Avci discussing how Defendant McGrail refused to add two new inmates to the Ramadan list); Def. Ex. 17 (HCC Ramadan Statistics 2004, including note that “Kitchen supervisor didn't allow inmates to remove temporarily [sic]”).

B. Defendants Lee and Pitts Were Required to Ensure That HCC Officials Understood and Implemented DOC Policies.

Broad DOC policies are distributed to individual facilities in the form of administrative directives. *See* Ex. 3 at 30-32; Def. Ex. 12 (Administrative Directive 10-8 on Religion); Ex. 12 (Administrative Directive 8-1 on Medical Care). Correction officers are trained in DOC policies and administrative directives in pre-service training and through various types of in-service training, which the DOC's academy coordinates. *See* Ex. 3 (Lee Depo.) at 35-36; Ex. 13 (Administrative Directive 2.7). Units within DOC, including the Religious Services Unit, may create and distribute DOC policies through memoranda on specific issues. Ex. 3 at 35-36.

When a policy changed and a new administrative directive was issued, the change “would go to the warden, and the warden's responsibility would be to make staff aware.” Ex. 4 (Bruno Depo.) at 39. Wardens instruct facility staff on the content of policy memoranda on specific issues through daily roll calls. Ex. 3 (Lee Depo.) at 57-58. Defendant Lee was responsible for

determining the content of roll calls. *See* Ex. 5 (Pitts Depo.) at 33; *see also* Ex. 23 (Roll Call Notice regarding Ramadan 2005). Through roll call, Defendant Lee could train facility staff on issues and correct any systemic problems with correction officer behavior. Ex. 5 (Pitts Depo.) at 32, 48. As institutional religious facilitator, Defendant Pitts was responsible for answering correction officers' questions regarding religious services and directing recurring issues to the Warden. *Id.* at 48-49.

As warden, Defendant Lee was responsible for ensuring that inmates received information about DOC and HCC policies through the Inmate Handbook. Ex. 3 (Lee Depo.) at 30, 122; Ex. 5 (Pitts Depo.) at 133-34. HCC officials were supposed to provide new inmates with a copy of the Inmate Handbook and explain its contents at orientation. Ex. 4 at 111; Ex. 5 at 57. Defendant Lee had overall responsibility for the content of the handbook for HCC and reviewed the content before it was finalized. Ex. 3 at 122. As institutional religious facilitator, Defendant Pitts reviewed and approved the content of the religious services section of the Inmate Handbook before sending it to Defendant Lee for final review. Ex. 5 at 133-34.

C. Defendant Lee Failed to Adequately Train HCC Staff About Ramadan.

In September 2004, Defendants Lee and Pitts received a memorandum from DOC's Director of Religious Services, Rev. Anthony Bruno, containing DOC's 2004 Ramadan Guidelines. Def. Ex. 15 (2004 Ramadan Guidelines Memo) at 1. DOC administrative directives do not address Ramadan, *see* Def. Ex. 12 (Administrative Directive 10-8 on Religion), and these posted staff guidelines were the only written DOC policy document for Ramadan. Ex. 5 (Pitts Depo.) at 74. General DOC training for correction officers and staff does not include any specific information about Ramadan. *See* Ex. 7 (Avci Depo.) at 29; Ex. 13 (Administrative Directive on training); Ex. 5 (Pitts Depo.) at 74. As a result, roll call was the only opportunity to provide

training to HCC staff regarding Ramadan policies. Ex. 3 (Lee Depo.) at 57-58; Ex. 5 (Pitts Depo.) at 77. Rev. Bruno’s memorandum did not contain any instructions on how to train staff regarding the Ramadan Guidelines. *See* Def. Ex. 15 at 1. However, at HCC, where Defendant Lee determined the content of roll call, *see* Ex. 5 (Pitts Depo.) at 33, commanding officers only explained certain “portions” of the Ramadan guidelines to HCC staff and correction officers. Ex. 3 at 59. Officers leading roll call read the dates when Ramadan began and ended, how inmates would receive bagged breakfasts, and how to remove an inmate who has broken the fast. *Id.* Defendant Lee did not take any steps other than roll call to inform HCC staff and correction officers on how to handle new inmates or other Ramadan policies. *See id.* at 57.

D. Defendant Lee Improperly Encouraged Correction Officers to Answer Inmates’ Questions About Religious Services.

In spite of their lack of training on Ramadan, Defendant Lee encouraged his correction officers—contrary to DOC policy—to answer inmates’ questions about Ramadan policies. *See* Ex. 3 (Lee Depo.) at 143. According to DOC’s Director of Religious Services, correction officers were not permitted to answer any questions relating to religious matters and were required to refer all such questions to chaplains. *See* Ex. 4 (Bruno Depo.) at 34-35. This rule was so important that the Religious Services Director testified that he would “jump up and down” at new employee trainings to ensure that staff knew never to answer religious questions. *See Id.* at 30-31.

In depositions, religious services personnel noted several reasons for this policy. First, correction officers were unqualified to answer religious questions. Ex. 4 (Bruno Depo.) at 30-31. Second, current and former imams at HCC testified that some HCC correction officers deliberately discriminated against Muslim inmates who asked for assistance. *See* Ex. 7 (Avci Depo.) at 111 (“[Correction officers at HCC] assume all Muslims bad.”); *see also* Ex. 8 (Hashim

Depo.) at 54-56 (noting “overall disrespect for Muslims” among HCC staff and noting that it was a risk to complain to HCC commanding officers about anti-Muslim bias because “a lot of stuff falls on deaf ears, and sometimes it can be dangerous.”). Third, religious services personnel would not necessarily be aware if correction officers provide incorrect information. *See* Ex. 4 (Bruno Depo.) at 31-32; Ex. 5 (Pitts Depo.) at 42.

In his deposition, Defendant Lee acknowledged the risk of his policy but did not note any safeguards that he put in place: “If a correctional officer is giving wrong information, then that sometime or another, I’m hoping that information would be corrected because the inmate would not be able to do what he requested based on the information that the officer gave him.” Ex. 3 at 143-44. To minimize the risk that incorrect information resulted in a violation of an inmate’s constitutional right to practice his religion, DOC’s Director of Religious Services implemented a policy that required correction officers to refer all questions to religious services, even if a correction officer believed he/she knew an answer to the question. *See* Ex. 4 (Bruno Depo.) at 31-32. However, Defendant Lee insisted it was an affirmative “responsibility” of correction officers at HCC to “answer any question they have knowledge of,” including religious ones, greatly increasing the risk of a constitutional violation. Ex. 3 at 143-45.

E. Defendant Pitts Created an Unwritten Deadline for Inmates to Join the Ramadan List.

The DOC’s 2004 Ramadan guidelines did not require a sign-up deadline for Muslim inmates, but at HCC in 2004, evidence suggests that Defendant Pitts and HCC religious services staff imposed a deadline anyway. Ex. 5 (Pitts Depo.) at 111-12; Ex. 7 (Avci Depo.) at 39-40. The DOC’s Director of Religious Services indicated that according to DOC policy in 2004: “These guidelines do not provide for a deadline for signing up, so people are signing up all through Ramadan.” Ex. 4 (Bruno Depo.) at 68. However, in his deposition, Defendant Pitts, when asked

about a deadline for Ramadan sign-ups in 2004 at HCC, explained: “I think it was there, but I don't think it was written and I don't think it was in the guidelines, and thereby maybe confusing about whether or not we could do that or not. So, I think, if I remember correctly, it was implicit.”¹ Ex. 5 at 112. Defendant Lee, who did not recall if there was deadline in 2004, testified that the absence of an explicit deadline in DOC policy meant that at HCC, he allowed Defendant Pitts to determine an appropriate deadline. Ex. 3 at 65. Evidence suggests that Imam Avci believed that HCC imposed a deadline of five days before the start of Ramadan in 2004. Ex. 7 at 39-40. Evidence also suggests that a deadline at HCC was not intended to apply to new inmates in 2004. Ex. 3 at 65; Ex. 7 at 46-47. Neither Defendant Lee nor Defendant Pitts believed a deadline at HCC should have applied to new inmates in 2004. Ex. 3 at 65; Ex. 5 at 112. However, because Defendant Pitts’s deadline was unwritten, the specific details, including an exception for new inmates, would not have been posted for correction officers to read and would not have been explained to correction officers during the Ramadan roll call training, which was limited to the content of the DOC’s Ramadan guidelines. Ex. 3 (Lee Depo.) at 57-58; Ex. 5 (Pitts Depo.) at 77.

F. Defendant McGrail Refused to Allow Certain Muslim Inmates on the Ramadan List.

Evidence suggests that because Defendants Lee and Pitts failed to provide supervision or clear guidance, inmates who were entitled to be on the Ramadan list were not allowed on. *See* Ex. 7 (Avci Depo.) at 55, 107-09; Ex. 1 ¶¶ 10-15. Under HCC policy, Defendant Pitts controlled access to the Ramadan list in 2004. Ex. 5 (Pitts Depo.) at 94. According to DOC’s Ramadan guidelines, the Islamic chaplain should interview any Muslim inmate found to have broken the fast to determine if there are religious reasons for the inmate to be reinstated. Def. Ex. 15 (DOC

¹ At the conclusion of his deposition, upon cross-examination from his attorney, Defendant Pitts changed his position and stated that there was no implicit or explicit deadline in 2004. Ex. 5 at 156-57.

Ramadan Guidelines 2004) at 3. Evidence suggests that in 2004, Defendant McGrail imposed a policy that Muslim inmates were not allowed to be removed temporarily from the Ramadan list. *See* Ex. 7 (Avci Depo.) at 55; Def. Ex. 17 (HCC Ramadan Statistics 2004) (“Kitchen supervisor didn’t allow inmates to remove temporarily [sic]”). For the Food Services department at HCC, adding inmates who arrived in the middle of the month to the Ramadan list was a disruptive, burdensome process. *See* Ex. 5 (Pitts Depo.) at 109 (“[Food Services] have to revamp their list, make the bags, and they just kind of complained about it.”); Ex. 4 (Bruno Depo.) at 95-96 (noting problems for kitchen staff for adding new inmates). When asked in his deposition about whether there was any confusion at Food Services in HCC due to the challenge of adding new inmates, Defendant Pitts replied: “Confusion? They didn’t like doing it, there was no confusion.” Ex. 5 at 113-14. In addition to not allowing inmates to be removed temporarily from the Ramadan list in 2004, Defendant McGrail also refused to allow HCC’s Islamic chaplain to add new inmates to the Ramadan list after the deadline had passed. *See* Ex. 7 (Avci Depo.) at 107-09. Although the Islamic chaplain believed that Defendant Lee was able to remedy the situation, HCC’s 2004 Statistics and Sign-up Sheets show that not a single new inmate joined the Ramadan list in 2004. *Cf.* Ex. 7 at 107-09; Def. Ex. 17 (HCC Ramadan Statistics 2004); Ex. 20 (2004 Ramadan Sign-Up Sheets).

G. No New Muslim Inmates at HCC Were Able to Join the Ramadan List in 2004.

HCC is a large² high-turnover correctional facility, *see* Ex. 5 (Pitts. Depo) at 61-62; Def. Ex. 33 (Lee Decl.) ¶ 9, that houses a substantial number of Muslim inmates.³ Yet HCC records

² In 2004, HCC held approximately 950 inmates. *See* DOC Statistics: Population Count by Facility, *available at* <http://www.ct.gov/doc/cwp/view.asp?a=1492&Q=270036&docNav=1>.

³ A little less than one in ten DOC inmates affiliates as Islamic, *see* Ex. 26 (Memo on Religious Affiliations).

show that not a single new Muslim inmate joined the Ramadan meal plan mid-month in 2004. See Def. Ex. 17 (HCC Ramadan Statistics 2004).⁴

Moreover, in 2005, DOC's Religious Services Unit changed the written Ramadan guidelines to require that facilities have an explicit deadline, but also to accept new inmates. ("For planning purposes, there must be a posted deadline for signing up, after which only new inmates into the institution will be allowed to sign up."). See Def. Ex. 19 at 3 (DOC Ramadan Guidelines 2005). The memo accompanying the Ramadan guidelines mentioned the required deadline but did not mention new inmates. See *Id.* at 1 (2005 Ramadan Guidelines Memo). In 2006, DOC's Religious Services Unit applied a DOC-wide deadline date, but also included the exception for new inmates in both the guidelines and the memorandum circulated to all facilities. See Ex. 18 (DOC Ramadan Guidelines 2006); Ex. 19 (2006 Ramadan Guidelines Memo) ("Please note Paragraph 14: Except for new inmates entering the facility, the absolute deadline..."). As the DOC's written Ramadan policy more explicitly took discretion away from the Defendants at HCC, more new Muslim inmates were able to join mid-month:

Year	DOC Ramadan Memo & Guideline	New Muslim Inmates Added to Ramadan List at HCC
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⁴ HCC archived its 2004 Ramadan sign-up forms. See Ex. 20 (2004 Ramadan Sign-Up Sheets). Every Muslim inmate who joined the Ramadan list was required to fill out a sign-up form, Ex. 5 at 66-68; Ex. 7 at 39, and HCC officials received all 2004 forms before October 14. See Ex. 20 (2004 Ramadan Sign-Up Sheets). Thus all inmates who participated in Ramadan at HCC in 2004 must have arrived before October 14. HCC also maintained a 2004 Ramadan Statistics Sheet. See Def. Ex. 17 (HCC Ramadan Statistics 2004). According to the Sheet, thirty-eight Muslim inmates began Ramadan. *Id.* Twenty-four inmates were permanently removed from the list before completion. *Id.*; see also Ex. 20 (2004 Ramadan Sign-Up Sheets, noting reasons for removal). Twelve inmates completed Ramadan at HCC, Def. Ex. 17 (HCC Ramadan Statistics 2004), and two inmates transferred to other facilities. *Id.*; see also Ex. 20 (2004 Ramadan Sign-Up Sheets, noting inmate transfer to another facility). Strangely, the Islamic chaplain in 2004 suggested during his deposition that the 2 "transferred" inmates refer to *new* inmates, see Ex. 7 at 97, and the Defendants therefore cite these statistics as evidence for the fact that new inmates were added. Def. Local Rule 56(a)(1) Statement ¶ 194. However, Defendant Pitts and Defendant Lee themselves were shown the 2004 Statistics Form and testified that the term "transferred inmates" refers to inmates transferring out of HCC, not new inmates. See Ex. 3 at 100; Ex. 5 at 81-82. The Defendants have failed to explain why, if the term "transferred" referred to new inmates, the form statistics account for only 36 of the 38 inmates who started Ramadan.

2004	DOC memo and guidelines are silent on the issue of a sign-up deadline.	0
2005 ⁵	DOC memo requires a sign-up deadline but is silent on the issue of inmates; DOC guidelines require a sign-up deadline but indicate there is an exception for new inmates.	3
2006	DOC memo and guidelines both require a sign-up deadline but both include an exception for new inmates.	11

See Def. Ex. 15 (2004 Ramadan Guidelines Memo and DOC Ramadan Guidelines 2004) at 1-3; Def. Ex. 19 (2005 Ramadan Guidelines Memo and 2005 DOC Ramadan Guidelines) at 1-3; Ex. 19 (2006 Ramadan Guidelines Memo); Ex. 18 (DOC Ramadan Guidelines 2006). Def. Ex. 17 (HCC Ramadan Statistics 2004); Ex. 21 (HCC Daily Ramadan Sheets 2005); Ex. 22 (HCC Ramadan Statistics 2006)

H. Muslim Inmates at HCC in 2004 Were Required to Complete an Unpublicized, 2-Step Process to Practice Ramadan.

According to formal but unpublicized HCC policies in 2004, new Muslim inmates seeking to practice Ramadan had to first designate their religion as Islamic on a Religious Affiliation form, and then seek out a chaplain in order to complete a Ramadan sign-up form. See Ex. 5 (Pitts Depo.) at 77-78; Ex. 4 (Bruno Depo.) at 102-03. Inmates may learn of most HCC policies through HCC's inmate handbook or inmate orientation, which is based on the inmate handbook. Ex. 3 (Lee Depo.) at 30, 122; Ex. 5 (Pitts Depo.) at 133-34. Religious services is one out of forty-nine sections of the handbook that would be reviewed in orientation. See Def. Ex. 11 (2003 Inmate Handbook); Ex. 14 (2005 Inmate Handbook). Defendants Lee and Pitts, who both reviewed the content of the inmate handbook, see Ex. 3 at 122; Ex. 5 at 133-34, did not ensure

⁵ The Defendants did not produce a Ramadan statistics sheet or Ramadan sign-up sheets for Ramadan at HCC in 2005. However, the Defendants did produce daily "Ramadan sheets" for fifteen of the thirty days of Ramadan in 2005. See Ex. 21 (HCC Daily Ramadan Sheets 2005). The Ramadan sheets list the individual inmates who participated in Ramadan each day. *Id.* When compared, the daily Ramadan sheets show that three HCC inmates were added to the Ramadan list mid-month—on October 7, 2005 (inmate K-7), October 22, 2005 (inmate Q-1), and November 2, 2005 (inmate G-5). *Id.*

that the handbook included any contain any reference to Ramadan, an Islamic chaplain, or any explanation of how to sign up for Ramadan. *See* Def. Ex. 11 (2003 Inmate Handbook); Ex. 14 (2005 Inmate Handbook).⁶ In a confusing contrast, the Inmate Handbook instructs inmates to refer all requests for religious diets to food services staff. *Id.* The Defendants maintain that inmates would have known about Ramadan because Ramadan information was posted in housing units. *See* Def. Local Rule 56(a)(1) ¶ 163. However, every set of Ramadan Guidelines provided by the Defendants reads, in full caps along the top of the page: “STAFF GUIDELINES—NOT FOR GENERAL POSTING.” *See* Ex. 15 (DOC Ramadan Guidelines 2001); Ex. 16 (DOC Ramadan Guidelines 2002); Ex. 17 (DOC Ramadan Guidelines 2003); Def. Ex. 15 at 2 (DOC Ramadan Guidelines 2004); Def. Ex. 19 at 2 (DOC Ramadan Guidelines 2005); Ex. 18 (DOC Ramadan Guidelines 2006). At his deposition, Defendant Pitts denied that the Ramadan guidelines would be posted where inmates could access it. Ex. 5 at 89. Defendants have failed to produce evidence of other Ramadan materials available to inmates in 2004.

Muslim inmates could not expect to receive written notice of Ramadan procedures in 2004, and the Defendants also failed to take steps to ensure that new inmates would receive verbal notice at orientations. Defendant Pitts believed that Ramadan should have been mentioned and sign-up forms provided in the weeks before Ramadan started. Ex. 5 at 67-68. But Defendant Lee and Rev. Bruno both testified that Ramadan sign-up forms were *not* provided at orientations. Ex. 3 at 71; Ex. 4 at 77.

Dorm tours by chaplains were also an unreliable means for alerting new inmates to HCC Ramadan policies. Although religious services staff tour as part of their required duties, the visits

⁶ HCC did not provide a 2004 Inmate Handbook in discovery, and Mr. El Badrawi did not recall receiving one, although he was required at orientation to sign a form saying that he received one. *See* Badrawi Dec. HCC did provide copies of the 2003 and 2005 Inmate Handbooks, and there is no material divergence in the religious or food services sections of the handbooks. *Cf.* 2003 and 2005 Inmate Handbooks.

may brief and inmates would not necessarily be present. Ex. 7 (Avci Depo.) at 74, 76; *see also* Def. Ex. 23 (Chaplain Log Book, November 2004, noting that chaplains covered dorms with hundreds of inmates in each tour). For instance, on November 3, 2004, Imam Avci toured thirteen dorms in three hours. Each dorm housed approximately sixty inmates and the 13 dorms together thus housed approximately seven hundred and eighty inmates. *See* Def. Ex. 23 at 2 (Chaplain Log Book, November 2004); Ex. 7 (Avci Depo.) at 73. Moreover, Imam Avci wore business attire that would not identify him as an Islamic chaplain. *See* Ex. 5 (Pitts Depo.) at 55; Ex. 7 (Avci Depo.) at 14-15. Additionally, Imam Avci testified at his deposition that some correction officers at HCC improperly refused to announce him and other chaplains. Ex. 7 at 76. (“Because they don’t like Islam, they don’t like imam.”).

Defendants’ failure to ensure that new Muslim inmates had information about Ramadan is especially consequential because delays in processing religious affiliation forms made it difficult for Islamic chaplains to learn the identities of new Muslim inmates. *See* Ex. 5 (Pitts Depo.) at 126. According to Defendant Pitts, it “would take up to two weeks. . . There’s only one person doing it and there was a backlog all the time. . . Because as it happened, we deal with Ramadan. That would even cause us to push that list back a little further.” Ex. 5 at 126. In 2004.

I. HCC Officials Refused to Add Mr. El Badrawi to the Ramadan List, Substantially Burdening His Religious Exercise.

Mr. El Badrawi is a practicing Sunni Muslim. Ex. 1 ¶ 7. In observance of his faith, he prays five times a day and refrains from consuming any drugs, alcohol, and pork products. *Id.* In addition, in every year of his adult life with the exception of 2004, he has fasted during the month of Ramadan, in accordance with the tenets of Islam. *Id.* Ramadan is the holiest month of the Islamic year and completing a Ramadan fast is a fundamental religious obligation for all adult Muslims. Ex. 9 (Expert Report of Omer Bajwa). Fasting means abstaining from eating or

drinking anything from dawn until sunset. *Id.* Participating Muslims fast throughout the day until sunset, when participating Muslims break their fast with a meal known as iftar. *Id.* Participating Muslims are permitted to eat and drink until the next morning. *Id.*

Mr. El Badrawi was wrongfully arrested and entered HCC custody on October 29, 2004, the sixteenth day of the month of Ramadan. Ex.1 ¶¶ 3, 8. During his arrest, he maintained his fast and refused any food that was offered to him. *Id.* at ¶ 9. Once he was in custody at HCC, he began the first of a number of requests to be allowed to have a meal accommodation in order to continue to observe Ramadan. *Id.* at ¶ 10. He made his first request for a meal accommodation to an HCC official in the initial two days of his incarceration. *Id.* at ¶ 11. The official denied his request, stating that because he had arrived at HCC after Ramadan had started, he could not be placed on the Ramadan meal accommodation list. *Id.* In total, Mr. El Badrawi made three requests, to three different HCC officials, during Ramadan: a white male prison counselor in his thirties, an African-American female correction officer, and a white male correction officer with blond hair. *Id.* at ¶ 14. All told him the same thing: because he had arrived at HCC after Ramadan had started, the official could not place him on the Ramadan meal accommodation list. *Id.* at ¶¶ 11-13. Because multiple HCC officials consistently responded to Mr. El Badrawi's requests for a meal accommodation by citing HCC policy, Mr. El Badrawi had no reason to believe that there were any other steps he could take to be placed on the Ramadan list. *Id.* at ¶ 15. None of the officials told Mr. El Badrawi to file a written request, and he reasonably believed that any request would have been futile. *Id.* at ¶ 16.

HCC officials did not provide Mr. El Badrawi with any other information about Ramadan policies at HCC. *Id.* at ¶ 17. The presenters at the orientation that Mr. El Badrawi attended did not mention Ramadan, an Islamic chaplain, or religious personnel at HCC. *Id.* at ¶ 19. The

presentation did not include a video and Mr. El Badrawi was not provided with a copy of an inmate handbook, although HCC officials required him to sign forms attesting to both. *Id.* Because of the inadequate orientation, Mr. El Badrawi was unaware that there was an Islamic chaplain until he spoke to another inmate, who told him about the chaplain. *Id.* at ¶ 21.

Once he learned that there was a Muslim chaplain at the HCC, Mr. El Badrawi requested to speak with him to ask him why the other HCC officials did not add him to the Ramadan list. *Id.* at ¶ 13. But the Islamic chaplain did not meet with Mr. El Badrawi until after Ramadan concluded. *Id.* When Mr. El Badrawi finally spoke to the Islamic chaplain, the chaplain confirmed that HCC officials were not able to add Mr. El Badrawi to the Ramadan list once Ramadan had begun. *Id.*

The HCC officials' denial of Mr. El Badrawi's request for a meal accommodation was especially important because different officials at HCC had also denied Mr. El Badrawi necessary medication for his Crohn's disease. *Id.* at ¶ 23. Because Mr. El Badrawi was in serious pain and needed adequate nutrition, he could not have subsisted on the single meal that HCC gave Mr. El Badrawi after sunset. *Id.* As a result, for the first time as an adult, Mr. El Badrawi could not observe Ramadan. *Id.* at ¶ 25.

After he received his medication from HCC officials, Mr. El Badrawi resumed fasting by surviving on the single meal HCC officials provided to him after sunset. *Id.* at ¶ 26. Without breakfast or lunch, Mr. El Badrawi was able to sustain himself through small amounts of food, an apple or a cookie, that other inmates provided to him out of pity. *Id.* When the inmates were not able to give him food, his only other sustenance was a glass of water. *Id.* at ¶ 27. Because of the actions of HCC officials that prevented Mr. El Badrawi from freely exercising his religion, Mr. El Badrawi suffered severe distress. *Id.* at ¶ 44.

J. Medical Staff and HCC Officials Failed to Provide Mr. El Badrawi With Urgently Needed Medication Until the Sixth Day of His Incarceration at HCC

At the time of his arrest and detention, Mr. El Badrawi suffered from Crohn's disease, a chronic disorder that causes inflammation of the gastrointestinal tract, resulting in severe pain when left untreated. Ex. 1 ¶ 29. Mr. El Badrawi would take six Asacol pills a day, an average of 180 pills a month. Ex. 1 ¶¶ 30-31; Ex. 2 at 79. He took his medication daily up until the day prior to entering HCC on October 29, 2004. Ex. 1 ¶ 32. If Mr. El Badrawi ever missed a dose of his medication, he would try to make up for it in the same day by taking it in the afternoon or evening. Ex. 2 at 78-79. When he was being arrested, Mr. El Badrawi asked ICE officials to bring his Asacol pills and he was sure they were brought to the federal facility where he was kept on October 29, 2004. Ex. 1 ¶¶ 34-35; Ex. 2 at 111-112.. While he was being held at the federal facility, he "specifically asked" two males who were handling his transfer to HCC to bring his Asacol medication. Ex. 2 at 106. Mr. El Badrawi was under the impression that his medication was accompanying him to HCC. *Id.* However, HCC did not make arrangements to receive his medication. Ex. 1 ¶ 35

HCC is a direct intake facility that experiences very high turnover rates of its inmate population. Def. Ex. 33 ¶ 9. At all relevant times, healthcare for inmates at HCC was overseen by University of Connecticut Correctional Managed Healthcare (CMHC), a subdivision of the University of Connecticut Health Center (UConn). Def. Ex. 33 ¶¶ 5, 13. A Memorandum of Understanding between DOC and University of Connecticut established the services provided by CMHC. Def. Ex. 14. Newly admitted inmates at HCC underwent a medical and mental health evaluation. Ex. 10 at 14-16; Def. ex. 33 ¶ 12; Def. Ex. 1. These evaluations were conducted by medical personnel employed by CMHC. Def Ex. 33, ¶ 13.

Shortly after being transferred to Defendant Lee's custody, Mr. El Badrawi informed

officials at HCC of his medical condition and made repeated requests for his medication. Ex. 1 ¶¶ 36.38-41.⁷ On the evening of October 29, upon arriving at HCC, Mr. El Badrawi informed the two individuals performing his medical screening that he needed his medication. *Id.* ¶ 38; . Between the night of October 29 and the morning of October 30, he informed a number of his inmates of the severe abdominal pain he was experiencing and his need for his Asacol pills. *Id.* ¶ 39. One inmate informed a correction officer about his condition. *Id.* During the night of October 29 and morning of October 30, Mr. El Badrawi also informed an HCC nurse about the need for his medication. *Id.* ¶ 40. The nurse, however, said that she was not authorized to provide him with his Asacol pills. *Id.* Mr. El Badrawi also filled out an inmate request form on November 1, requesting the medication that was being denied to him. *Id.* ¶ 41; Def. Ex. 5.

Despite repeated and persistent requests, however, Mr. El Badrawi did not receive Asacol pills until his sixth day of imprisonment at HCC. Def. Ex. 6 at 1. During this time, Mr. El Badrawi experienced severe pain and internal bleeding that could have been alleviated by his medication. Ex. 1 ¶¶ 36-37. The pain prevented him from sleeping for an entire night and occurred periodically throughout that week. Ex. 1 ¶ 37.

During the relevant period, if an inmate requested uncommon medication during the intake process, a nurse would fax a request for the medication to an offsite pharmacy. Ex. 10 at 32. HCC had two locations where medication was accessed: an onsite dispensary and an offsite pharmacy. *Id.* at 33-34. The HCC medical unit did not keep in stock every prescription medication that might be needed by an inmate and would request non-stock items from UConn. Def. Ex. 33 ¶ 17. The turnaround time for medication not commonly provided was three or four days. Ex. 10 at 33. A request for Asacol would be delivered to an inmate in “[t]hree or four days if [the pharmacy]

⁷ The 2003 HCC Inmate Handbook states that for emergency health problems, an inmate is required to “tell a staff member immediately.” Def Ex. 11 at 11. HCC custody staff can learn that an inmate is in need of medical care “through the inmate directly” or “observing the inmate in pain.” Def. Ex. 33 ¶ 16.

had it in stock and everything was working right.” *Id.* at 34. If Asacol was ordered for an inmate, Mr. El Badrawi’s intake nurse mentioned that follow-up would be conducted “two to three days later” if it had not been received. *Id.* Follow-up calls to the pharmacy were not recorded. *Id.* at 35. There is no evidence that such a follow-up was conducted by CMHC staff to ensure that Mr. El Badrawi receive his medication in a timely manner.

Defendant Lee stated that if he were “informed of a problem or undue delay that caused any inmate harm, “[he] would have contacted the appropriate CMHC supervisor to request that the medication be delivered as soon as possible and [he] would have requested an explanation for the delay.” Def. Ex. 33 ¶ 28. It was Defendant Lee’s responsibility “to have made sure that plaintiff was provided any medication he needed as quickly as possible.” *Id.*

Defendant Lee has been aware of inmates complaining that they have not received their medication. “In talking to 500, 600, a thousand inmates per day in one form or another,” Lee said he was “sure” that he has heard of such complaints. Ex. 3 at 107. However there is no evidence that Defendant Lee responded to these delays in medication.

ARGUMENT

I. Standard of Review

On summary judgment, the moving party must show that “there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant the entry of judgment for the moving party as a matter of law.” Fed.R.Civ.P. 56(c)(2); *see Price v. N.Y. State Board of Elections*, 540 F.3d 101, 107 (2d Cir. 2008). In this context, the court’s role is not to “resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists.” *In re Dana Corp.*, 574 F.3d 129, 151 (2d Cir. 2009); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986). Moreover, “the court must draw

all reasonable inferences in favor of the nonmoving party,” Kaytor v. Electric Boat Corp., 609 F.3d 537, 545 (2d Cir. 2010) (emphasis in original), “even though contrary inferences might reasonably be drawn.” *Id.* (internal quotations omitted) Thus, “[s]ummary judgment is inappropriate when the admissible materials in the record make it arguable that the claim has merit . . . for the court in considering such a motion *must disregard all evidence favorable to the moving party that the jury is not required to believe.*” *Kaytor*, 609 F.3d at 545 (emphasis in original).

II. Defendant Lee Is Not Entitled to Summary Judgment on Mr. El Badrawi’s § 1983 Free Exercise Claim.

Defendant Lee argues that: (1) there was no “substantial burden” on Mr. El Badrawi’s religious exercise, (2) Defendant Lee was not personally involved, and (3) Defendant Lee is entitled to qualified immunity. None is persuasive. Significant evidence demonstrates that Defendant Lee allowed a custom of not allowing new inmates to join the Ramadan List in 2004, and that his specific actions with regard to training and supervision led to Mr. El Badrawi’s inability to join the list and observe his faith. Moreover, a jury reasonably could conclude that Defendant Lee should have known his actions would deprive Mr. El Badrawi of his clearly established rights.⁸

⁸ Plaintiff respectfully requests that the Court deny Defendants’ Motion for Summary Judgment because their Local Rule 56(a)(1) Statement is defective. Local Rule 56(a)(1) requires that each assertion of material fact “must be followed by a specific citation to (1) the affidavit of a witness competent to testify as to the facts at trial and/or (2) evidence that would be admissible at trial.” Local R. 56(a)(3). Moreover, counsel must “cite to specific paragraphs when citing affidavits or responses to discovery requests and to cite to specific pages when citing to deposition or other transcripts or to documents longer than a single page in length.” *Id.* Failure to abide by this rule may result in “the Court imposing sanctions, including, when the movant fails to comply, an order denying the motion for summary judgment . . .” *Id.*

Courts have routinely denied motions for summary judgment because the moving party has failed to adhere to the requirements of Local Rule 56(a). *See, e.g., Cerilli v. Rell*, 2010 U.S. Dist. LEXIS 99358 (D. Conn. Sept. 23, 2010)(denying motion for summary judgment for failure to comply with Local Rule 56(a)); *Sadler v. Lantz*, 2010 U.S. Dist. LEXIS 86956 (D. Conn. Aug. 20, 2010)(same); *Prall v. Hartford Prosecutors*, 2010 U.S. Dist. LEXIS 39857 (D. Conn. Apr. 22, 2010) (same); *Morse v. Nelson*, 2010 U.S. Dist. LEXIS 11186 (D. Conn. Feb. 8, 2010)(same); *Torres v. Howell*, 2006 U.S. Dist. LEXIS 38568, 2-3 (D. Conn. May 26, 2006)(same); *see also Vt. Teddy Bear Co. v. 1-800 BEARGRAM Co.*, 373 F.3d 241, 244 (2d Cir. 2004) (“[I]n determining whether the moving

A. A Jury Could Conclude That HCC Staff Imposed a Substantial Burden on Mr. El Badrawi's Religious Exercise

HCC staff imposed a “substantial burden” on Mr. El Badrawi’s religious exercise by denying his repeated requests to join the Ramadan List. The “starting point” of a substantial burden analysis is whether an individual is made to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other hand.” *Westchester Day Sch. v. Vill. of Mamdroneck*, 504 F.3d 338, 348 (2d Cir. 2008) (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1963)).⁹ Based on this standard, courts have concluded that a failure to accommodate religious dietary requirements imposes a substantial burden. See *El Badrawi v. Dept. of Homeland Sec.*, 579 F.Supp.2d 249, 259 (D. Conn. 2008) (“The Second Circuit has regularly held that failure to accommodate a prisoner’s dietary restrictions will constitute a free exercise violation.”) (citations omitted).

1. A Jury Could Conclude That HCC Custom Did Not Permit New Inmates to Join the Ramadan List Mid-Month

A reasonable jury could infer that in 2004 HCC custom did not allow Muslim inmates who arrived during Ramadan to participate in the special meal plan, contrary to the Defendants’ assertions. Since under controlling case-law, such a custom would have constituted a substantial burden on Mr. El Badrawi’s religious exercise, this dispute constitutes a genuine issue for trial.

party has met th[e] burden of showing the absence of a genuine issue for trial, the district court may not rely solely on the statement of undisputed facts contained in the moving party’s Rule 56.1 statement. It must be satisfied that the citation to evidence in the record supports the assertion.”). In this case, Defendants have failed to adhere to the “specific citation” requirement of Local Rule 56(a)(3) in 50 paragraphs throughout their Local Rule 56(a)(1) statement. Defendants have failed to cite any evidence whatsoever for 41 paragraphs. See Def. Local Rule 56(a)(1) Statement at ¶¶ 19, 31-32, 48, 54, 60, 70, 87, 96, 100-01, 117-18, 122-27, 129-32, 134, 150, 161-62, 166-72, 175, 177, 182, 195, 200, 210, 212. Furthermore, in nine paragraphs, Defendants have failed “to cite to specific pages when citing to [a] document[] longer than a single page in length.” Local Rule 56(a)(3); see Def. Local Rule 56(a)(1) Statement at ¶¶ 10, 28, 80, 116, 139, 206-08, 211. Therefore, this Court should deny Defendants’ Motion for Summary Judgment.

⁹ *Westchester Day Sch.* is a RLUIPA case, but as the Second Circuit notes, Congress intended in RLUIPA to incorporate the Supreme Court’s conception of “substantial burden” from free exercise jurisprudence. *Westchester Day Sch.*, 504 F.3d at 348.

Mr. El Badrawi's experience provides significant evidence of this custom. He was told by a prison counselor, two correction officers, and a Muslim chaplain, that he could not join the Ramadan meal plan because he had arrived mid-month. Ex. 1 at ¶¶ 11-13. HCC records corroborate Mr. El Badrawi's experience. HCC is a high-turnover prison that receives 50-80 new inmates a day, see Ex. 5 at 61-62, a significant proportion of whom are Muslim (in June 2005, approximately 1,500 out of a general DOC population of 18,000, or 8%, was Muslim). See Ex. 26 (Memo on Religious Affiliation). One would therefore expect that at least some new Muslim inmates would arrive during Ramadan. And if HCC in fact allowed new inmates to join the Ramadan list mid-month, then many of these new arrivals should have been added to the list. Yet according to authoritative HCC records, Ex. 5 at 90, 99, no inmates were added mid-month in 2004. Def. Ex. 17 (HCC Ramadan Statistics 2004). But only after DOC guidelines were amended in 2005 and clarified in 2006 expressly to allow new inmates to join the list mid-month do the statistics indicate new additions. See Facts section (G) *supra*. For example, 3 individuals joined mid-month in 2005, and the number rose sharply to 11 inmates joining mid-month in 2006. See Ex. 21 (HCC Daily Ramadan Sheets 2005); Ex. 22 (HCC Ramadan Statistics 2006).

Numerous witnesses noted potential causes for resistance to Ramadan observance at HCC.¹⁰ Imam Avci, HCC's Islamic chaplain suggested that inmates had trouble joining the

¹⁰ The absence of inmate grievance records regarding Ramadan in 2004 demonstrates neither that grievances were not filed nor that inmates were not aggrieved. Defendants admit that they lacked any system for retaining complaints and Inmate Requests Forms and that such records were regularly destroyed. Ex. 5 (Pitts Depo.) at 149; Ex. 3 at 42-43. Chaplain Pitts' was particularly disorganized in his management of religious matters. He specifically recalled disposing of Inmate Request Forms, Ex. 5 at 147, and an official DOC audit of HCC religious services "recommended that Chaplain Pitts devote some time to organizing the piles of paperwork in his office." Ex. 28 at 2. The grievance process was also slow and cumbersome and new inmates would have had little incentive to use it to remedy any Ramadan related problems. Inmates were required to submit an Inmate Request Form before they were allowed to file a formal grievance. Ex. 3 (Lee Depo.) at 45. Because the appropriate unit had fifteen days to respond to Inmate Request Forms, Ex. 3 (Lee Depo.) at 47, and Ramadan lasts only a month, a new inmate denied access to the meal plan might not even be able to *file* a formal grievance before the end of Ramadan. Although there was an emergency grievance procedure, it was not well known—even HCC's former Islamic chaplain was unaware it existed. Ex. 8 (Hashim Depo.) at 46. In addition, new inmates, those most likely to be aggrieved by the Ramadan policy, were also the least likely to know about these processes. For these reasons, a jury could reasonably infer that

Ramadan lists because of intra-HCC tensions and anti-Muslim sentiments. *See* Ex. 7 (Avci Depo.) at 108-11. A former HCC imam confirmed that anti-Muslim biases existed at HCC, Ex. 8 at 53-55, and both Defendant Pitts and Rev. Bruno noted that food services staff were aggravated by adding new inmates mid-month. Ex. 4 at 95-96; Ex. 5 at 113-14.

Defendants' assertion that the "formal policy . . . within HCC" permitted new inmates to join the Ramadan list mid-month, Def. Br. 33, is insufficient basis for summary judgment. It is undisputed that there was no written policy in 2004; the Ramadan Guidelines did not say that new inmates could join the list mid-month.¹¹ Moreover, there is substantial confusion among DOC witnesses about what the so-called "formal" policy was. Rev. Bruno claimed that all inmates should have been able to join the Ramadan list at anytime. Ex. 4 (Bruno Depo.) at 68. But according to Chaplain Pitts, there was an "implicit" sign-up deadline for existing inmates. Ex. 5 at 112. Warden Lee lacked any memory of whether or not such a deadline existed. Ex. 3 at 64-65. Given the conflicting understandings among HCC staff and the uncontroverted evidence that no Muslim inmates joined the list mid-Ramadan in 2004, a jury would not be "required to believe" that any "formal" policy existed, much less that it was followed.

2. HCC Staff Told Mr. El Badrawi that He Could Not Join the Ramadan List.

Even if HCC policy allowed new inmates to join the Ramadan list mid-month, there is an additional dispute of fact as to whether HCC staff imposed a substantial burden on Mr. El Badrawi's religious exercise by repeatedly providing him incorrect and misleading information about such policy. A substantial burden can exist short of an outright denial of dietary accommodations if the system makes it too difficult for an individual to exercise his rights. The

there are no records of Ramadan grievances because Defendant s threw away or lost the documentation or because aggrieved inmates chose not to file grievances.

¹¹ In addition, the Inmate Handbook and Administrative Directives do not state any such policy, either. *See* Def. Ex. 11 (2003 Inmate Handbook); Ex. 14 (2005 Inmate Handbook); Def. Ex. 12 (Administrative Directive on Religion).

“burden need not be found insuperable to be held substantial,” *Westchester Day Sch.*, 504 F.3d at 349, and when the plaintiff has “no ready alternatives, or where the alternatives require substantial delay, uncertainty, and expense,” *Id.* (internal quotations omitted), a substantial burden exists. Such circumstances include when government officials “inconsistently appl[y] specific policies” or make their decisions “without explanation.” *Id.* Thus, the “procedural requirements for obtaining a religious diet” can itself constitute a substantial burden. *Nelson v. Miller*, 570 F.3d 868, 879 (7th Cir. 2009). The question of whether a substantial burden exists is a question of fact to be determined at trial when there is a reasonable dispute. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1317-18 (10th Cir. 2010) (holding that whether particular dietary restriction was substantial burden is “genuine issue of material fact” and citing cases).

i. Multiple HCC Staff Told Mr. El Badrawi that He Could Not Join the Ramadan List, Thereby Imposing a Substantial Burden on his Religious Exercise

Mr. El Badrawi asked three HCC staff, a prison counselor and two correction officers, how he could join the Ramadan meal plan, but every staff person told him that he was barred under HCC policy. Ex. 1 ¶¶ 11-12. Within two days of entering HCC, Mr. El Badrawi approached a prison official and requested to be added to the Ramadan list. *Id.* at ¶ 11. The official denied Mr. El Badrawi’s request and explained that he could not be added to the list because he had arrived mid-way through the month. *Id.* Rather than accept this answer, Mr. El Badrawi approached a correction officer and made a second request. *Id.* at ¶ 12. This request was also denied and Mr. El Badrawi was again told that he could not join the Ramadan list mid-month. *Id.* Still unwilling to take “no” for an answer, Mr. El Badrawi approached another correction officer, only to receive *his third consecutive denial*. *Id.* In none of these conversations did HCC staff mention that he could file a formal written request to join the Ramadan list. *Id.* at

¶¶16-17. When Mr. El Badrawi finally learned from a fellow inmate that there was a Muslim chaplain at HCC he immediately requested a meeting. *Id.* ¶13. However, by the time Mr. El Badrawi met with Imam Avci, Ramadan had already concluded.¹² Based on this evidence, a reasonable jury could conclude that even if official HCC policy permitted new inmates to join the Ramadan list, Mr. El Badrawi faced a substantial burden when he attempted to take meaningful advantage of this policy.

ii. HCC Religious Policies Did Not Alleviate the Substantial Burden Imposed on Mr. El Badrawi

Defendants deny that HCC staff imposed a substantial burden on Mr. El Badrawi and instead argue that Mr. El Badrawi did not work hard enough to access the Ramadan list. Defendants argue that Mr. El Badrawi failed to make even a “modest act of commitment,” Def. Br. 40-41(internal quotations omitted), and that the “only person who truly caused plaintiff to not join the Ramadan List was plaintiff, through his own apathy, neglect and disregard for obvious and easy access to religious programs.” *Id.* at 42. These assertions are belied by Mr. El Badrawi’s persistent efforts to join the Ramadan list. Moreover, if HCC policy permitted new inmates to join the Ramadan list mid-month, then it was not Mr. El Badrawi but *HCC staff* who “neglect[ed] and disregard[ed]” HCC’s religious policies by repeatedly denying Mr. El Badrawi’s requests. *See* Def. Br. 42. Indeed, it is hard to credit Defendants’ assertion that Mr. El Badrawi “remained almost willfully blind” to HCC’s religious policies, *Id.* at 41, when multiple HCC staff remained wholly ignorant of these policies. If trained and experienced staff were unfamiliar with HCC’s policies, they could hardly have been “obvious” to a newly arrived inmate. There are several material disputes of fact arising from these arguments.

¹²When they finally met, Imam Avci told Mr. El Badrawi that he could not have been added to the Ramadan list because HCC policy did not permit new inmates to join mid-month. Ex. 1 ¶13.

First, there is a material dispute as to whether “Plaintiff could have completed a Ramadan sign-up form at his orientation or requested one.” Def. 56 Statement ¶ 88 (Citing Def. Ex. 31 (Excerpts from Avci Deposition) at 84). Defendants provide no evidence that the topic of Ramadan was raised at Mr. El Badrawi’s orientation, much less that a sign-up form was circulated or even mentioned. To the contrary, Warden Lee and Rev. Bruno both said that no Ramadan sign-up sheet was made available at orientation. Ex. 3 at 71; Ex. 4 at 77.

Second, there is a material dispute of fact as to whether “[r]eligious programming information, including Ramadan sign-up information and the listing of religious staff and medical staff were posted in Dorm 3” Def. 56 Statement ¶ 163 (Citing Def. Ex. 33 (Declaration of Charles Lee) at ¶ 49; Def. Ex. 34 (Declaration of Reverend Albert Pitts) at ¶ 15; Def. Ex. 32 (Declaration of Father Anthony Bruno) at ¶ 20). Although Lee stated that the Ramadan guidelines were posted on the inmates in each housing unit, Ex. 3 at 60, Mr. El Badrawi does not recall seeing anything posted. Ex. 1 ¶ 20. The Religious Services Audit of 2004 also revealed that religious activity signs were not consistently posted. Ex. 27 at 4 (2004 HCC Religious Services Audit). A reasonable jury could therefore infer that Ramadan information was not clearly posted in Mr. El Badrawi’s housing unit. Moreover, a reasonable jury could also conclude that the posting of such information would not have been sufficient to alleviate the substantial burden on Mr. El Badrawi’s religious exercise.

Third, there is a material dispute as to whether chaplains’ tours through housing units provided adequate notice of HCC Ramadan policies. Def. Br. 34. Chaplains’ tours were neither sufficiently frequent, lengthy, or well-publicized to provide adequate notice. HCC Chaplain Log Book shows that Sister Loretta, another chaplain, passed through plaintiff’s dorm on November 1, and Imam Avci did not visit until November 3 and 9, well after Plaintiff’s arrival on October

29. See Def. Ex. 23 (Chaplain Log Book for period of Ramadan 2004); Ex. 7 (Avci Depo.) at 73; Ex. 1 ¶3. Tours were also extremely short because chaplains had to cover a large amount of ground. For instance, Imam Avci normally spent only 5-25 minutes in each dorm. Ex. 7 at 73. On November 3, 2004, he had to cover thirteen dorms, housing 780 inmates, in just three hours. See Def. Ex. 23 (Chaplain Log Book for period of Ramadan 2004). At this pace, it is easy to see how Mr. El Badrawi could have failed to notice Imam Avci's visit.

Defendants provide no evidence to support their assertion that "[c]haplains were announced when they arrived at [Mr. El Badrawi's] unit by custody staff and wore clothing and items that clearly identified them as clergy; that information regarding religious programs at HCC was posted in Dorm 3." Def. 56 Statement ¶ 175. In fact, chaplains' visits were sometimes not announced. Ex. 7 (Avci Depo.) at 75. Imam Avci believed that some correction officers did not announce his visits because of anti-Muslim bias. *Id.* ("[N]ewcomers . . . might . . . not know us. Q. You said some [DOC] officers don't want to announce; why not? A. Because they don't like Islam, they don't like imam.") In addition, chaplains generally toured the dorms in professional clothing, not religious clothing. Ex. 5 (Pitts Depo.) at 55.¹³

Based on this evidence, a reasonable jury could still conclude that Defendants' imposed a substantial burden on Mr. El Badrawi's religious exercise. Because "[t]he function of the district court in considering the motion for summary judgment is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists," *In*

¹³ Defendants also assert as a material fact that "Plaintiff had no visitors and made no phone calls and did not seek out inmates with questions while he was at HCC." Def. 56 Statement ¶93 (Citing Def. Ex. 30 (Excerpts from Plaintiff's Deposition) at 133-134, 156). Plaintiff disputes this characterization: Plaintiff spoke to another inmate who told him that HCC had an Islamic chaplain. Ex. 1 ¶21. More fundamentally, though, Plaintiff disputes the underlying suggestion that obtaining information on religious services through discussions with other inmates satisfied any part of the Defendants' responsibility to provide clear guidelines to inmates. Indeed, Rev. Bruno explicitly conceded that such a method of information transfer was not adequate, as "inmates cannot function on behalf of other inmates." Ex. 4 at 74.

re Dana Corp., 574 F.3d 129, 151 (2d Cir. 2009), Defendants' motion for summary judgment should be denied.

B. A Jury Could Conclude That Defendant Lee Was Sufficiently Involved to Be Liable Under § 1983

Defendant Lee is personally liable for imposing a substantial burden on Mr. El Badrawi's religious exercise. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995) is the authoritative Second Circuit precedent for determining personal involvement. Defendants are incorrect to assert that *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) altered the personal involvement standard set forth in *Colon*.

1. Ashcroft v. Iqbal Does Not Disturb This Circuit's Colon Framework for Analyzing Personal Involvement Under § 1983.

Defendants incorrectly assert that the *Colon* factors have been superseded by *Ashcroft v. Iqbal*, arguing that "[a]fter *Iqbal*, any claim based on establishment of an unconstitutional policy would have to demonstrate, at a minimum, in the absence of Lee's personal involvement, that Warden Lee established the unconstitutional policy because of the unconstitutional effect on plaintiff and not merely in spite of the effect." Def. Br. 22. This argument dramatically overreads *Iqbal*. The *Iqbal* Court made clear that "[t]he factors necessary to establish a Bivens violation will vary with the constitutional provision at issue" and that its holding was limited to *Iqbal*'s claim of "invidious discrimination in contravention of the First and Fifth Amendments." *Iqbal*, 129 S. Ct. at 1948. The Court was speaking to *Iqbal*'s discrimination claim when it stated that its "decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose," *id* (emphasis added), and further stated that "[u]nder extant precedent purposeful discrimination requires more than intent as volition or intent as awareness

of consequences.” *Id* (emphasis added) (internal quotations omitted). Because Mr. El Badrawi does not claim that he was the victim of discrimination, *Iqbal* is inapposite.

Moreover, Mr. El Badrawi’s free exercise claim does not require any proof of intent. In order to prevail on his free exercise claim, Mr. El Badrawi “must establish a substantial burden on his religious exercise.” *Ford v. McGinnis*, 352 F.3d 582, 591 (2d. Cir. 2003). But he is not required to demonstrate that this burden was intentional.¹⁴

2. Defendant Lee Was Personally Involved in Imposing a Substantial Burden on Mr. El Badrawi’s Religious Exercise.

There is a material dispute of fact whether Defendant Lee was personally involved in depriving Mr. El Badrawi of his right to free religious exercise because (1) he “allowed the continuance” of a “custom” under which inmates who arrived at HCC during Ramadan were unable to sign up for the Ramadan meal plan (2) he “created” or “allowed the continuance” of a “custom” under which unqualified HCC staff provided inmates information about religious matters and (3) he was “grossly negligent in supervising” subordinate correction officers who gave Mr. El Badrawi incorrect and misleading information about the Ramadan list. *Colon*, 58 F.3d 865 at 873.

i. A Jury Could Conclude Defendant Lee Created or Allowed the Continuance of a Custom

Defendant Lee is personally liable under *Colon* because he created or allowed the continuance of a custom under which Mr. El Badrawi suffered a substantial burden on his

¹⁴ Other courts in this circuit have confirmed that *Iqbal* does not require proof of intent when a constitutional claim would not otherwise require such proof. See e.g. *Qasem v. Toro*, No. 09 Civ. 8361, 2010 WL 3156031, at *4 (S.D.N.Y. Aug. 10, 2010) (J. Stein) (“the five *Colon* categories supporting personal liability of supervisors still apply as long as they are consistent with the requirements applicable to the particular constitutional provision alleged to have been violated.”); *Sash v. United States*, 674 F. Supp. 2d 531, 544 (S.D.N.Y. 2009) (J. Peck) (“[i]t was with intent-based constitutional claims in mind, specifically racial discrimination, that the Supreme Court rejected the argument that ‘a supervisor’s mere knowledge of his subordinate’s discriminatory purpose amounts to the supervisor’s violating the Constitution.’”); *D’Olimpio v. Crisafi*, 2010 WL 2428128, at *5 (S.D.N.Y., 2010) (“As *Iqbal* noted, the degree of personal involvement varies depending on the constitutional provision at issue”).

religious exercise. *Colon*, 58 F.3d 865 at 873. A jury reasonably could find that Defendant Lee created or allowed the continuance of a custom under which 1) Muslim inmates who arrived at HCC after the beginning of Ramadan were not allowed to participate in the Ramadan meal plan or 2) unqualified HCC staff answered inmates' religious questions instead of referring such questions to chaplains.

Based on the evidence detailed above, a jury could reasonably infer that Defendant Lee created or allowed the continuance of a custom that denied new Muslim inmates access to the Ramadan list mid-month. In addition, it would not be unreasonable to infer that Defendant Lee allowed this custom to continue despite learning from Imam Avci in 2004 that Defendant McGrail was frustrating efforts to add two Muslim inmates to the Ramadan list. Ex. 7 (Avci Depo.) at 109-112. This custom is evidenced by HCC statistics showing that no Muslim inmates were added to the Ramadan list mid-month in 2004. *See* Def. Ex. 17 (HCC Ramadan Statistics 2004).

Even if HCC custom did permit new inmates to join the Ramadan list, Mr. El Badrawi's personal experiences and Defendant Lee's own statements demonstrate that Defendant Lee created or allowed the continuance of a custom under which unqualified HCC staff routinely dispensed uninformed answers to inmates' religious questions. A reasonable jury could infer that this custom caused Mr. El Badrawi to receive incorrect information about the Ramadan list and thereby imposed a substantial burden on his religious exercise. Mr. El Badrawi asked a prison counselor and two correction officers how he could join the Ramadan meal plan, but not one of these HCC employees directed him to speak with a Muslim chaplain. Ex. 1 ¶¶ 11-13. Defendant Lee's own statements confirm that Mr. El Badrawi's experience was indicative of HCC custom. According to Defendant Lee, because "correction officers . . . communicate with inmates daily"

it was “their responsibility” to answer inmates’ questions about religious matters. Ex. 3 at 146. Indeed, Defendant Lee stated that HCC used “on the job training,” “in-house training,” and “roll call” to try to train its employees to answer inmates’ religious questions. *Id.* at 144, 147.

By permitting his staff to answer inmates’ religious questions, Warden Lee created or allowed the continuance of a custom under which there was a significant risk that inmates would receive incorrect information about religious matters. According to Father Anthony Bruno, Director of Religious Services for the DOC, “staff persons . . . are not qualified to be answering religious questions” and therefore “should be referring all religious issues and matters to chaplains.” Ex. 4 at 34. When asked whether “staff members are not supposed to give religious advice to inmates . . . because they may give incorrect information?”, Rev. Bruno responded, “[t]hat's a possibility. A very distinctive possibility.” *Id.* at 35. Rev. Bruno therefore conducted orientation sessions for all “new employees” during which he “insist[ed]” that the employees refer religious questions to chaplains: “I say chaplains don't give out medical pills, chaplains don't fix the pipes, it's not our job. Your job is not to be a chaplain. Period. End of discussion.” *Id.* at 30-31. Based on Rev. Bruno’s statements, it is not surprising that the HCC employees who answered Mr. El Badrawi’s Ramadan questions provided him with misleading information that substantially burdened his religious free exercise.

ii. A Jury Could Conclude that Defendant Lee Was Grossly Negligent in Supervising Staff

A jury could also reasonably conclude that Defendant Lee was personally involved in depriving Mr. El Badrawi of his right to free religious exercise because he “was grossly negligent in supervising subordinates who committed the wrongful acts.” *Colon*, 58 F.3d 865 at 873. Four HCC employees—Imam Avci, two correction officers and a counselor— informed Plaintiff that he could not join the Ramadan list mid-month. Ex. 1 ¶¶ 24-26. If, as the State

argues, HCC policy permitted inmates to join the list mid-month, these statements suggest that Warden Lee was grossly negligent in supervising his employees. As this Court recognized, "the fact that multiple officials disobeyed, or misunderstood, prison regulations certainly makes it plausible that Warden Lee failed to appropriately train and/or supervise his staff to ensure that they accommodated Ramadan observances." *El Badrawi*, 579 F.Supp. 2d 249, at 257.

Defendants mischaracterize the standard for finding a supervisor to have been "grossly negligent in supervising subordinates who committed the wrongful acts." *Colon*, 58 F.3d 865 at 873. Defendants rely on *Green v. City of New York*, 465 F.3d 65 (2d Cir. 2006) and *Walker v. City of New York*, 974 F.2d 293 (2d Cir. 1992), *see* Def. Br. 38, which use a four-prong test "for showing that a lack of training manifests deliberate indifference." *Green*, 465 F.3d 65, at 80. This test is inapposite because it was developed by the Second Circuit, following *City of Canton v. Harris*, 489 U.S. 378 (1989), to determine when a *municipality* is liable for a constitutional violation by an employee. By contrast, *Colon* directly addressed whether a *supervisory official* was *personally* involved in a constitutional violation by a subordinate. *Colon*, 58 F.3d at 873.

Warden Lee was "grossly negligent in supervising subordinates," *Colon*, 58 F.3d at 873, because there is "some evidence that [he] knew or should have known of a substantial risk that constitutional rights would be violated due to [his] lack of supervision, that [he] consciously disregarded the risk by failing adequately to supervise, and that such disregard caused a constitutional violation committed by subordinates." *Beatty v. Davidson*, WL 1407311, *9-10 (W.D.N.Y. 2010). As described above, Warden Lee used "on the job training," "in-house training," and "roll call" to train HCC correction officers to answer inmates' religious questions directly. Ex. 3 (Lee Depo.) at 144, 147. This custom directly contravened Rev. Bruno's instructions. Rev. Bruno was adamant that correction officers should have been "referring all

religious issues and matters to chaplains” because they were “not qualified to be answering religious questions.” Ex. 4 at 34. Indeed, Rev. Bruno said that he “jump[ed] up and down” during orientation presentations to emphasize this very point, instructing new employees: “[A]ny religious questions [you] have, you refer them to the chaplain. You are not religious experts.” *Id.* at 30. Warden Lee therefore should have known that allowing his staff to answer religious questions created a significant risk that inmates would receive incorrect information which would impose a substantial burden on their religious exercise.

Warden Lee knew or should have known there was a substantial risk that correction officers who were not adequately aware of Ramadan policies could violate an inmate’s constitutional rights. Defendant Lee’s decision to have HCC correction officers answer questions about religious policies, discussed above, greatly heightened this risk. DOC’s Ramadan policies were entirely encompassed in the staff guidelines and accompanying memorandum that Rev. Bruno sent to all DOC wardens. *See* 2004 Ramadan Guidelines and Accompanying Memorandum. All training and clarification of Ramadan guidelines, which were posted at HCC, took place during roll call. *See* Ex. 3 (Lee Depo.) at 57-58; Ex. 5 (Pitts Depo.) at 77. Defendant Lee was responsible for determining the content of that roll call. *See* Ex. 5 (Pitts Depo.) at 33; *see also* Ex. 23 (Roll Call Notice Regarding Ramadan 2005). In spite of the substantial risk that correction officers might not understand the details of DOC’s Ramadan policies, the only aspects of Ramadan guidelines discussed at roll call were the start and end dates of Ramadan, the bagged breakfast process, and how to remove an inmate from a Ramadan list. Ex. 3 at 59.

Additionally, in 2004, Defendant Pitts added an implicit deadline for inmates to sign up for Ramadan. Ex. 5 (Pitts Depo.) at 111-12; Ex. 7 (Avci Depo.) at 39-40. Although Defendants claim that new inmates were supposed to be excepted from that deadline, they produce no

written guidance to that effect. Ex. 5 (Pitts Depo.) at 111-12 (noting deadline was implicit). Defendant Lee was aware that Defendant Pitts had the authority to interpret and clarify Ramadan guidelines, and therefore knew or should have known when Defendant Pitts did so in 2004. Ex. 3 at 65. A jury could reasonably find that there was a substantial risk that, given the lack of guidance in the formal deadline, that an implicit deadline could be improperly applied if not adequately explained to correction officers. A jury could further find that Defendant Lee consciously disregarded the risks inherent in not ensuring that any exceptions to implicit deadlines were adequately explained.

In light of a history of anti-Muslim prejudice among HCC employees, Warden Lee also knew or should have known that allowing correction officers to answer religious questions created an especially acute danger that *Muslim* inmates would receive misleading information that would impose a substantial burden on their religious exercise. Imam Hashim witnessed HCC employees exhibiting anti-Muslim bias on multiple occasions, *see e.g.* Ex. 8 at 53-54, including a particularly “[o]ffensive and insulting” incident, *id.* at 66, in which a correction officer referred to a Muslim inmate whose last name was “Hussein” as “Saddam Hussein.” *Id.* at 54-55 (“So I called one particular pod, asked the CO in charge to send me down -- this person's name was something Hussein. He said, Oh, we send down Saddam Hussein? . . . That's unexpected from . . from professional people. I don't expect it from professionals.”).¹⁵ Imam Avci also said that many HCC correction officers were prejudiced against Muslims: “[O]fficers are not educated, just high school . . . so they assume all Muslims [are] bad....” Ex. 7 at 111. Defendant Lee should have known that this prejudice increased the risk that HCC staff would provide Muslim prisoners with incorrect or misleading information with respect to religious matters.

¹⁵ Imam Hashim explained that he did not report this incident to HCC management because he was worried about potential retaliation: “If you complain . . . anything can happen . . . a lot of these things I based on somewhat survival. . . a lot of stuff falls on deaf ears, and sometimes it can be dangerous.” Ex. 8 at 56.

Defendant Lee's disregard for these risks led to the violation of Mr. El Badrawi's constitutional rights. When Mr. El Badrawi asked multiple HCC officials to be added to the Ramadan list, they refused to give him a Ramadan meal accommodation. Ex. 1 ¶¶ 11-13. Thus, a jury could reasonably conclude that Defendant Lee was grossly negligent because he failed adequately to supervise the dissemination and implementation of Ramadan policies to HCC staff, and that his gross negligence led to the denial of Mr. El Badrawi's constitutional right to free exercise.

iii. A Jury Could Conclude Defendant Lee Failed To Act In Light of Evidence of the Constitutional Violation

Defendant Lee was also personally involved in depriving Mr. El Badrawi of his right to free exercise because he "exhibited deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring." *Colon*, 58 F.3d 865 at 873. As noted above, Imam Avci informed Warden Lee in 2004 that Defendant McGrail refused to add two inmates to the Ramadan meal list mid-month. Ex. 7 at 109-112. Although Avci believed that they were then added to the list, HCC statistics reveal that Warden Lee failed to act to remedy this problem because they show that no people were added to the Ramadan list mid-month in 2004. See Def. Ex. 17 (HCC Ramadan Statistics 2004) at 109.

C. Defendant Lee Has Not Demonstrated that He Is Entitled to Qualified Immunity Because a Jury Could Conclude that He Violated Mr. El Badrawi's Clearly Established Rights.

Defendant Lee is not entitled to summary judgment on grounds of qualified immunity. Defendant Lee's argument is based on unsubstantiated assertions about what a "reasonable warden" in his position would have believed. Def. Br. 43. However, as this Court has noted, "because the issue of reasonableness depends on the facts of the situation, if there is a dispute as

to the facts, that must be resolved by the factfinder before qualified immunity can be granted,” *Maye v. Vargas*, 638 F. Supp. 2d 256, 262 (D. Conn 2009); *see also Zellner v. Summerlin*, 494 F.3d 344, 368 (2d Cir. 2007). The proper test, then, is not whether Defendant Lee thinks he behaved reasonably, but “whether the evidence is such that, even when it is viewed in the light most favorable to the plaintiff and with all permissible inferences drawn in his favor, no rational jury could fail to conclude that it was objectively reasonable for the defendant to believe that he was acting in a fashion that did not violate a clearly established right,” *Salahuddin v. Goord*, 467 F.3d 263, 263 (2d Cir. 2006).

At the time of the events at issue in this case, it was “clearly established that a prisoner has a right to a diet consistent with his or her religious scruples,” absent a legitimate penological justification. *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003). Defendant Lee should have known he was imperiling the free exercise rights of HCC inmates when he instructed his staff to answer religious questions, *See* Ex. 3 (Lee Depo.) at 143, despite the Director of DOC Religious Services’ insistence that staff should refer all such questions to chaplains. *See* Ex. 4 (Bruno Depo.) at 31-32. Defendant Lee acknowledged the risk of this policy, but implemented no safeguards: “If a correctional officer is giving wrong information, then that sometime or another, I’m hoping that information would be corrected because the inmate would not be able to do what he requested based on the information that the officer gave him.” Ex. 3 at 143-44. In addition, there are material disputes of fact whether Defendant Lee allowed the continuance of a custom that did not permit inmates to join the Ramadan list mid-month and failed to act in light of information regarding potentially unconstitutional acts. *See* Argument, *supra*, at II.B.2.i. and II.B.2.iii. In light of these disputes, a jury could reasonably conclude that it was not objectively reasonable for Defendant Lee to believe he was acting in a fashion that did not violate Mr. El

Badrawi's clearly established rights. Thus, Defendant Lee should not be awarded summary judgment on the basis of qualified immunity.

III. Defendants Lee, Pitts, and McGrail Are Not Entitled to Summary Judgment on Mr. El Badrawi's RLUIPA Claim

The Defendants are not entitled to summary judgment on Mr. El Badrawi's RLUIPA claim.¹⁶ Contrary to the government's arguments, RLUIPA authorizes individual capacity damages, a jury could reasonably conclude that Mr. El Badrawi faced a substantial burden of his free exercise rights, *see* Argument, *supra*, at II.A, Defendant McGrail was personally involved and the Defendants are not entitled to qualified immunity.

A. RLUIPA Provides for Damages in Individual Capacity Suits

Defendants argue that government officials are not subject to suit in their individual capacities for damages for violations of RLUIPA. This argument is incorrect because RLUIPA expressly authorizes suits against "any . . . person acting under color of State law," 42 USC § 2000cc-5(4)(A)(iii); *see* 42 U.S.C. § 2000cc-2(a), and because Mr. El Badrawi's claims constitute valid applications of Congress' power under both the Spending Clause and the Commerce Clause. Defendants' argument also fails because Second Circuit authority assumes that government officials are liable for damages under RLUIPA. In *Salahuddin v. Goord*, the Second Circuit vacated a district court judgment to the extent that it granted summary judgment to the defendant officials on multiple damages claims under RLUIPA. 467 F.3d 263, 282-83 (2d Cir. 2006). Because the *Salahuddin* Court's extensive qualified immunity analysis presumes that RLUIPA authorizes claims for damages against government officials. *See also Orafan v. Goord*,

¹⁶ RLUIPA prohibits the imposition of a "substantial burden on the religious exercise" of an institutionalized person unless that burden "(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. § 2000cc-1(a). The Defendants do not even attempt to argue that the denial of Mr. El Badrawi's right to join the Ramadan list served any compelling government interest.

2003 WL 21972735, *9 (N.D.N.Y. Aug.11, 2003) (RLUIPA “[c]learly . . . contemplates individual liability”).¹⁷

1. Congress Authorized Individual Capacity Suits Under its Spending Power

Defendants urge the Court to follow courts from outside this circuit that have analogized the Spending Clause to a contract and have therefore concluded that it does not give Congress power to impose liability on actors who do not directly receive federal funds. Def. Br. 45. However, the Solicitor General recently filed an amicus brief in *Sossamon v. Texas* in which it argued that these courts’ “conclusion that RLUIPA does not authorize damages suits against state officials in their individual capacities is incorrect.” Brief for the United States as Amicus Curiae, *Sossamon v. Texas*, 130 S.Ct. 3319 (U.S. May 24, 2010) (No. 08-1438), at 11. As the Solicitor General explains, Defendants overlook the interplay between the Spending Clause and the Necessary and Proper Clause, which gives Congress the authority to enact legislation that it believes to be “convenient,” “useful,” or “plainly adapted” to the exercise of its enumerated powers. *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 413-14, 421 (1819). Therefore “[j]ust as Congress may attach conditions to its disbursement of federal funds, so it is empowered to prevent third parties from interfering with a fund recipient’s compliance with those conditions.” Brief for the United States as Amicus Curiae, *Sossamon v. Texas*, at 13.

Congress’ power to impose liability on individuals who interfere with its spending objectives is demonstrated by *Sabri v. United States*, 541 U.S. 600 (2004). In *Sabri*, the Supreme Court held that the Spending Clause and the Necessary and Proper Clause together provide

¹⁷ The State also makes the puzzling argument, for which it cites no authority, that Mr. El Badrawi “should be found to not be a ‘person’ for purposes of RLUIPA because plaintiff was not ‘residing in or confined to an institution’ at the time he commenced this action and therefore is not entitled to bring a RLUIPA claim under this provision.” Def. Br. 48. Former detainees such as Mr. El Badrawi are fully entitled to bring damages suits under RLUIPA. *Salahuddin*, 467 F.3d at 272 (Plaintiff’s “right to seek damages is not affected” by fact that he is no longer incarcerated in “the prison facilities in which the actions complained of . . . occurred”).

Congress authority to impose criminal liability on persons who bribe officials of state or local entities that receive at least \$10,000 in federal funds. *Id.* at 602-608. Sabri was no more a direct recipient of federal funds than the individual defendants in this case. Moreover, the *criminal* liability imposed on Sabri was significantly more onerous than the *civil* liability that RLUIPA imposes on the defendants in this case. If Congress had authority to impose criminal liability in *Sabri*, it surely has authority to impose civil liability upon government officials who actively interfere with the statutory scheme set forth in RLUIPA by undermining the compliance of federal fund recipients.

2. Congress Authorized Individual Capacity Suits Under the Commerce Clause

RLUIPA also authorizes suits against government officials in their individual capacities pursuant to Congress' Commerce Clause power. In *Westchester Day School v. Village of Mamaroneck*, the Second Circuit observed that "Congress made explicit reference to . . . [the Commerce Clause] by limiting the application of RLUIPA to cases in which, inter alia, 'the substantial burden affects, or removal of that substantial burden would affect, commerce . . . among the several States.'" 504 F.3d 338, 354 (2d Cir. 2007) (citing 42 U.S.C. § 2000cc(a)(2)(B)); *see also* 42 USC § 2000cc-1(b)(2) (using identical language to limit application of RLUIPA in cases involving institutionalized persons). Where this "jurisdictional element is satisfied, RLUIPA constitutes a valid exercise of congressional power under the Commerce Clause." *Westchester Day Sch.*, 504 F.3d 338 at 354. Moreover, "the evidence need only demonstrate a minimal effect on commerce to satisfy the jurisdictional element." *Id.* Indeed, according to RLUIPA's "Limitation" provision, the jurisdictional element is presumptively satisfied unless "the government demonstrates that all substantial burdens on . . . similar religious exercise *throughout the Nation* would not lead *in the aggregate* to a substantial effect

on commerce . . . among the several States.” 42 U.S.C. § 2000cc-2(g) (emphases added).

Defendants make no such showing.

RLUIPA’s jurisdictional element is satisfied in this case because denying Muslim prisoners throughout the country the opportunity to participate in Ramadan meal plans would lead in the aggregate to at least “a minimal effect on commerce.” *Westchester Day Sch.*, 504 F.3d 338 at 354. The provision of Ramadan meals is a large commercial undertaking, requiring procurement of additional food items and substantial overtime payments to government employees. According to the Director of Religious Services for the Connecticut Department of Corrections (DOC), “Ramadan results in significant additional costs to the DOC.” Ex. 24 (DOC Email on Cost Calculations, 7/13/05).¹⁸

If Muslim prisoners throughout the country were excluded from Ramadan meal plans, departments of corrections could substantial reduce their expenditures. Because correctional facilities purchase food products that move across state lines and because these products also may include ingredients and packaging materials that move separately across state lines, a reduction in Ramadan food purchases by correctional facilities would directly affect interstate commerce. *See e.g. Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (upholding constitutionality of Civil Rights Act of 1964 as applied to restaurant that “serves food a substantial portion of which has moved in interstate commerce.”) In addition, reduced overtime payments to correctional department staff would lower demand for labor which, in the aggregate, could affect interstate labor markets. *See e.g. Adams v. Suozzi*, 433 F.3d 220, 225-26 (2d Cir.

¹⁸ In 2005, for example, prisoners on the Ramadan meal plan received an extra orange or apple for breakfast each morning, costing DOC an estimated \$7000. *Id.* In addition, the “overtime cost alone for DOC food services personnel for the 30 days of Ramadan . . . exceeded[ed] \$85,000.” *Id.* In 2006, the “[t]otal estimated Ramadan cost” rose to \$130,402.70. Ex. 25 (DOC Email on Cost Calculations, 8/8/06). This total included “added breakfast items (Peanut butter, 2 slices of wheat bread)” costing \$7379.70, an “added dinner item (Fish)” costing \$13,023, and “overtime for staff” costing \$110,000. *Id.*

2005) (“Congress has authority to regulate public employment under the Commerce Clause, just as it can regulate employment in the private sector . . . This power extends to ostensibly intrastate economic activity that has a cumulative substantial effect on interstate commerce.”). RLUIPA’s jurisdictional element is satisfied in this case because excluding Muslim prisoners throughout the country from Ramadan meal plans would, in the aggregate, affect interstate commerce.¹⁹

B. A Jury Could Conclude That Defendants Imposed a Substantial Burden on Mr. El Badrawi’s Religious Exercise

RLUIPA prohibits the imposition of a “substantial burden on the religious exercise” of an institutionalized person. 42 U.S.C. § 2000cc-1(a).²⁰ The “substantial burden” standard for RLUIPA is no higher than for § 1983. *See e.g. Westchester Day Sch. v. Village of Mamaroneck*, 504 F.3d 338, 348 (2d Cir. 2008). As demonstrated above (Argument, *supra*, at II.A), Defendants imposed a substantial burden on Mr. El Badrawi’s religious exercise.

C. A Jury Could Conclude That Defendant McGrail Was Sufficiently Involved to Be Liable Under RLUIPA.

A reasonable jury could infer that Defendant McGrail either created or allowed the continuance of a custom under which Muslim inmates who arrived at HCC after the beginning of Ramadan were not allowed to participate in the Ramadan meal plan. *Colon*, 58 F.3d 865 at 873. While the Defendants argue that Defendant McGrail “played absolutely no role in determining

¹⁹This Court may also adopt the approach of *Hall v. Epke*, 2010 WL 3996211, at *3 (2d Cir. 2010) , in which the Second Circuit determined to hold in abeyance a RLUIPA appeal pending the Supreme Court’s decision in *Sossamon v. Texas*, 560 F.3d 316 (5th Cir.2009), *cert. granted*, 130 S.Ct. 3319 (U.S. May 24, 2010) (No. 08-1438). The Supreme Court granted certiorari specifically to decide “[w]hether an individual may sue a State or a state official in his *official capacity* for damages for violations of” RLUIPA. *Sossamon v. Texas*, 130 S.Ct. 3319 (2010) (emphasis added). The Second Circuit reasoned that “resolution of th[is] question may also shed light on Hall’s ability to sue defendants in their *individual capacities* for money damages,” and it therefore “reserve[d] decision on Hall’s challenge to the award of summary judgment on his RLUIPA claim in its entirety.” *Id.* (emphasis added). Accordingly, like the Second Circuit in *Hall*, this Court may wish to hold in abeyance the State Defendants’ motion for summary judgment regarding whether Mr. El Badrawi may sue State Defendants for damages in their official capacities “pending the Supreme Court’s resolution of th[is] question.” *Hall*, 2010 WL 3996211, at *3.

²⁰ Although the imposition of a substantial burden may be justified if it “(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. § 2000cc-1(a), Defendants do not raise this defense and therefore have waived it.

who was put on the Ramadan List,” Def. Br. 48, documents from Ramadan in 2004 and testimony from HCC’s Islamic chaplain in 2004 directly contradict this assertion. First, HCC’s Islamic chaplain testified that Defendant McGrail refused to add new inmates to the Ramadan list. Ex. 7 at 108-09. Second, HCC’s 2004 Ramadan Statistics Sheet contains a typewritten category, “Number of inmates temporarily removed from fasting list but later reinstated to the list,” and a handwritten note: “Kitchen supervisor didn’t allow inmates to remove temporarily [sic].” Def. Ex. 17 (HCC Ramadan Statistics 2004).

Defendant McGrail’s refusal to allow Muslim inmates to remove temporarily was directly contrary to DOC religious policy for two reasons. First, according to DOC’s Ramadan guidelines, the Islamic chaplain, not the Defendant McGrail, must determine if there are religious reasons for the inmate to be reinstated. Def. Ex. 15 (DOC Ramadan Guidelines 2004) at 3. Second, Defendant Pitts, not Defendant McGrail, was supposed to be in charge of the Ramadan list. Ex. 5 at 94. Both Defendant Pitts and DOC’s Director of Religious Services testified that Food Services complained about and did not like to add inmates to the Ramadan list once Ramadan had begun because it made their job considerably more difficult. Ex. 4 (Bruno Depo.) at 95-96; Ex. 5 (Pitts Depo.) at 113-14.

A reasonable jury that considered Defendant McGrail’s refusal to add new inmates, his control over whether inmates were added to the Ramadan list, his motive for avoiding adding any new inmates to the Ramadan list, and the fact that no new Muslim inmates were added in 2004, could infer that Defendant McGrail was liable for, or created or allowed to continue, a custom of refusing to new Muslim inmates to the Ramadan list in 2004.²¹

²¹ The State Defendants do not cite any legal standard to judge personal involvement under RLUIPA, and in fact “[n]either the Supreme Court nor the Second Circuit have directly addressed the issue of whether personal involvement is a prerequisite for any valid RLUIPA claim, as it is under § 1983.” *Joseph v. Fischer*, 2009 U.S. Dist. LEXIS 96952, *50 (S.D.N.Y. 2009). A number of courts have found that any personal involvement standard under

D. Defendants Have Not Demonstrated that They Are Entitled to Qualified Immunity Because a Reasonable Jury Could Conclude that Mr. El Badrawi's Clearly Established Rights Were Violated.

The Defendants are not entitled to qualified immunity for their RLUIPA claims. They fail to provide any explanation for why Defendants Lee, Pitts, and McGrail are entitled to qualified immunity for Mr. El Badrawi's RLUIPA claims, except to incorporate their arguments for why Defendant Lee is entitled to qualified immunity from Mr. El Badrawi's 1983 claim. For Defendant Lee, Plaintiff incorporates by reference the reasons to deny Defendant Lee qualified immunity, as explained above. For Defendants' Pitts and McGrail, the Defendants cannot incorporate arguments relating to the reasonableness of a different prison official in a different position who took different actions. The argument that Defendants Pitts and McGrail are entitled to qualified immunity is therefore waived.

Even assuming *arguendo* that it has not been waived, Defendants cannot demonstrate that given the evidence "viewed in the light most favorable to the plaintiff and with all permissible inferences drawn in his favor," "no rational jury could fail to conclude that it was objectively

RLUIPA would be broader than the standard for § 1983, and in particular have allowed for liability under a theory of *respondeat superior*, which is not available for § 1983. *See Agrawal v. Briley*, 2004 WL 1977581, *14 (N.D. Ill. 2004) ("In light of Congress's stated preference for a broad construction [of the RLUIPA statute], this court is unwilling to assume that Congress intended to incorporate into RLUIPA the judge-made limits of potential liability under § 1983 if other principles of tort law casting a broader net might result in 'appropriate relief.');" *see also Layman Lessons, Inc. v. City of Millersville, Tenn.*, 2008 WL 686399, *20 (M.D.Tenn. 2008) (RLUIPA allows for liability under *respondeat superior*). At a minimum, a showing that Defendant McGrail is personally involved under the Second Circuit's *Colon* framework for § 1983 is sufficient. *See Harnett v. Barr*, 538 F. Supp. 2d 511, 526 (N.D.N.Y. 2008) (allowing RLUIPA claim to proceed under *Colon* personal involvement standard).

The State Defendants do not contest the personal involvement of Defendants Lee and Pitts under RLUIPA. That argument is therefore waived. In any event, the evidence shows that Defendant Lee is liable for at least the same reasons he is liable under *Colon* and Defendant Pitts is liable for the same reasons that his defense of qualified immunity to Mr. El Badrawi's RLUIPA claim should be denied, discussed *infra*. Moreover, both Defendant Lee and Pitts would be liable additionally under a theory of *respondeat superior* since Defendant Lee unquestionably supervised the correction officers who denied Mr. El Badrawi's request to join the Ramadan list, *See* Ex. 3 at 21, 26-27, 100; Ex. 4 at 21 and Defendant Pitts had responsibility over all religious policies at HCC. *See* Ex. 5 at 9; Def. Ex. 11 (2003 Inmate Handbook) at 10.

reasonable for the defendant to believe that he was acting in a fashion that did not violate a clearly established right.” *Salahuddin v. Goord*, 467 F.3d 263, 263 (2d Cir. 2006).

Applied to Defendant Pitts, the arguments for qualified immunity are entirely inapposite. The Defendants claim that, “A reasonable warden in Warden Lee’s position would have reasonably relied upon . . . the religious personnel at HCC to conduct religious programs.” Def. Br. at 43. But Defendant Pitts was the head of religious personnel at HCC and the record establishes that he was involved in almost all aspects of religious services at HCC. Defendant Pitts was responsible for determining whether an inmate could receive Ramadan meal accommodations at HCC, *see* Ex. 5 at 94, ensuring the DOC religious policies were correctly implemented, *see* Ex. 5 at 9, creating a Ramadan sign-up deadline in order to fill a gap in a DOC Ramadan policy, *see* Ex. 3 at 65, Ex. 5 at 112, and answering correction officers’ questions about religious services and directing any problems or issues to Defendant Lee. Ex. 5 at 48-49.

At the time of the events at issue in this case, it was “clearly established that a prisoner has a right to a diet consistent with his or her religious scruples,” absent a legitimate penological justification. *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003). Evidence suggests that in 2004, Defendant Pitts may have acted contrary to DOC policy by creating an implicit deadline at HCC for joining the Ramadan list. Ex. 5 (Pitts Depo.) at 111-12; Ex. 7 (Avci Depo.) at 39-40. Moreover, Defendant Pitts was responsible for the Ramadan list but allowed the kitchen supervisor to add new inmates and dictate HCC custom. *See* Def. Ex. 17 (2004 HCC Ramadan Statistics Sheet). Further, as discussed above, because a reasonable jury could infer that HCC custom in 2004 was to refuse to allow new Muslim inmates to join the Ramadan list and that Defendant Pitts was responsible for ensuring that religious policies were properly implemented, it could also infer that Defendant Pitts should have known why no new inmates could join the

Ramadan list, and in failing to do so he allowed the continuance of that custom – all done in violation of clearly established rights.

Qualified immunity also cannot apply to Defendant McGrail. As discussed above, a jury could reasonably infer that Defendant McGrail exercised control over the Ramadan meal accommodations list and refused to add new inmates to the Ramadan list, thereby creating or allowing the continuance of a custom of denying new Muslim inmates, including Mr. El Badrawi, access to the Ramadan list. Based on his conduct, a jury could reasonably conclude that it was not objectively reasonable for Defendant McGrail to believe he was acting in a fashion that did not violate a clearly established right.

IV. Defendant Lee Is Not Entitled to Summary Judgment on the Medical Claim under § 1983 Due to Numerous Material Disputes of Fact.

As an immigration detainee, Mr. El Badrawi was entitled to medical care at least equivalent to that required by the Eighth Amendment for convicted inmates. *Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 244-45 (1983); *Youngberg v. Romeo*, 457 U.S. 307, 321-24 (1982). There are numerous disputes of material fact as to whether Defendant Lee was deliberately indifferent to Mr. El Badrawi's serious medical need. *Estelle v. Gamble*, 429 U.S. 97, 104-05 (1976).

This Court has held that “[t]here can be no real dispute that Crohn’s disease, which causes severe pain when left untreated, constitutes a serious medical condition.” *El Badrawi*, 579 F. Supp.2d at 258. Crohn’s disease is a chronic disorder that causes inflammation of the gastrointestinal tract and can result in severe pain and internal bleeding when left untreated. Ex. 1 ¶ 29; Ex. 2 at 49. Mr. El Badrawi was diagnosed with Crohn’s disease in 1996 and was prescribed to take 400 mg of Asacol six times daily to treat his condition. Ex. 1 ¶ 30. The extreme physical pain and internal bleeding that Mr. El Badrawi experienced after being

deprived of his medication clearly supports a finding that he had a serious medical need. Ex. 2 at 179.

Defendant Lee claims that the expert report by Dr. Edward Blanchette proves that Mr. El Badrawi's Crohn's flare-up would not have been caused by his missed medication and could have been experienced anyway because of stress. Def. Br. 28. Yet there are several material disputes of fact surrounding the causation and severity of Mr. El Badrawi's flare-up that are genuine issues for trial. First, nowhere did Dr. Blanchette state that medication could *not* have alleviated the pain Mr. El Badrawi experienced as a result of his Crohn's flare-up. Def. Ex. 24. Instead, contrary to Mr. El Badrawi's consistent and persistent testimony, Ex. 1 ¶ 23, 37; Ex. 2 at 179, Dr. Blanchette doubts that Mr. El Badrawi *experienced his severe flare-up at all*. Def. Ex. 24 at 5. There is also a dispute as to whether Mr. El Badrawi had been taking his prescribed dosage of Asacol daily throughout the month of October 2004 up until his arrest. Ex. 2 at 112, 127. Mr. El Badrawi testified that if he ever missed a dosage, he would try to make up for it in the same day. Ex. 2 at 78-79. Without basis, Dr. Blanchette finds it "most unlikely" that the medical intake nurse entered false information when he recorded the last date on which Mr. El Badrawi took his medication. Def. Ex. 24 at 5. This is a genuine issue for trial. Finally, there is a dispute as to the severity of the effects a deprivation of medication would have on Mr. El Badrawi's health. Mr. El Badrawi only started experiencing the extreme symptoms of his Crohn's disease after he missed his dosage upon transfer to HCC, and those symptoms subsided as soon as Mr. El Badrawi started taking the medication (that he was able to obtain only on his sixth day of incarceration). Ex. 2 at 179; Def. Ex. 6 at 1.

There are also disputes of material fact as to whether HCC personnel were deliberately indifferent to Mr. El Badrawi's serious medical needs by failing to provide medication for six

days. Here, there is evidence to suggest that staff failed to provide medication “with knowledge that harm will result.” *Farmer v. Brennan*, 511 U.S. 825, 835 (1994); *see also Caiozzo v. Koreman*, 581 F.3d 63, 71 (2d Cir. 2009). After being transferred to HCC, Mr. El Badrawi made repeated requests for his medication, Ex. 1 ¶¶ 36, 38-41, which he had been taking up until the night before his arrival. *Id.* ¶ 32. On the evening of his arrival, October 29, 2004 through October 30, he informed two individuals performing his medical screening, *id.* ¶ 38, a number of his fellow inmates, one of whom notified a correction officer, *id.* ¶ 39 and a nurse at HCC of the need for his medication. *Id.* ¶ 40. On November 1, Mr. El Badrawi filled out an inmate request form for the medication he had yet to receive. *Id.* ¶ 41; Def. Ex. 5. Mr. El Badrawi did not receive his medication until his sixth day of imprisonment at HCC. Def. Ex. 6 at 1. For nearly a week, he experienced severe pain and internal bleeding that could have been alleviated by his medication. Ex. 1 ¶¶ 36-37. A jury could reasonably conclude that staff at HCC who were on notice of Mr. El Badrawi’s condition and the severe pain he was experiencing, demonstrated deliberate indifference by failing to provide him with his Asacol pills. There is no evidence that officials followed up with the request for Mr. El Badrawi’s medication to ensure that he received it in a timely manner. The nurse who conducted his intake stated that if he ordered Asacol for an inmate, he would follow up “two to three days later.” Ex. 10 at 35. There is no evidence any follow-up occurred, and Mr. El Badrawi received his medication on his sixth day of incarceration. Def. Ex. 6 at 1.

Defendant Lee argues that he was not personally involved in the violation of Mr. El Badrawi’s Due Process rights to the extent necessary to state § 1983 liability.²² Def. Br. 23.

²² Defendant Lee is not entitled to qualified immunity from Mr. El Badrawi’s medical claim because he cannot establish that “viewed in the light most favorable to the plaintiff and with all permissible inferences drawn in his favor, no rational jury could fail to conclude that it was objectively reasonable for the defendant to believe that he was acting in a fashion that did not violate a clearly established right.” *Salahuddin*, 467 F.3d at 263. It is clear that

However, for a defendant to be personally involved under § 1983, “direct participation is not always necessary.” *Al-Jundi*, 885 F.2d at 1066; see also *El Badrawi*, 579 F. Supp. 2d at 258 (“a state official can be liable under § 1983 for . . . the creation or failure to rectify an unconstitutional policy or custom.”). There are disputes of material fact as to whether Defendant Lee created a custom that allowed for *his subordinates*’ failure to provide adequate medical care for Mr. El Badrawi in violation of the Fourteenth Amendment. See *Colon*, 58 F.3d at 873. A jury could also reasonably find that Defendant Lee was “grossly negligent” in supervising his subordinates and that his negligence resulted in Mr. El Badrawi’s constitutional injury. See *id.* Defendant claims that there is “no evidence” that he had “actual knowledge of a problem at HCC regarding undue delay in inmate’s receipt of prescription medication for chronic or acute medical problems. Def. Local Rule 56(a)(1) ¶ 118. However, he testified that he has been aware of inmates complaining that they have not received their medication. “In talking to 500, 600, a thousand inmates per day in one form or another,” Defendant Lee said he was “sure” that he has heard of such complaints. Ex. 3 at 107.

It was ultimately Defendant Lee’s responsibility “to have made sure that plaintiff was provided any medication he needed as quickly as possible.” Def. Ex. 33 ¶ 28. Though DOC had a Memorandum of Understanding with the University of Connecticut Health Center (UCHC), Def. Ex. 14, Defendant Lee was ultimately responsible for the safety and security of his inmates. Ex. 3 at 100. Defendant Lee confirmed that if he were informed of a problem or undue delay that caused any inmate harm, “[he] would have contacted the appropriate CMHC supervisor to request

Defendant Lee had an affirmative obligation under the Due Process Clause to provide Mr. El Badrawi with adequate medical care during his confinement. *City of Revere*, 463 U.S. at 244 (1983); *El Badrawi*, 579 F. Supp. 2d at 257 (“When the State incarcerates an individual pending further proceedings, the Due Process Clause requires that the State provide a certain level of medical care.”). No reasonable warden could conclude that failing to act on inmate complaints about delays in obtaining medication and allowing a custom of medication delays would not violate an inmate’s constitutional rights.

that the medication be delivered as soon as possible and [he] would have requested an explanation for the delay.” Def. Ex. 33 ¶ 28. However there is no evidence that Defendant Lee responded to the delays in medication of which he was aware, leading in large measure to Plaintiff’s denial of necessary medication for the first six days of his detention.

Defendant Lee need not have had knowledge of the Plaintiff’s “particular condition” but should have been aware that inmates with conditions such as that of Mr. El Badrawi were housed at HCC from time to time and that no process was in place by which Lee’s subordinates could ensure that patients received urgent medication without undue delays. *See Beatty v. Davidson*, 713 F.Supp.2d 167, 177 (W.D.N.Y. 2010). Defendant Lee has stated that he was aware that inmates complained of delays in medication. Ex. 3 at 107. There is also evidence that in the event that medication would be delayed, there was no clear procedure by which subordinates were trained to ensure the timely delivery of urgent medication, as was demonstrated in Mr. El Badrawi’s case. Accordingly, a jury could also reasonably find that Defendant Lee was “grossly negligent” in supervising his subordinates and that his negligence resulted in Mr. El Badrawi’s constitutional injury.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that Defendants’ Motion for Summary Judgment be denied.

Respectfully Submitted,

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