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United States District Court,
S.D. New York.

Rashaad MARRIA, Plaintiff,
v.
Dr. Raymond BROADDUS, Deputy Commissioner of Programs; G. Blaetz, Chairperson of Green Haven Correctional Facility Media Review Committee; Warith Deen Umar, Coordinator for Islamic Affairs; and Glenn Goord, Commissioner of the New York State Department of Corrections, Defendants.

No. 97 Civ.8297 NRB. | July 31, 2003.

Prisoner brought action against New York State Department of Correctional Services (DOCS) and various officials alleging violation of his rights under First Amendment and Religious Land Use and Institutionalized Persons Act (RLUIPA). The District Court, Buchwald, J., held that: (1) prisoner's beliefs as a member of the Nation of Gods and Earths were both sincere and "religious in nature" and therefore entitled to Religious Land Use and Institutionalized Persons Act (RLUIPA) and First Amendment, and (2) DOCS' classification of Nation of Gods and Earths as a security threat group and its absolute ban on Nation literature violated prisoner's free exercise rights under First Amendment and RLUIPA.

Order in accordance with opinion.

West Headnotes (4)

[1] **Constitutional Law**
Beliefs Protected; Inquiry Into Beliefs

A court's scrutiny of whether a plaintiff deserves free exercise protection extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[2] **Constitutional Law**
Beliefs Protected; Inquiry Into Beliefs

Analysis of whether a claimant sincerely holds a particular belief and whether the belief is religious in nature, and thus subject to protection under free exercise clause of First Amendment, seeks to determine the subjective good faith of an adherent in performing certain rituals and can be guided by such extrinsic factors as a purported religious group's size and history, whether the claimant appears to be seeking material gain by hiding secular interests behind a veil of religious doctrine, and whether the claimant has acted in a manner inconsistent with his professed beliefs; however, courts are not permitted to ask whether a particular belief is appropriate or true, however unusual or unfamiliar the belief may be. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[3] **Constitutional Law**
Prisons and Pretrial Detention
Prisons
Religious Practices and Materials

Prisoner's beliefs as a member of the Nation of Gods and Earths were both sincere and "religious in nature" and therefore entitled to Religious Land Use and Institutionalized Persons Act (RLUIPA) and First Amendment protection under the free exercise clause; despite Nation members' reluctance to call the Nation of Gods and Earths a "religion," prisoner lived by the Nation's teachings and observed the Nation's holy days to the extent possible under corrections regulations, Nation carried the same significance for its members as Christianity, Judaism, and Islam did for their adherents, and Nation's contrasting belief system meant that one could not be a part of those religions and the Nation simultaneously. U.S.C.A. Const.Amend. 1; 42 U.S.C. § 2000cc-3(g).

12 Cases that cite this headnote

[4] **Constitutional Law**

Prisons and Pretrial Detention
Prisons
Religious Practices and Materials

Department of Correctional Services' (DOCS) classification of Nation of Gods and Earths as a security threat group and its absolute ban on Nation literature violated prisoner's free exercise rights under First Amendment and Religious Land Use and Institutionalized Persons Act (RLUIPA); Department failed to establish that its complete ban on Nation materials, literature, and activities furthered a compelling security interest and was the least restrictive means of doing so under RLUIPA. 42 U.S.C. § 2000cc-1(a).

21 Cases that cite this headnote

Opinion

OPINION AND ORDER

BUCHWALD, J.

***1** Plaintiff Intelligent Tarref Allah, formerly known as Rashaad Marria[1] (hereinafter "plaintiff"), has been an inmate in the custody of the New York State Department of Correctional Services ("DOCS") since June 1995. For the duration of his incarceration within DOCS, plaintiff has been a member of the Nation of Gods and Earths ("Nation"), which he joined in August of 1994 while awaiting trial at Rikers Island. Defendants are DOCS employees sued in their individual and official capacities: defendant Glenn S. Goord ("Goord") is current the Commissioner of DOCS; defendant Dr. Raymond Broaddus ("Broaddus") was the Deputy Commissioner for Program Services of DOCS at all times relevant to this action; defendant G. Blaetz ("Blaetz") was a Senior Counselor and the Media Review Committee Chairperson at DOCS' Green Haven Correctional Facility ("Green Haven"); and defendant Warith Deen Umar ("Umar") was the Coordinator for Islamic Affairs at DOCS at all times relevant to this action (collectively, "defendants" or "DOCS").

Plaintiff challenges DOCS' policy classifying the Nation as an "unauthorized" or "security threat" group and DOCS' consequent prohibition on his receipt of Nation materials and literature, including the group's central texts and its newspaper, and ban on formal gatherings with other members of the group. He seeks declaratory and injunctive relief pursuant to 42 U.S.C. § 1983, alleging violations of the First and Fourteenth Amendments to the United States Constitution, the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), the New York State Constitution, and state law. Plaintiff's federal due process and analogous state law claims were dismissed on qualified immunity grounds at the summary judgment stage of this case. *See Marria v. Broaddus,* 200 F.Supp.2d 280, 301-302 (S.D.N.Y.2002).

The Court held a five-day bench trial during which the parties presented evidence bearing on the issue of whether plaintiff's beliefs as a member of the Nation are entitled to Constitutional protection and, if so, what proper the scope of protection would be. Having reviewed the testimony and evidence that has been presented, we find that plaintiff's sincerely-held beliefs as a member of the Nation are entitled to First Amendment and RLUIPA protection, and thus grant plaintiff's requested injunctive relief in part and remand in part for further consideration and action by DOCS not inconsistent with this decision.[2] Our findings of fact and conclusions of law are set forth below.

BACKGROUND

The Nation's history, teachings, and practices are largely not contested, nor are the existence and application of DOCS' policies concerning the Nation.

A. The Nation of Gods and Earths

The Nation, whose adherents are commonly referred to as "Five Percenters," the "Five Percent", or the "Five Percent Nation," was founded in New York nearly 40 years ago. The Nation traces its roots to the Black Muslim movement that emerged in the midtwentieth century and most directly to the Nation of Islam ("NOI")-a group that DOCS classifies as a religion pursuant to the settlement in *Muhammad v. Coughlin,* No. 91 Civ. 6333 (S.D.N.Y), and one with which the Nation shares some teachings and its central text (known to Nation members as the 120 Degrees).[3] *See* Trial Tr. at 162:11-17; Trial Tr. at 56:18-23. The concept of the "Five Percent" from which the Nation derives its colloquial name was first set forth by NOI leader Elijah Muhammad, who separated the world's population into three categories: the Five Percent, the Ten Percent, and the Eighty-Five Percent. *See* Trial Tr. at 54:6-20. According to Elijah Muhammad, the Ten Percent teach the Eighty-Five Percent to believe in the existence of a "mystery God" and thereby keep the Eighty-Five Percent enslaved by having them worship something that they cannot see. *See id.* Muhammad

characterized the remaining Five Percent as the poor, righteous teachers who do not believe in the teachings of the Ten Percent and instead teach the identity of the true and living God, as well as freedom, justice, and equality to all human families of the planet earth. *See id.* The term "Five Percenter," while commonly used to describe members of the Nation, can be used more generally to describe a person who subscribes to the belief that humankind can be broken down into the Five Percent, the Ten Percent, and the Eighty-Five Percent. Thus, not all people who might nominally identify themselves as "Five percenters" are necessarily members of the Nation of Gods and Earths. *See* Trial Tr. at 55:15-25.

***2** The Nation of Gods and Earths began in 1964 when its founder Clarence 13X Smith broke with the NOI. *See* Trial Tr. at 56:18-23. In contrast to the NOI's belief that Allah (God) appeared on Earth solely in the person of its founder Master Fard Muhammad, Smith and his followers professed the central belief that every black man is an embodiment of God with the proper name Allah and that every black woman is "Earth," from which life springs. *See* Trial Tr. at 56:24-57:7. Thereafter, with the assistance of the City of New York and the Urban League, Smith and his followers created the "Allah School in Mecca," a headquarters that also houses the "Allah Youth Center in Mecca," in Harlem, New York as a street academy designed to bring the Nation's message to urban youth. *See* Trial Tr. at 56:18-23; *see also generally* April 30, 2001 Decl. of Elise Zealand ("Zealand Decl.") Ex. N (article discussing the history of the Nation); April 27, 2001 Decl. of Rashaad Marria ("Marria Decl.") ¶ 15 & Ex. D (discussing the Nation's relationship with the Urban League and New York City). The Center, which enjoys 501(c)(3) not-for-profit tax status and a favorable ninety-nine year lease from the City paid at the rate of twenty dollars per month, continues to operate in Harlem as do several similar centers elsewhere. *See* Trial Tr. at 316:9-13. Among the activities sponsored by the Allah School and Youth Center are substance abuse programs, after-school tutoring for children, and youth trips to show children that "there is more to life than what they see in the ghettos." *See* Trial Tr. at 313:17-315:21. Aside from its headquarters in Harlem, the Nation does not have a formal structure or hierarchy beyond preaching respect for "elders"-i.e ., those with the most extensive knowledge of the group's beliefs and lessons. *See* Trial Tr. at 94:12-24.

As we previously mentioned, some of the Nation's beliefs and practices overlap with those of the NOI as a result of the two groups' shared belief in the lessons that comprise the 120 Degrees. Both groups, for example, believe that the black man is the "original Asiatic man." Both the Nation and NOI also believe that the white man is "the devil," made through a selective breeding process referred to as "grafting," as all of these teachings are set forth in the 120 Degrees. *See* Trial Tr. at 165:12-21; Trial Tr. at 302:15-20; Pl. Trial Ex. 180 (anthropological "syncretism" created by plaintiff witness Ted Swedenberg comparing the Nation of Gods and Earths to various religious traditions); Blocker Decl. ¶ 8. Members of both groups also observe dietary restrictions, such as refraining from eating pork, and fast on holy days.[4] Finally, the Nation's emblem, known to members as the "Universal Flag," is reminiscent of the one used by NOI. *Compare* Pl. Trial Ex. 1 (cover of *Five Percenter* newspaper containing the "Universal Flag") *with* http://www.noi.org/ (visited May 26, 2003) (NOI web page displaying crescent emblem).

***3** Although plaintiff asserts that his belief system as a member of the Nation would be commonly understood as a religion, he and other nation members reject the label "religion" in describing the Nation because they believe that the term "religion" connotes "belief in the mystery God"-i.e., the false religious belief systems promulgated by the Ten Percent to enslave the minds of others. *See* Trial Tr. at 106:13-16. Therefore, plaintiff and other Five Percenters commonly describe the Nation as a "way of life or culture," not a "religion." *See* Trial Tr. at 58:2-13.

The 120 Degrees, along with two numerology devices known as the Supreme Alphabet and Supreme Mathematics, forms the core of the Nation's literature. The 120 Degrees are lessons arranged in a question and answer format that represent the teachings of NOI founder Master Fard Muhammad and Elijah Muhammad. The Supreme Alphabet and Supreme Mathematics assign a word to each letter of the alphabet (almost all of which begin with the letter to which they correspond) and ten "righteous" principles to each number from 0 to 9. They are used as the keys "to understand[ing] man's relationship to the universe and Islam," as well as to understanding and interpreting the 120 Degrees.[5] Marria Decl. ¶ 13. There is no dispute that the Supreme Alphabet and Mathematics have not changed since they were created by Clarence 13X Smith in the 1960's and are made widely available by the Nation and others. Members of the Nation use these sources in conjunction with one another to attain "knowledge of self," which is central to their membership in the Nation, and they must be understood and applied on a daily basis in order to live righteously. Hence, just as Nation members are required to fast on holy days and follow dietary restrictions, they are also required to study the lessons in these teachings on a regular basis both individually and in group sessions. The Nation's beliefs are also based on the Koran and the Bible, which serve as secondary texts, *see* Trial Tr. at 65:7-66:15, and "plus lessons" consisting of written commentary by Five Percenters aimed at fostering further insight into the group's texts and teachings. *See* Trial Tr. at 64:17-20, 64:25-65:6.

One additional piece of Nation literature specifically at issue in this case is *The Five Percenter,* a monthly

newspaper published by the Allah Youth Center. It contains articles about current events relevant to the Nation, information about community activities, letters to the editor, editorials, and Five Percenter lessons and "plus lessons," including teachings from the 120 Degrees, the Supreme Alphabet, and the Supreme Mathematics. *See e.g.,* Pl. Trial Ex. 3 (copy of the October 1995 issue of *The Five Percenter* received in evidence); Pl. Trial Ex. 6 (copy of the June 1996 issue of *The Five Percenter* received in evidence). Some of *The Five Percenter's* content is directed specifically towards prison inmates, including messages advising them to better themselves and follow prison rules while incarcerated.[6] Plaintiff asserts that *The Five Percenter* also serves as the principal and vital link for him to communicate with members of the Five Percenter community outside prison. *See* Trial Tr. at 69:24-70:17; *see also* Trial Tr. at 154:24-155:6 (plaintiff's expert anthropologist Ted Swedenberg explaining that *The Five Percenter* shows Nation members how the group's abstract principles can be applied in life); Trial Tr. at 292:17-293:15 (Nation representative Cee Aaquil Allah Barnes discussing the importance of *The Five Percenter* as a link to the community for prison inmates who are members of the Nation); Pl. Trial Ex. 4 (December 1995 issue of *The Five Percenter* containing a "Correspond with a God Column" for readers who wish to correspond with incarcerated members of the Nation).

***4** Practicing members of the Nation also have various congregative gatherings. For example, the Nation conducts "Civilization Classes," in which more senior members-i.e., those who have studied the lessons longer than others-educate newer members about the lessons and how they can be applied. *See* Trial Tr. at 291:17-23. Such classes are held regularly at the Allah Youth Center. *See* Trial Tr. at 314:25-315:3. Nation members also gather regularly for "Parliaments" and "Rallies." During these gatherings, members come together to help one another learn their lessons, to educate one another by conversing about the lessons' meaning and application (which they call "building"), and to make decisions as a community. *See* Trial Tr. at 59:25-60:10; Trial Tr. at 287:25-288:8; Trial Tr. at 291:2-10.

Finally, as we mentioned earlier, the Nation has an official symbol referred to as the a Universal Flag, consisting of an eight-pointed star containing a number 7, a crescent, a smaller five-pointed star, and the words "In the Name of Allah." *See* Trial Tr. at 155:16-23.

B. DOCS' Policies Concerning the Nation

DOCS deems the "Five Percenters" to be an "unauthorized" or "security threat" group, which is the nomenclature that DOCS uses to describe a gang or other group that it views as an organized threat to prison safety and security.[7] As a result, though DOCS' correctional philosophy is primarily "behavior based," Nation members like plaintiff are regarded as gang members within the New York State correctional system and are consequently prohibited from receiving or possessing any of the group's literature or symbols, as well as from engaging in any organized activities associated with the Nation.

DOCS' policies concerning the Nation stem from its nonrecognition policy designed for security threat group management, which seeks to diminish gangs' power and importance by refusing to legitimize their existence. DOCS does not officially recognize unauthorized or security threat groups, even by tracking their activities internally, because it believes that "to do so would give them undue credibility and attention and embellish their importance." Def. Findings at ¶ 45 (citing Trial Tr. at 340:18-341:19). Pursuant to its non-recognition policy, and to further prevent the growth and/or proliferation of security threat groups through recruiting, DOCS implemented Rule 105.12 of its Standards of Inmate Behavior, which states that inmates "shall not engage or encourage others to engage in unauthorized organizational activities or meetings, display, wear, possess, distribute, or use unauthorized organizational insignia or materials." Def. Trial Ex. I. Rule 105.12 defines an unauthorized organization as "any gang, or organization which has not been approved by the Deputy Commissioner for Program Services." *Id.* Materials violating Rule 105.12 are considered contraband and are not subject to the "Media Review" process DOCS has implemented for determining the acceptability of the majority of other printed and written materials received by prisoners. *See* Trial Tr. at 360:21-361:9. DOCS has also implemented a zero-tolerance gang policy, under which any kind of behavior deemed to be part of gang activity, including possession of written materials or gang-associated emblems or logos, will subject an inmate to discipline. *See* Trial Tr. at 342:13-19.

***5** Applying its complete ban on "Five Percenter" literature pursuant to its non-recognition policy, DOCS forbids plaintiff from having lessons from the 120 Degrees, possessing the Supreme Alphabet and Mathematics, or receiving or possessing *The Five Percenter* and other materials that are either associated with the Nation or contain its symbols.[8] DOCS' designation of the Nation as an unauthorized group also means that plaintiff can meet with no more than four other Five Percenter inmates at a time, and can only do so sporadically. *See* Trial Tr. at 63:6-18. He is thus prohibited from attending or organizing Civilization Classes, Parliaments, or Rallies. Finally, plaintiff is not permitted to eat his meals after sundown on fast days or to meet with other inmates on those days in order to break the fast, privileges that are extended to inmates who adhereJuly 16, 2003 to authorized religions like Nation of

Islam members and Orthodox Muslims. *See* Trial Tr. at 62:11-63:5.

Because DOCS' procedures for becoming "authorized" explicitly exclude religious groups, there does not appear to be an established process by which an unrecognized group like the Nation can attain recognition as a religion from DOCS in order to avoid gang treatment .[9] We surmise from the trial testimony, however, that a religious group cold become effectively "authorized" in a manner equivalent to becoming an authorized group directly through the Department of Program Services by attaining a favorable recommendation for accommodations from DOCS' Division of Ministerial and Family Services that is subsequently approved by executive level DOCS officials. *See* Trial Tr. 525:25-526:15, 530:3-6 (former Director of Ministerial and Family Services John LoConte describing his role in investigating and making subsequent recommendations to executive level DOCS officials concerning inmate requests for religious accommodations). It has apparently been DOCS' practice upon receiving an inmate request for religious accommodations to attempt to "verify the religious practice, whether or not it is something that is understandable in light of organized operational religious communities," Trial Tr. 512:17-21, and to "reach out to the outside religious community of the inmates [making the claim]" in order to confirm the practices' legitimacy and seek assistance in providing accommodations. Trial Tr. at 513:1-2. However, DOCS did not introduce any evidence to indicate that it has made such investigative or outreach efforts with respect to the Nation, despite having received a number of requests for religious accommodation.[10] Moreover, in defending this lawsuit, DOCS has consistently avoided this issue by insisting that plaintiff cannot seek religious recognition because the Five Percenters are, in its view, a gang and not a religion.

C. Conflicting Claims About the Nature of the Nation

While plaintiff claims that DOCS' ban on Nation materials and gatherings violates his free exercise rights under the Constitution and RLUIPA, DOCS argues that his beliefs and practices as a member of the Nation are not protected because they are not sincere or religious in nature, and in any event that its ban of the Nation's literature is justified by violence associated with Five Percenter inmates. The parties' conflicting claims boil down to widely disparate characterizations of the nature of the Nation of Gods and Earths.

***6** DOCS, on the one hand, takes the position that "the Five Percenters," including purported members of the Nation of Gods and Earths, is a violent organization that, like some other gangs, utilizes symbols and seemingly innocuous literature touting the group's positive aspects to identify its members and "territory," as well as to recruit new members into its violent and illegal activities.[11] Such activities include assaults, intimidation, extortion, drug dealing, and retaliation against fellow members who attempt to leave the group or act against other Five Percenters. *See* Def. Findings ¶¶ 56-58. DOCS additionally asserts that Five Percenters utilize the Supreme Alphabet and Mathematics as a code in furtherance of its disruptive activities. *See* Def. Findings ¶¶ 61-63, 103-104. DOCS' stance in this case represents a shift from its previous litigation position that the content of the Nation's literature itself is dangerous.[12] Here, DOCS concedes that the Nation's literature is innocuous, but claims that its ban on Nation materials is still necessary to preserve prison safety and security because the materials are used to facilitate the recruiting efforts and illegal activities of a violent and disruptive organization. Furthermore, according to DOCS, it would give the Five Percenters and other security threat groups increased legitimacy and status, contrary to its non-recognition strategy, if inmates were permitted access to the groups' materials. *See* Def. Findings ¶¶ 42, 52, 90-92, 94-95 (outlining this justification for DOCS' non-recognition strategy in general and for its specific application to the Five Percenters).

Plaintiff, on the other hand, asserts that the Nation is not a gang, but rather a legitimate religious group whose beliefs extol lawfulness, righteousness, freedom, justice, equality, and peace and whose literature focuses largely on positive messages, such as education, self-improvement, self-worth, and responsibility. *See* Pl. Proposed Findings of Fact ("Pl.Findings") ¶¶ 19-21, 35-36. According to plaintiff and other Nation members, "[a]ny purported member who engages in violent or disruptive activities is violating the tenets of the Nation." Pl. Findings ¶ 35; *see also* Trial Tr. at 287:9-288:8. He further asserts that the Supreme Alphabet and Mathematics are a religious numerology system, not a secret code, *see* Pl. Findings ¶¶ 16-19; *see also* Trial Tr. 47:13-16, and that Nation members are allowed to leave the group without reprisals.[13] *See* Pl. Proposed Conclusions of Law ("Pl.Conclusions") 26; *see also* Trial Tr. at 96:4-23; Trial Tr. at 385:6-386:11. Plaintiff thus argues that allowing him to receive the group's literature poses no threat to prison safety or security.

In evaluating these contradictory positions, we make further factual findings below as they become relevant.

DISCUSSION

A. Sincerity and Religious Nature of Plaintiff's Beliefs

***7** As a threshold matter, we discuss DOCS' position that plaintiff may not seek the protections of the First

Amendment or RLUIPA because he has failed to demonstrate either the sincerity of his professed beliefs or that they otherwise merit religious protection.

[1] [2] The Second Circuit set forth the scope of this Court's inquiry into a plaintiff's beliefs in *Patrick v. LeFevre,* a previous free exercise case brought by a Five Percenter inmate, by emphasizing the "limited function of the judiciary in determining whether beliefs are to be accorded first amendment protection" as follows:

> It cannot be gainsaid that the judiciary is singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs. Mindful of this profound limitation, our competence properly extends to determining "whether the beliefs professed by a [claimant] are sincerely held and whether they are, in his own scheme of things, religious."

Patrick v. LeFevre, 745 F.2d 153, 157 (2d Cir.1984) (quoting *United States v. Seeger,* 380 U.S. 163, 185, 85 S.Ct. 850, 13 L.Ed.2d 733 (1965)). Hence, a court's scrutiny of whether a plaintiff deserves free exercise protection "extends only to whether a claimant sincerely holds a particular belief and whether the belief is religious in nature." *Jolly v. Coughlin,* 76 F.3d 468, 476 (2d Cir.1996) (discussing this standard in the context of a free exercise claim brought under the Religious Freedom Restoration Act). Sincerity analysis "seeks to determine the subjective good faith of an adherent in performing certain rituals" and can be guided by such extrinsic factors as a purported religious group's size and history, whether the claimant appears to be seeking material gain by hiding secular interests behind a veil of religious doctrine, and whether the claimant has acted in a manner inconsistent with his professed beliefs. *Int'l Soc'y for Krishna Consciousness v. Barber,* 650 F.2d 430, 441 (2d Cir.1981). However, "courts are not permitted to ask whether a particular belief is appropriate or true-however unusual or unfamiliar the belief may be." *Jolly,,* 76 F.3d at 476. *Patrick v. LeFevre* further instructs us that deciding such subjective issues as the sincerity and the perceived nature of beliefs requires the factfinder-the Court in this case-to assess the claimant's demeanor at trial and "delve into the internal operations of the claimant's mind and in turn assess the sincerity of the held beliefs and the place occupied by such beliefs in the plaintiff's life." *Patrick,* 745 F.2d at 158; *see also id.* at 159. In this regard, the Circuit has cited with approval the definition of religion espoused by philosopher William James-"the feelings, acts, and experiences of individual men in their solitude, so far as they apprehend themselves to stand in relation to whatever they may consider the divine." *Id.* at 158 (quoting W. James, *The Varieties of Religious Experiences* 31 (1910)). Having heard plaintiff's testimony and observed his demeanor throughout the week-long trial, we find that plaintiff meets the two *Patrick v. LeFevre* criteria.

i. Sincerity Analysis

***8** [3] We find that the trial record contained ample evidence of plaintiff's sincerity in his beliefs and that DOCS' arguments to the contrary are unpersuasive. Plaintiff, who is incarcerated for murder, testified that the Nation had "resurrected" him "from ... a life of total unrighteousness." Trial Tr. at 100:8-9. He also described the manner in which his life is guided by his Five Percenter beliefs-specifically the 120 Degrees, Supreme Alphabet, and Supreme Mathematics-and his efforts to conform his life to his beliefs as follows:

> When I look at that first degree in the student enrollment [the first few lessons of the 120 Degrees] and I see the black man is the God of the universe, it's endowed me with the power to know the sky's the limit. I manifested, I make changes in my life. I don't do things I did before. I became a vegan, stopped eating animals. I enhanced my discipline level. My mother's, she's amazed I've been locked up so long and haven't even had a fight. I learn to conduct myself in matters where people respect me for who I am. I don't have to be bothered no more because people respect intelligence, and once they see you living what you say, they respect that. And I learn to conduct myself in a manner which I don't put myself in predicaments that would lead to altercations and things of that nature.

Trial Tr. at 100:14-101:1. He reports that in doing so he has gone from being a person who was "trying to take things to the extreme, you know, on a negative aspect" to being a "very disciplined person, a person that's constantly striving to obtain righteousness" who has "learned and grown to have respect for other people's feelings." Trial Tr. at 43:5-17. Examples of ways in which plaintiff has conformed his life and daily activities with his beliefs as a member of the Nation include memorizing and studying his lessons to the extent possible under DOCS' complete ban, eschewing pork and pork byproducts, fasting on holy days, and officially changing his name from Rashaad Marria to a "righteous" one reflecting Nation values and custom (Intelligent Tarref Allah), not to mention diligently pursuing this litigation since 1997 and engaging in a letter-writing campaign to recover confiscated copies of *The Five Percenter* prior to that. *See* Trial Tr. at 38:14-18; 100:17-20. When one

considers the totality of plaintiff's testimony, it is apparent that he has structured his daily lifestyle in conformity with the rigors of membership in the Nation for some time. This conclusion is underscored by plaintiff's record of conduct as a prisoner, which includes earning his GED, participating in numerous other classes and programs, serving on the Inmate Liaison Committee,[14] and no incidents of violence or disruptive conduct. *See* Trial Tr. at 126:12-14; June 18, 2001 Reply Decl. of Rashaad Marria Exs. F-J (certifications and letter of commendation documenting various classes and programs in which plaintiff participated while incarcerated).

***9** Plaintiff's sincerity was further substantiated at trial by the largely unchallenged testimony of Cee Aaquil Allah Barnes and Born Justice Allah, representatives of the Allah Youth Center, concerning the Nation's apparent legitimacy outside prison.[15] *See* Trial Tr. at 296:17-298:13 (DOCS' extremely limited cross examination of Mr. Barnes); Trial Tr. at 323:10-12 (DOCS declining to cross examine Mr. Justice Allah). There was no suggestion by DOCS that either of these representatives was involved in a criminal organization. Nor did DOCS contest the testimony that the Nation's non-incarcerated members include police officers, doctors, lawyers, and other professionals who would presumably not be part of a violent gang. *See* Trial Tr. at 294:17-21. Moreover, the Allah Youth Center's 501(c)(3) tax status and the favorable lease that it continues to receive from New York City, neither of which DOCS disputes, are strong indications that the Nation itself is not believed to be a criminal organization outside prison.[16] The various community-oriented programs and activities the representative described as taking place at the Allah School and Youth Center are also consistent with plaintiff's claims that the Nation is a sincere, legitimate religious group. *See* Trial Tr. at 290:16-25 (Cee Barnes testifying about health and book fairs taking place at the Allah Youth Center), 292:1-16 (Cee Barnes testifying about the Nation's prison outreach and assistance given to former inmates); Trial Tr. at 313:17-315:19 (Born Justice Allah testifying about the youth programs run at the Allah School).

The Nation thus appears to be in the somewhat unique position of having a legitimate existence outside prison while being classified exclusively as a security threat group within DOCS.[17]

In support of its position that plaintiff is insincere, DOCS makes a series of unpersuasive arguments. Several concern instances in which DOCS claims plaintiff did not conform his conduct to his professed Five Percenter tenets and thereby suggests that he is essentially faking them in order to gain the legitimacy that religious protection would afford his gang participation. *See* Def. Findings ¶¶ 21-32. DOCS first cites three instances in which plaintiff was disciplined by prison authorities for nonviolent conduct: (1) giving false information to a corrections officer, to wit, falsely telling the officer that he had received legal pads from the prison commissary; (2) failing to obey a direct order from a guard who apparently told him to stay away as he was attempting to observe another inmate's grievance meeting in the sergeant's office as the representative of the Inmate Liaison Committee; and (3) possessing an "altered item"-a toothbrush that plaintiff testified he used as a makeshift screwdriver by outfitting it with the sliding metal piece from the inside of a pair of headphones-that could be used as a weapon. *See* Def. Findings ¶¶ 29-31; Trial Tr. at 124:22-129:9. Whether or not one believes plaintiff's assertions that he was disciplined unjustly in the first two instances, they are a far cry from the kind of marked or regular departure from professed beliefs that would lead us to find a plaintiff insincere. *Cf. Int'l Soc'y for Krishna Consciousness v. Barber,* 650 F.2d 430, 441 (2d Cir.1981) (citing, as an example of the type of inconsistent act that would lead a court to find an adherent insincere, a Jewish adherent claiming a free exercise violation from being compelled to appear in court on the Sabbath who otherwise works on Saturdays). In the case of the altered item, which no one disagrees constituted contraband, we find credible plaintiff's explanation that he was simply using it as a makeshift screwdriver, given that he did not alter the rounded, blunt tip of the headphone piece and made no real attempt to conceal the item, which was found in a bucket filled with radio parts and other knick-knacks where it was regularly kept. *See* Def. Trial Exhibit OO (photocopy of "altered item").[18]

***10** Other evidence of inconsistent conduct, according to DOCS, includes plaintiff's mentioning only that the Nation's dietary restrictions require him to eschew pork while Cee Barnes testified that the Nation's tenets require one "not to eat pork and if you go a little bit further ... not to eat any type of scavenger, and a scavenger is like shrimp or tuna fish," Def. Findings ¶ 28; *see also* Trial Tr. at 287:7-8, plaintiff's allowing his subscription to *The Five Percenter* lapse for a time in 1996, *see* Def. Findings at ¶ 26, and plaintiff's adopting a NOI religious designation during a period in which he attended a number of NOI services. *See* Def. Findings ¶ 27. The purported inconsistencies raised by the first two arguments seem sufficiently minor that we need not address them in detail here, except to note that DOCS does not contest plaintiff's testimony that he has adhered to a vegan diet since becoming a Nation member (meaning that he does not eat shrimp or tuna) and that the lapse in plaintiff's subscription occurred during a period in which DOCS began to confiscate the newspaper as illegal contraband.[19]

With respect to DOCS' argument about the NOI designation, plaintiff testified that he sporadically attended both NOI and other groups' services while remaining a member of the Nation in order to "get an

understanding of what separates the two and why people think the way they think," Trial Tr. at 67:3-5, but that NOI was the only group for which DOCS required him to sign a religious designation form in order to be allowed to attend the services. *See* Trial Tr. at 67:22-68:16. He emphatically, and credibly, denied that his attendance at any other group's services constituted a commitment to be a part of a religious community other than the Nation. *See id.* We find it unsurprising that a member of the Nation, which builds on related religious traditions, like plaintiff would seek to attend NOI services and correspondingly sign up as a NOI adherent when DOCS treats the Nation itself as an unauthorized group, especially since this is exactly what DOCS encouraged him to do in response to his requests for religious accommodations.[20] *Cf. Campos v. Coughlin,* 854 F.Supp. 194 (S.D.N.Y.1994) (finding "not persuasive" DOCS' attempt to cast doubt on the sincerity of Santeria adherents' religious beliefs because they had previously self-identified as "Catholic"). Moreover, DOCS' argument that we should find plaintiff insincere because he signed up for and attended NOI services is in tension with its claim, discussed *infra,* that plaintiff's beliefs are not substantially burdened by its policies because he can gain access to the Nation's lessons through the NOI (presumably in part by attending their services).

Ultimately, the point of sincerity analysis is to "provide[ ] a rational means of differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Patrick,* 745 F.2d at 157 (citation omitted). Having engaged in such an analysis, and while we do not find it inconceivable that a gang or other group might seek to cloak itself in a purported "religion" in order to increase its legitimacy, we find DOCS' attempt to cast doubt upon the sincerity of the plaintiff's beliefs in this case singularly unpersuasive.

ii. Religious Nature of Plaintiff's Beliefs

***11** DOCS' claims that plaintiff's beliefs are not "religious in nature" are similarly unpersuasive. DOCS' argument on this issue throughout this litigation has been a semantic one, focusing on plaintiff's and other Nation members' reluctance to call the Nation of Gods and Earths a "religion." *See Marria v. Broaddus,* 200 F.Supp.2d 280, 292 (S.D.N.Y.2002). DOCS asserts that Nation members' refusal to call the group a "religion" indicates that it should not be treated as one and that plaintiff's statements that he believes that the Nation fits the legal definition of a religion are merely a self-serving tactic to further this litigation. *See* Def. Findings ¶¶ 3-7, 23-25. In support of this argument, DOCS notes that plaintiff stated at his first deposition that the Five Percenters are not a religion, but rather a way of life. *See id.* ¶ 24; *see also* Feb. 12, 2001 Decl. of Dale Artus Ex. Q (issue of *The Five Percenter* with headline and article entitled "We Are Not A Religion").

The weakness of DOCS' semantic argument is evident. While it is somewhat understandable that a group that refuses to describe itself as a "religion" did not inspire immediate outreach from DOCS officials, the law of the Free Exercise Clause does not turn on mere semantic distinctions. *Cf. Graham v. Cochran,* 96 Civ. 6166, 2000 U.S. Dist. LEXIS 1477, at *30 (S.D.N.Y. February 14, 2000) (Ellis, M.J.) (noting, in a similar case brought by a Five Percenter inmate, that "just as calling one's beliefs a 'religion' does not make it such for constitutional purposes, failure to label one's beliefs a 'religion' does not prohibit constitutional protection"). The significance of plaintiff's beliefs in his life is considerably more relevant than what plaintiff and other members of his community choose to call their beliefs-"a rose by any other name," as the saying goes, "would smell as sweet." As already described in some detail, plaintiff has submitted substantial evidence that he has been a practicing member of the Nation since August of 1994 and that he lives by the Nation's teachings and observes the Nation's holy days to the extent possible under DOCS regulations. Furthermore, plaintiff, the Allah School representatives, and an expert cultural anthropologist all testified that the Nation carries the same significance for its members as Christianity, Judaism, and Islam do for their adherents, and that the Nation's contrasting belief system means that one could not be a part of those religions and the Nation simultaneously. Overall, plaintiff has convincingly demonstrated the central significance of the Five Percenter belief system in his daily life and his understanding of that which he considers divine, which is in accordance with the William James definition of religion. Finally, it would be incongruous for us to reject the notion that the Nation's belief system is "religious in nature" when it is, in several respects, more orthodox in both its practices and notions of the "divine" than the belief systems espoused by other groups that currently receive religious protections.[21]

***12** For these reasons, we find that plaintiff's beliefs as a member of the Nation of God's and Earths are both sincere and "religious in nature" and therefore entitled to RLUIPA and First Amendment protection under the free exercise clause. *Cf. Patrick v. LeFevre,* 745 F.2d 153 (2d Cir.1984) (finding for summary judgment purposes that an inmate's beliefs as a Five Percenter were constitutionally protected); *Breland v. Goord,* No. 94 Civ. 3696, 1997 WL 139533 (S.D.N.Y. March 27, 1997) (same); *Graham v. Cochran,* No. 96 Civ. 6166, 2000 U.S. Dist. LEXIS 1477, (S.D.N.Y. February 14, 2000) (same); *Lord Natural-Self Allah v. Annucci,* No. 97 Civ. 607, 1999 WL 299310 (W.D.N.Y. March 25, 1999) (Heckman, M.J.) (finding, for purposes of a preliminary injunction, that "Five Percenterism, in its pure uncorrupted form, represents a system of beliefs which, outside the prison

context, does not advocate or promote violence").

B. Religious Land Use and Institutionalized Persons Act

Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA") in response to the Supreme Court's holding in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997), declaring unconstitutional the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb-1(b).[22] RLUIPA applies both to programs or activities that receive federal financial assistance and to substantial burdens on religious exercise having an effect on interstate commerce. 42 U.S.C. § 2000cc-1(b). Although other courts have debated the statute's constitutionality, *see e.g., Mayweathers v. Newland,* 314 F.3d 1062 (9th Cir.2002) (finding RLUIPA constitutional); *Madison v. Riter,* 240 F.Supp.2d 566 (W.D.Va.2003) (ruling that RLUIPA violates the Establishment Clause), defendants in this case have never made such a constitutional challenge. RLUIPA's constitutionality, moreover, was assumed in our earlier opinion at the case's summary judgment stage, *see Marria v. Broaddus,* 200 F.Supp.2d 280 (S.D.N.Y.2002), without subsequent objection by either side, and we maintain that assumption for purposes of this decision. RLUIPA provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person -
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.
>
> 42 U.S.C. § 2000cc-1(a). Under RLUIPA, once a plaintiff produces prima facie evidence to support a free exercise violation, the plaintiff bears the burden of persuasion over whether the regulation substantially burdens his or her exercise of religion and the state bears the burden of persuasion on all other elements. 42 U.S.C. § 2000cc-2(b).

By its terms, RLUIPA is to be construed to favor broad protection of religious exercise. *See* 42 U.S.C. § 2000cc-3(g). The statute defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). This reflects an extension of the definition provided in RFRA, which defined exercise of religion as "the exercise of religion under the First Amendment to the Constitution." 42 U.S.C. § 2000bb-2(4); *Kikumura v. Hurley,* 242 F.3d 950, 960 (10th Cir.2001) (noting the change in definition); *Henderson v. Kennedy,* 265 F.3d 1072, 1073-74 (D.C.Cir.2001) (noting that the definition of religious exercise in RLUIPA expanded upon the protections of RFRA). The otherwise similar language of RFRA and RLUIPA, however, suggests that cases decided under RFRA may guide this Court's inquiry in this case. *See Wyatt v. Terhune,* 315 F.3d 1108, 1115 (9th Cir.2003) (noting that RLUIPA "provides rights similar to those delineated in RFRA").

***13** In seeking to defeat plaintiff's RLUIPA claim, DOCS argues that the record does not establish that its ban on Five Percenter literature and gatherings substantially burdens the exercise of plaintiff's beliefs. *See* Def. Findings ¶¶ 9-20. DOCS further asserts that its regulations are in furtherance of a compelling governmental interest in prison security and that the ban on Five Percenter literature and congregative gatherings is the least restrictive means of effectively controlling security threat group behavior. *See* Def. Findings at 24-25.

C. Evaluating DOCS' Treatment of the Five Percenters Under RLUIPA

i. Substantial Burden

[4] Like its predecessor RFRA, RLUIPA requires a plaintiff to demonstrate that his right to free exercise of religion has been substantially burdened. The Supreme Court has defined a substantial burden in this context as "[w]here the state ... denies [an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs. While the compulsion may be indirect, the infringement upon free exercise in nonetheless substantial." *Thomas v. Review Bd. of the Indiana Employment Sec. Div.,* 450 U.S. 707, 717-18, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981); *Jolly,* 76 F.3d at 477 (citing this passage of *Thomas* with approval in considering Rastafarian inmate's RFRA claim). Despite DOCS' treatment of the Nation exclusively as a security threat group and complete ban on Nation materials and literature, defendants argue that plaintiff's Five Percenter beliefs are not substantially burdened because he can still practice certain aspects of his beliefs. These include possessing the Bible and Koran, gathering informally with five or fewer Five Percenters at certain times of day, learning the Supreme Alphabet and Mathematics orally, gaining access to lessons through NOI, celebrating certain holidays informally, and communicating with Nation members outside prison (though not through the *Five Percenter* newspaper). *See* Def. Findings ¶¶ 9-20.

Defendants' arguments are untenable. Throughout this

litigation, plaintiff has credibly maintained that the study (alone and with others) of the 120 Degrees, Supreme Mathematics, the Supreme Alphabet, as well as other lessons found in *The Five Percenter,* is an integral part of the daily practice of the Nation's beliefs, and his testimony was substantiated by that of other Nation representatives. Furthermore, in a religious community that lacks both a formal organizational structure and a fixed place of worship, *The Five Percenter* newspaper serves as a central link and mechanism of communication, clearly falling within RLUIPA's broad protections of religious exercise "whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). There is no question that under DOCS' regulations plaintiff may not possess these materials and study them with other inmates and is denied the opportunity to gather with other Nation members other than informally.[23] The evidence at trial also established that the Bible and Koran serve only as secondary religious sources for Nation members, refuting DOCS' argument that plaintiff can meaningfully practice his religion while possessing only these texts.[24] Finally, DOCS' contentions that plaintiff is able to obtain the 120 Degrees through NOI and fast on holy days contradict the evidence that plaintiff cannot receive the lessons from NOI without being an official member registered with an NOI temple outside prison,[25] *see* Trial Tr. at 57:8-15; Blocker Decl. ¶¶ 10-11, and that he is not permitted to eat his prison meal after sundown on holy days or gather for that meal (as are NOI and Orthodox Muslim inmates), but must do so using food he has saved from the prison commissary. *See* Trial Tr. at 62:11-63:5.

***14** We thus find that plaintiff's free exercise of his religious beliefs are substantially burdened by DOCS' current policies concerning Five Percenters.

ii. Compelling Interest and Least Restrictive Means Tests

Moreover, DOCS has failed to establish that its complete ban on Five Percenter materials, literature, and activities furthers a compelling security interest and is the least restrictive means of doing so under RLUIPA. It is undisputed that maintaining the safety, security, and internal order of prisons is a compelling governmental interest. *See Campos v. Coughlin,* 854 F.Supp. 194, 207 (S.D.N.Y.1994) ("prison security and penological institutional safety goals are indeed a most compelling governmental interest"); *Muhammad v. Coughlin,* 904 F.Supp. 161 (S.D.N.Y.1995) (finding compelling interest in internal order in prisons); *Breland v. Goord,* No. 94 Civ. 3696, 1997 WL 139533, at *4 (S.D.N.Y. March 27, 1997) ("[t]here is no question that prison safety and security are legitimate penological interests"). We are also mindful of the well-established judicial tradition of giving heightened deference to the experience and judgment of prison officials on such "central" issues in the context of inmate First Amendment claims. *Duamutef v. Hollins,* 297 F.3d 108, 112 (2d Cir.2002) (citing *Giano v. Senkowski,* 54 F.3d 1050, 1054 (2d Cir.1995) and *Thornburgh v. Abbott,* 490 U.S. 401, 415, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) *quoting Pell v. Procunier,* 417 U.S. 817, 823, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974) for the proposition that prison security is "central to all other corrections goals"). However, it is equally well-established that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner v. Safley,* 482 U.S. 78, 84, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), and our tradition of deference on security matters does not require this Court to altogether abdicate its role in constitutional cases brought by inmates. Hence, while prison officials "must be given latitude to anticipate the probable consequences of certain speech, and must be allowed to take reasonable steps to forestall violence," *Giano v. Senkowski,* 54 F.3d 1050, 1055 (2d Cir.1995), they "cannot merely brandish the words 'security' and 'safety' and expect that their actions will automatically be deemed constitutionally permissible conduct." *Campos,* 854 F.Supp. at 204. *Cf. Jolly v. Coughlin,* 76 F.3d 468, 479 (2d Cir.1996) ("The DOCS policy is not insulated from scrutiny merely because the defendants brandish the concepts of public health and safety."). Congress also made it clear in enacting RFRA/RLUIPA that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the [A]ct's requirements." *Campos,* 854 F.Supp. at 207 (quoting the Senate Report to RFRA); *Jolly,* 76 F.3d at 479 (1996) (same). Even the less restrictive test set forth in *Turner v. Safley* that governed prisoner free exercise claims prior to the enactment of RFRA/RLUIPA recognized that deference is not warranted when a prison regulation represents an exaggerated response to security objectives. *See Turner,* 482 U.S. at 97-98 ("No doubt legitimate security concerns may require placing reasonable restrictions upon an inmate's right to marry, and may justify requiring approval of the superintendent. The Missouri regulation, however, represents an exaggerated response to such security objectives.").

***15** Here, DOCS proposes to treat exclusively as a gang a group that has had a law-abiding existence outside prison for the better part of 40 years, that is an offshoot of another group that DOCS considers a religion, and that has practices that largely resemble those of recognized religious groups, with the consequence that DOCS has banned literature which it concedes is facially innocuous as well as any other expression of religious identity associated with the group. In order for such a ban to be upheld, there ought to be some sense that DOCS is substantially correct in its decision to treat the group exclusively as a gang and not a religion. *Cf. Jolly,* 76 F.3d at 479 (holding in a RFRA analysis that "the connection

between the application of a policy to an individual and the furtherance of the government's goals must be clear").[26] The evidence DOCS presented at trial, however, failed to justify such treatment.

First, DOCS failed to provide any evidence that its decision to treat "Five Percenters" as a security threat group was either reasoned or informed. The trial record is almost entirely devoid of evidence concerning DOCS' initial decision to treat the Nation as a gang and not a religion. DOCS possesses no records whatsoever setting forth the basis for its decision or even documenting its decision-making process concerning the Five Percenters. None of the DOCS officials who testified at trial were the decision-makers, nor could they do more than speculate about who the decision-makers were, when the decision was made, how it was made, or what information was deemed relevant.[27] Moreover, DOCS admits that its classification of Five Percenters as a security threat group is not based on any guidelines or specific criteria. *See* Trial Tr. at 340:16. Nor, pursuant to its non-recognition policy, does DOCS maintain statistics concerning gang activity or even the rough number of gang members in the system. *See* Trial Tr. at 341:16-19, 345:10-13. Rather, its decision to label the Nation itself as a security threat was based on the subjective sense of the decision-makers-whomever they were-that the group as a whole was a gang. However, it is clear that DOCS knows little about the Nation's seemingly legitimate existence outside prison,[28] and DOCS failed to present any evidence concerning how it came to the conclusion that the Nation of Gods and Earths is not a religion in spite of the fact that several inmates have sought religious accommodations for their beliefs as members of the Nation. *See* Footnote 10 *supra.* It is also worth noting that DOCS' previous litigation position claiming that the Nation's literature contained violent messages indicates that it was misinformed about at least that aspect of the Nation at the time it made its classification and suggests that its treatment of the Nation exclusively as a gang may be based on either exaggerated fears or speculation.

Lacking a record for its decision, DOCS has attempted to justify its absolute ban *post hoc* by arguing that the evidence it has compiled in preparation for this litigation demonstrates that "the Five Percenters" are indeed a security threat group, and hence that the mere presence of the Nation's materials in the prison setting or any other forms of "recognition" pose a security threat by legitimating the group and facilitating its recruiting efforts. Several DOCS corrections officers and officials who testified at trial professed a general understanding from their training and experience that Five Percenters in prison were associated with violence and disruption, but had personal knowledge of only a few incidents involving inmates identified as Five Percenters despite their decades of combined experience.[29] *See* Def. Findings ¶¶ 66-68, 70-71, 74. Ron Holvey, a corrections official from the New Jersey Department of Corrections with expertise in gangs and related security issues, testified that the New Jersey prison system considers the Five Percenters to be its largest security threat group and that, after reviewing the materials and statements DOCS compiled for this litigation, he would support New York's ban on the Nation's literature as a security threat. *See* Trial Tr. at 710:1-2, 722:17-21. Mr. Holvey, however, admitted that he had never spoken with a member of the Nation of Gods and Earths in New York or set foot inside a DOCS prison. *See* Trial Tr. at 729:24-730:5. Moreover, he went on to testify that his perception of the Nation outside prison is that it is not a religion because "[t]hey don't have temples or mosques or churches. They don't have a minister that comes in. There is nothing formal about their organization. They don't have priests. They don't have rabbis. They don't have imams. They don't-they worship-they consider themselves to be God." *See* Trial Tr. at 741:10-14. Additional DOCS evidence concerning alleged Five Percenter gang activity came from two inmate-witnesses who claimed to have experienced violence and threats at the hands of Five Percenters. Their testimony, however, lacked consistency and credibility, leaving us with little reliable evidence beyond the fact that these two inmates regarded the Five Percenters as a gang.[30]

***16** DOCS' principal form of "hard evidence" concerning the nature of the Five Percenters consisted of compilations of facility reports concerning unusual incidents, inmate transfer requests, and inmate separation requests that contain gang-like references to Five Percenters and sometimes report violent acts attributed to individuals or groups identified as Five Percenters. *See* Trial Tr. at 363:23-364:10, 472:9-10, 502:5-8; Def. Trial Exhibit A (inmate transfer requests not received into evidence); Def. Trial Ex. B (sample separatee reports not received into evidence); Def. Trial Exhibit C (unusual incident reports not received into evidence); Def. Trial Exhibit D (protective custody reports received into evidence); Def. Trial Ex. M (summary of separatee report "hits" for "Five Percenters" and other groups from 1990 to 1999 not received into evidence). Although there is no evidence to suggest that DOCS' decision-makers ever reviewed these reports, DOCS argues that they constitute the kind of evidence that its decision-makers would have known about when determining that the Five Percenters were a security threat group and provide an objective basis for its decision to treat the Nation exclusively as a gang. *See* Def. Findings ¶¶ 77-78, 82. The transfer reports were excluded at trial because they contained hearsay within hearsay and did not otherwise exhibit indicia of reliability.[31] *See* Trial Tr. at 434:11-453:3; Fed. R. Enid. 802; *Parsons v. Honeywell, Inc.,* 929 F.2d 901, 907 (2d Cir.1991) (quoting with approval the Ninth Circuit's opinion in *United States v. Passant,* 703 F.2d 420, 424 (9th Cir.1983) stating that "[it is well established that entries in a police report which result from the officer's own

observations and knowledge may be admitted *but that statements made by third persons under no business duty to report may not."* (emphasis added by Second Circuit)); *Giles v. Rhodes,* No. 94 Civ. 6835, 2000 WL 1425046, at *8-*9 (S.D.N.Y. Sept.27, 2000) (ruling that prison unusual incident reports are inadmissible hearsay not subject to the Business Record Exception under Fed. R. Enid. 803(6)). There are, in fact, several additional reasons to doubt their reliability, as well as the reliability of the reports underlying DOCS' summary chart of separatee "hits" for the term "Five Percenters," which was similarly excluded due to DOCS' failure to comply with the Federal Rules of Evidence by providing plaintiff with the underlying documents.[32] *See* Trial Tr. at 468:17-480:25; Fed. R. Enid. 1006 (stating that voluminous evidence "may be presented in the form of a chart, summary or calculation," but that the underlying documents "shall be made available for examination or copying, or both, by other parties"). Among the unusual incident reports-which document occurrences of violence or other serious disturbances-the number of relevant "hits" for references to Five Percenters was only 67 out of approximately 102,000 incidents over the ten year period from 1990 to 1999. *See* Trial Tr. at 241:13-24.

***17** Thus, DOCS' *post hoc* justifications for its ban are inadequate to establish that it has a principled basis for labeling the Nation a security threat group. Finding DOCS' absolute ban to be justified based on the episodic accounts of its witnesses and unreliable facility reports would require us to make a speculative leap concerning the nature of an entire group based on spotty evidence about some of its supposed members that would be in tension with what we have learned about the group's legitimate existence outside prison. We stress that we are not saying that there are not prisoners who would describe themselves as Five Percenters who have committed crimes or otherwise violated prison regulations. However, the limitations of this "fact" should be obvious. *Cf. Breland v. Goord,* No. 94 Civ. 3696, 1997 WL 139533, at *5 (S.D.N .Y. March 27, 1997) ("The mere fact that inmates identified as Five Percenters have been involved in altercations with other inmates and guards does not establish that the literature at issue here caused those incidents."). There are prisoners who would describe themselves as Catholics, Protestants, Jews, Muslims, NOI, etc. who likewise violate prison regulations, and it is easy to imagine a situation where the common ethnic or religious bond shared by members of a group could serve as the impetus for some to band together and at times act cohesively, but no one would suggest that such facts preclude the classification of these recognized groups as religions deserving of First Amendment protection.[33]

A hypothetical dealing with a more mainstream group further illustrates the point: imagine, for example, that one or several gangs of inmates were to form within the New York State Correctional system each of whose membership is united by a common religious/ethnic identity-Judaism. The gangs could either be formal disruptive organizations or simply the result of an agreement among some Jewish inmates to "get each other's back" in a pinch. Imagine further that the members of the Jewish gang(s) identify themselves by displaying the Star of David, utilize Hebrew letters (which also stand for numbers) as a "code" similar to Five Percenters' alleged use of the Supreme Alphabet and Mathematics, and sometimes recruit new members by using the Bible and other traditional Jewish texts. DOCS' records would soon be replete with reports containing statements that "the Jews" were involved in violent and disruptive activities and such groups would clearly pose a security threat to prison staff and inmates. But would this transform Judaism from a religion into a security threat group? Would DOCS, in such a situation, ban anyone who identified themselves as a Jew from possessing a Hebrew Bible and Alphabet or from displaying a Star of David? The trial testimony of DOCS officials convinces us that it would not, or that it would at least exhaust other avenues of redress before subjecting the "sincere believers" of a mainstream group to the type of blanket treatment that Nation members currently receive.[34]

***18** While we do not question the sincerity of the witnesses who testified as to their belief that there is a Five Percenters gang, their convictions alone are not sufficient. There must be admissible evidence to justify DOCS' policies, and no such evidence was introduced. Particularly lacking was evidence concerning the structure of the alleged Five Percenters gang. We are also troubled by the "Catch-22" aspect of its policies concerning the Nation, whereby the group's "unauthorized" classification leads DOCS to train its employees to recognize Five Percenters exclusively as gang members and otherwise innocuous literature and activities as threatening.[35] As such, we find the anecdotal evidence that DOCS has presented insufficient to justify after the fact its decision to treat the Nation solely as a gang under RLUIPA. Moreover, the trial testimony and submissions throughout this case suggest that, while DOCS now formally concedes that the Nation's literature does not contain violent or disruptive content, its officials' perception of the threat posed by the Nation and its literature was and potentially still is affected by their belief that it espouses an objectionable racist ideology.[36] *Cf. Marria v. Broaddus,* 240 F.Supp.2d 280, 295 (S.D.N.Y.2002) (" "DOCS' argument that it bans Nation literature because of what it represents and not what it says seems disingenuous given DOCS' prior position in past litigation from the same time period that the literature itself encourages violence."). Whether or not these lingering objections are justified as a matter of principle, they raise questions about whether DOCS' absolute ban on Nation literature is unrelated to the literature's content. *See generally Turner,* 482 U.S. at 90 ("We have found it important to inquire whether prison regulations restricting

inmates' First Amendment rights operated in a neutral fashion, without regard to the content of the expression."); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("The Free Exercise Clause commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures. Those in office must ... ensure that the sole reasons for imposing the burdens of law and regulation are secular.").

As a result of the foregoing, we cannot find, based on the trial record, that DOCS' classification of the Nation as a security threat group and absolute ban on Nation literature further a compelling security interest and is the least restrictive means of doing so.[37]

D. Relief

This case, like others in which prison inmates have asserted their First Amendment right to practice non-mainstream religions while incarcerated, "underscores the complex nature and difficulty of accommodating various religious belief systems and tenets within a prison system, wherein violence is a real and daily threat." *Campos v. Coughlin,* 854 F.Supp. 194, 197 (S.D.N.Y.1994). We have found that plaintiff is a sincere adherent to a religious belief system that qualifies for First Amendment protection, but are also prepared to accept for the purposes of this decision DOCS' claims that prison inmates identified as "Five Percenters" have been associated with instances of violence and disruption. This raises the possibility that "the Five Percenters" may somewhat uniquely connote *both* a religion *and* a gang in the New York State prison system (though the sincere religious adherents and gang members may not be the same inmates).

***19** It is apparent, however, that in pursuing its non-recognition policy DOCS has never fully considered the possibility or the policy consequences of the Nation qualifying for First Amendment protections, and did not do so at any time during the pendency of this case. Based on our review of the evidence and applying RLUIPA's compelling interest and least restrictive means tests in light of our determination that plaintiff is entitled to free exercise protection, we have concluded that plaintiff has clearly established his right to some of the relief requested. With respect to other of plaintiff's requests, given the tradition of judicial deference to the considered judgment of correction officials and the indications that there are some nominal Five Percenter inmates who violate prison rules, we remand them to DOCS in order for DOCS to reevaluate its policies in light of our free exercise ruling and to determine the appropriate accommodations that can be made consistent with security needs.[38] Our conclusions are set forth below.

i. 120 Degrees

In our summary judgment opinion we noted that DOCS' position concerning the 120 Degrees, "namely, that one religious group may possess the same materials that if possessed by another contribute to gang formation" was "a challenging one to sustain." *See Marria v. Broaddus,* 200 F.Supp.2d 280, 295 (S.D.N.Y.2002). Based on the trial evidence, DOCS cannot properly prevent plaintiff from receiving and possessing the 120 Degrees consistently with the Free Exercise clause and RLUIPA. As the book serves as the central text in plaintiff's religious belief system, he is clearly substantially burdened if he is denied access to it. In any event, its content is identical to the texts DOCS currently permits NOI to use and possess. Thus, because the 120 Degrees is associated with more than one group, including a currently "authorized" religious group, DOCS cannot tenably argue that its mere presence in prison legitimizes gang activity. Therefore, we order DOCS to permit plaintiff to possess a copy of the 120 Degrees in accordance with his beliefs as a member of the Nation of Gods and Earths, and that his access cannot be conditioned upon his joining the Nation of Islam.[39]

ii. Supreme Alphabet and Mathematics

We similarly grant plaintiff's request to be allowed to possess a copy of the Supreme Alphabet and Mathematics. As we noted earlier, these numerological devices are central aspects of the Nation's beliefs and practices, have remained unchanged since the 1960's, and are widely available to law enforcement on the Internet and elsewhere. DOCS admits that the alleged "code" is a simple one that can be learned by inmates orally even under its current ban, but maintains that the Supreme Alphabet and Mathematics are sometimes used by Five Percenter inmates to send coded messages to one another in furtherance of gang activities and would require the expenditure of significant resources to train officers to recognize and decode if they were disseminated among the inmate population (DOCS has also argued that the *Five Percenter* newspaper poses a security threat because it contains "code"). *See* Def. Findings ¶¶ 60-63, 103-104; Trial Tr. 407:13-15; Trial Tr. 665:14-19; Trial Tr. 692:9-693:8. While the Supreme Alphabet and Mathematics may indeed be susceptible to being used as a code, DOCS' arguments are unpersuasive. Toni Bair, a professor of criminal justice, former Warden of Virginia's Mecklenberg Correctional Center "Supermax" facility, and former assistant commissioner of the New York City Department of Corrections who testified as plaintiff's expert on prison security, succinctly refuted DOCS'

claims that the Supreme Alphabet and Mathematics threaten prison security:

> ***20** It's published. The code is published. It is on the Internet. It is in the newspapers. It's everywhere. In order for a code to be effective and used, you know, covertly to be subversive or create problems in the institution, the code must be unbreakable and must not be, you know, common knowledge.... To ban the Mathematics and Alphabet because it is a code, you know, would be ludicrous. If we do that, why don't we ban Spanish, for example, because I would daresay that there is not a tremendous number of correctional officers in DOCS that are bilingual and yet we allow Spanish not only to be spoken but documents inside institutions that are Spanish ... and they are much more difficult to translate than this code would be.

Trial Tr. at 246:17-247:12.

We are persuaded that the Supreme Alphabet's and Mathematics' primary purpose is a religious one, and that, to they extent inmates might attempt to use them as a code, messages could be translated with minimal effort and training. Furthermore, the ability of inmates to communicate with each other by using the Supreme Alphabet and Mathematics in covert fashion would appear to be more challenging and limited than conversations in a foreign language not spoken by guards. Hence, we see no connection between DOCS' current ban on possessing the Supreme Alphabet and Mathematics and a compelling security interest, and order that plaintiff be permitted to possess them.[40]

iii. Other Materials and Symbols, Gatherings, and Fasts

We remand the remainder of plaintiff's claims to DOCS to reevaluate its policies concerning the Nation and determine what materials and religious practices it can accommodate in light of our ruling that plaintiff's beliefs as a member of the Nation are entitled to free exercise and RLUIPA protection. It is incumbent upon DOCS to make a determination about the feasibility of allowing sincere adherents like plaintiff to possess literature and to engage in religious practices in light of its security concerns.

In particular, DOCS must reevaluate how, if at all, it can accommodate plaintiff's request to receive *The Five Percenter*. In this regard, plaintiff has proposed two suggestions addressing DOCS' concerns about permitting security threat group members to use innocuous literature to recruit, control, and intimidate as less restrictive alternatives to a complete ban on the Nation's literature. First, plaintiff suggests that DOCS utilize the existing media review committee process to redact symbols that it views as posing a security threat. Alternatively, plaintiff proposes that DOCS maintain a copy of *The Five Percenter* in the prison library that plaintiff can presumably sign for and read individually during normal library time without removing the copies from the library. At trial, DOCS' efforts to address the library suggestion were particularly unconvincing.[41] On remand, because plaintiff has established that his religious beliefs are substantially burdened by DOCS' current ban on *The Five Percenter,* DOCS bears the burden of demonstrating why his proposals are infeasible on remand.

***21** On the issue of congregative gatherings, such as parliaments, rallies, and civilization classes, DOCS has thus far dismissed the possibility of allowing such activities on the assumption that any sanctioned congregation of members of an unauthorized group would elevate that group's status and permit the group's members to conspire to engage in violent activities. Here again, DOCS' position suffers from the incorrect assumption that all Five Percenters are gang members. DOCS has also pinned its objections in part on the assumption that the gatherings would be unsupervised. *See* Def's. Findings at ¶ 122 ("Permitting plaintiff to participate in *unsupervised* inmate led parliaments would create a security risk in the prison by allow [*sic*] Five Percenters to organize, recruit additional members and serve as a forum for criminal conspiracy.") (emphasis added); Trial Tr. at 461:3-11 (Dale Artus stating that his understanding of a parliament is "an unsupervised meeting place for the individuals who wish to be involved in this type of activity to be allowed to meet and learn" that he would view as "detrimental to the safety and security of the facility and the department"). Plaintiff's counsel, however, has made it clear that he is not requesting unsupervised parliaments, and we note that Born Justice Allah from the Allah Youth Center testified at trial that he and other Nation members from outside prison would volunteer to assist DOCS in accommodating rallies and parliaments through advice and supervision. *See* Trial Tr. at 316:20-317:9. We recognize, however, that DOCS must consider security concerns, as well as considerations of limited time, space, and resources, in evaluating whether and how accommodations can be made for such gatherings.

Finally, DOCS must determine what can be done consistent with security concerns with respect to plaintiff's requests to receive late meals and gather with other inmates when he fasts in observance of Holy Days.

CONCLUSION

Based on the foregoing, it is ordered that DOCS conform its policies concerning the group known as the Nation of Gods and Earths with this ruling, and further that DOCS report the results of that policy reevaluation to the Court in sixty days.[42]

IT IS SO ORDERED.

Footnotes

1 Plaintiff legally changed his name in December 2001. *See* Trial Transcript ("Trial Tr.") at 38:14-18. Apparently, he had also sought to do so approximately two years earlier, but without success. *See id.* at 38:21-39:7.

2 It should be clear that in protecting plaintiff's constitutional rights to practice his adopted religion, we are fulfilling our sworn duty and in no way endorsing or heralding the Nation's tenets, several of which we find repugnant to the principles of tolerance and equality that are fundamental to our Constitution and the ethos of our country. *See Thomas v. Review Board of Indiana Employment Security Division,* 450 U.S. 707, 714, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection").

3 While the NOI and the Nation differ in their interpretation of the 120 Degrees, referred to as the "Book of Supreme Wisdom" or "Lost-Found Muslim Lessons" by the NOI, both groups study them. *See* April 12, 2001 Decl. of A. Blocker ("Blocker Decl.") ¶¶ 8-11. DOCS permits the Book of Supreme Wisdom to be issued to any inmate who is a registered member of NOI, but Nation members who have not registered as members of the NOI are not permitted to view these materials. *See id.*

4 Holy days observed by the Nation include the anniversaries of the birth and death of Clarence 13X Smith and the birthdays of Elijah Muhammad and Fard Muhammad. *See* Trial Tr. at 62:6-8, 18. The Nation, however, does not participate in Ramadan, Jumma, and some other traditional Islamic customs practiced by NOI members. *See* Pl. Trial Ex. 180.

5 For example, in the nomenclature of the Supreme Alphabet, the letter "A" stands for "Allah," "B" stands for "Be," and "C" stands for "See" or "Cee." In the Supreme Mathematics, the number "1" represents "Knowledge," the number "2" represents "Wisdom," and the number "3" represents "Understanding." *See id.* One example of how Nation members apply this numerological system to their lives, according to plaintiff, is that "1" ("Knowledge") and "2" ("Wisdom") must precede "3" ("Understanding"). *See* Trial Tr. at 98:8-24 (plaintiff explaining how he uses the Supreme Alphabet and Mathematics to understand the world).

6 One such article instructs inmates: " 'Don't serve time, but make time serve you.' is the principle that you should adopt internally in order to return back to your family and community as an asset and not a continued liability ... When you serve time negatively, you waste precious moments of your life." *See* Pl. Trial Ex. 3 at Bates No. 240 (article entitled "Belly of the Beast" from the October 1995 issue of *The Five Percenter*). The article further instructs inmates to "participate to the best of your ability within the rules of your respective prison and reap what you sow in this righteousness." *See id.*

7 In doing so, DOCS does not distinguish between "Five Percenters" and members of the Nation of Gods and Earths. *See e.g.,* Def. Proposed Findings of Fact and Conclusions of Law ("Def.Findings") ¶ 36 ("Plaintiff is able to participate in DOCS' educational and rehabilitative programs in spite of the fact that he is a member of the Five Percenters."). As previously noted, however, DOCS and plaintiff do not necessarily use the term "Five Percenter" to identify the same individuals.

8 According to plaintiff and a supporting affidavit submitted for summary judgment purposes by an inmate NOI minister, members of the Nation are also unable to obtain the 120 Degrees in bound format from NOI members, as only inmates registered with an NOI temple outside of prison are permitted to have those lessons. *See* Trial Tr. at 57:8-15; Blocker Decl. ¶¶ 10-11.

9 DOCS Directive 4670, which deals with inmate organizations, makes it clear that religious groups seeking to meet regularly for worship or prayer services cannot apply for inmate organization status. *See* Def. Trial Ex. F2 (Directive 4670) at ¶ II(C)(2). Trial testimony reflected some confusion concerning exactly how a group claiming to be religious in nature like the Nation can become "authorized." *Compare* Trial Tr. at 390:18-25 (DOCS official Richard Roy testifying that he did not know the answer to plaintiff's counsel's question about whether there was a way for a group claiming religious status to become authorized by DOCS short of litigation) *with* Trial Tr. 416:9-22 (Richard Roy testifying that, though he was not familiar with the details, there is a procedure by which religious groups can become recognized within DOCS through the Division of Ministerial and Family Services) *and* Trial Tr. at 525:25-528:7 (former DOCS Director of Ministerial and Family Services John LoConte discussing generally how he handled requests for religious accommodation within DOCS, but stating that he did not make the final decision about accommodating religious requests and that "[o]ur recognition I don't believe is that important."). The evidence introduced at trial also indicates that at least two other Black Muslim groups, the Nation of Islam and Moorish Science Temple, resorted to litigation similar to this one before DOCS ceased treating them as "unauthorized groups" and began classifying them as religious groups. Both cases were settled without court rulings on the plaintiffs' claims for injunctive relief from DOCS' non-recognition of the groups in question.

See Trial Tr. 389:6-20; 533:8-535:25; *see also Muhammad v. Coughlin,* No. 91 Civ. 6333 (S.D.N.Y.) (Nation of Islam); *Gilmore-Bey v. Coughlin,* No. 93 Civ. 6592 (S.D.N.Y.) (Moorish Science Temple).

10 *See e.g., Breland v. Goord,* No. 94 Civ. 3696, 1997 WL 139533 (S.D.N.Y. March 27, 1997); *Graham v. Cochran,* No. 96 Civ. 6166, 2000 U.S. Dist. LEXIS 1477, (S.D.N.Y. February 14, 2000) (Ellis, M.J.); *Lord Natural-Self Allah v. Annucci,* No. 97 Civ. 607, 1999 WL 299310 (W.D.N.Y. March 25, 1999) (Heckman, M.J.); Pl. Trial Exhibit 182 (October 29, 1996 letter from DOCS Deputy Commissioner for Program Services Raymond Broaddus to an inmate regarding a request for religious accommodations stating "I have been informed that the Five Percent Nation is not a religion. Therefore, there is no religious faith to practice."); Pl. Trial Ex. 81 (October 19, 1998 letter from defendant Warith Deen Umar, DOCS coordinator for Islamic Affairs, to plaintiff stating that "there are no directives or rules and regulations regarding the Five Percenters. The reason for this is the courts have ruled the Five Percenters are not a legitimate religious group").

11 According to DOCS, "[j]oining a gang such as the Five Percenters is about money, power and respect," Def. Findings ¶ 87, and "[t]he Five Percenter newspaper is used as a tool by inmates to recruit other gang members and sometimes inmates are recruited into joining the Five Percenters without realizing that they may be asked to participate in violent or illegal activities." *See id.* ¶ 91.

12 In previous litigation arising from the same time period as this one, DOCS claimed that Five Percenter literature incited violence against white people with messages like "kill the White devils and their families" and asserted that a statement urging Nation members to "struggle to get out of prison houses" through education was an incitement to escape (in full, the statement read: "we've experienced the trials and tribulations of his prison house and we must now struggle to get out of his prison houses and remove the veil that has been placed over our people's minds. This can only be done through education, i.e., proper education."). *See Breland v. Goord,* No. 94 Civ. 3696, 1997 WL 139533, at *2 (S.D.N .Y. March 27, 1997). DOCS' content-based justification for banning the Nation's literature was rejected by Judge Baer of this Court, who found that the Nation's literature contained no such incitements to violence and that DOCS had "unfairly characterized the material at issue" and "unfortunately focused on the non-traditional nature of plaintiff's religion." *See id.* at *2, *6.

13 At the summary judgment stage of this case, plaintiff submitted the declarations of numerous Nation members, living both within and outside the DOCS system, asserting that the Nation is not a gang and does not promote violence or retaliate against members who leave. *See* June 26, 2001 Decl. of Cee Aaquil Allah Barnes (detailing the activities of the Allah Youth Center and asserting that the Five Percenters are not a gang); April 12, 2001 Decl. of Wendell Williams (asserting that Five Percenters are not a gang and do not engage in gang like activities); April 13, 2001 Decl. of Terayus Jones (same); April 25, 2001 Decl. of Rahiem Buford (same); April 18, 2001 Decl. of Gabriel Clausen (same); October 6, 200 Decl. of H. Khalif Khalifah (same).

14 We note that, according to DOCS witness Superintendent Joseph Smith, serving on the Inmate Liaison Committee is the kind of "positive" activity through which a charismatic inmate can become a "stabilizing influence" within a prison facility. Ironically, Smith sought to contrast this kind of positive activity with his negative perception of Five Percenter inmates. *See* Trial Tr. at 652:25-653:7.

15 Mr. Barnes is the Center's Chairman and Mr. Justice Allah serves as an elder and administrator.

16 DOCS does argue that "Five Percenters outside of prison have engaged in criminal activity." *See* Def. Findings ¶ 80. However, this argument-relying solely on Shawangunk Superintendent Joseph Smith's recollections of supervising several Five Percenters as a probation officer in the 1970's, Investigator Ron Holvey's experiences with alleged Five Percenter gangs in New Jersey, and an inmate's testimony that he participated in Five Percenter gang activities outside prison after joining the group in a boys home-does not really address or challenge the Nation representatives' testimony to the effect that the Nation is a legitimate organization engaged in constructive and lawful activities outside prison.

17 According to DOCS' former Director of Ministerial and Family Services John LoConte, the existence of an established, legitimate religious community outside of prison would have been an important factor is his determination of whether a prisoner deserved religious accommodations during his tenure as DOCS Director of the Division of Ministerial and Family Services. *See* Trial Tr. at 536:23-538:8, 538:17-840:2; *see also* Trial Tr. 543:4-13 (LoConte testifying that DOCS recognizes Wiccans as a religion because of their "visible presence," complete with articulated doctrine, dogma, traditions, and rituals, outside prison).

18 Plaintiff's expert on prison administration, former federal prison warden Toni Bair, reached a similar conclusion upon examination of the photocopy during his testimony. *See* Trial Tr. at 220:18-221:15.

19 In a similar vein, we reject DOCS' argument that plaintiff's insincerity is evidenced by his failure to formally request parliaments and other gatherings until 2000, *see* Def. Findings ¶ 22, since DOCS' complete ban on the Nation's materials and previous denials of plaintiff's requests to receive them made it fairly clear that such a request would not have been granted and plaintiff has represented that he did so merely to ensure that he had exhausted his administrative remedies.

20 In response to his inquiries concerning confiscated copies of the *Five Percenter* newspaper, DOCS Coordinator for Islamic Affairs, Warith Deen Umar responded as follows:

> Dear brother:
> This responds to your letter of September 22, 1998. There are no directives or rules and regulations regarding Five Percenters. The reason for this is because the courts have ruled that Five Percenters are not a legitimate religious group. The New York State Department of Correctional Services does not acknowledge the claims of inmates who designate themselves as Five Percenters. *You may want to explore some of the teaching of the Muslims and the Nation of Islam in your facility.*
> Your brother in Islam, Imam Warith Deen Umar Ministerial Program Coordinator Ministerial and Family Services

Pl. Trial Ex. 81 (emphasis added). We note that, to the Court's knowledge, no case law existed to substantiate Imam Umar's assertion that "the courts have ruled that Five Percenters are not a legitimate religious group."

21 Despite markedly different conceptions of "the divine" from most Americans, heterodox groups like Rastifarians, Wiccans, and Hare Krishnas have all been afforded free exercise protection. Here, the Nation's doctrine is predicated on a an essentially monotheistic belief in God, its central and secondary texts-including the 120 Degrees, Bible, and Koran-are largely identical to those of other accepted religions, the Supreme Mathematics and Supreme Alphabet are reminiscent of other religions' use of numerology devices to understand the world, and the nature of its observances is far from uncommon. Moreover, the Nation appears to be a close relative of an officially recognized religion, the Nation of Islam.

22 The constitutional controversy surrounding RFRA and the subsequent congressional enactment of RLUIPA have been discussed extensively elsewhere, *see e.g., Madison v. Riter,* 240 F .Supp.2d 566, 568-70 (W.D.Va.2003), and familiarity with RLUIPA's history is assumed.

23 According to John LoConte, DOCS' former Director of Ministerial and Family Services, such informal gatherings "wouldn't be enough" to allow Catholic inmates to practice their religion while in prison. *See* Trial Tr. at 532:11-17. Moreover, DOCS admitted the importance of formal gatherings in plaintiff's belief system at an earlier stage of this litigation when, in attempting to show that plaintiff is not a sincere believer in the Nation's tenets because he has never attended a parliament (despite having banned him from doing so), DOCS asserted that parliaments are "a fundamental ritual" for Nation members that, if consistently skipped, would be equivalent to "a Catholic never going to Mass." Defs.' Summ. J. Reply Mem. at 9.

24 DOCS' argument is tantamount to arguing that a Christian's or Muslim's beliefs would not be substantially burdened if he or she were permitted to possess the Jewish Bible, but not the New Testament or the Koran. The courts have recognized, however, that it is the free exercise of a *plaintiff's* religion, not someone else's, that the First Amendment and RLUIPA protect. *See Breland v. Goord,* No. 94 Civ. 3696, 1997 WL 139533, at *5 (S.D.N .Y. March 27, 1997) (citing *Thornburgh v. Abbott,* 490 U.S. 401, 418, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989) and *O'Lone v. Shabaaz,* 482 U.S. 342, 352, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987)). *But cf. Fraise v. Terhune,* 283 F.3d 506, 519-20, (3d Cir.2002) (accepting such an argument in ruling that alternatives means existed for inmates to practice their beliefs under New Jersey's treatment of Five Percenters exclusively as a security threat group).

25 In making its argument that plaintiff can gain access to the 120 Degrees from NOI members, DOCS apparently relies on plaintiff's testimony that NOI conducts introductory classes for non-members, similar to the Nation's civilization classes, at which the lessons are sometimes discussed. *See* Trial Tr. at 60:20-61:14; Def. Findings ¶ 19. However, plaintiff's immediately following testimony makes it clear that he is not able to obtain the 120 Degrees, or even consistent study of them, merely by attending such classes. *See* Trial Tr. at 61;15-24.

26 DOCS places undue reliance on the Second Circuit's decision in *Giano v. Senkowski,* 54 F.3d 1050 (2d Cir.1995), which held that it was unnecessary for DOCS to establish an explicit link between such "emotionally charged" materials as nude photographs of inmates' wives and girlfriends and violence in order to justify its ban on such materials. *See Giano,* 54 F.3d at 1055; Def. Findings at 20-21. Here, unlike instances in which common sense would indicate that prohibited materials may pose a threat to security, DOCS predicates its policy banning any and all religious expressions associated with the Nation on the group's allegedly violent nature, which is not simply a matter of common sense.

27 Although DOCS claims that its classification of the Five Percenters as a gang is based on a history of violence and disruptive activities associated with the group, as well as its employees' day-to-day reporting of such activities, Def. Findings ¶ 53; Trial Tr. at 378:7-15, DOCS official Richard Roy testified that there was probably no stack of materials that was reviewed by DOCS' decision-makers at the time they classified the Nation as unauthorized. *See* Trial Tr. at 408:2-18.

28 DOCS official Richard Roy, for example, testified that he did not believe that there was a connection between the members of DOCS' alleged "Five Percenters" prison gang and an outside organization called the Nation of Gods and Earths, *see* Trial Tr. at 346:16-19, while another official, Dale Artus, testified that "[t]he term "Nation of Gods and Earths" is not in my vocabulary. It is nothing I've been-it is just-it doesn't come about in the course of my private life or in my professional life other than this litigation." *See* Trial Tr. at 481:8-10.

29 The most credible of these accounts in light of the evidence concerning the Nation's legitimate existence outside prison was that of Deputy Superintendent for Security Services at Collins Correctional Facility Sibato Khahaifa, who testified that, as an Orthodox Muslim who grew up in Brooklyn, he understood the Nation to be a religious group that had split from the NOI prior to joining DOCS. *See* Trial Tr. at 756:3-9. In recounting his experiences as a corrections officer in several DOCS facilities, Khahaifa also drew a distinction between some Five Percenter inmates who he perceived as sincere adherents of the Nation and others who

appeared to be behaving in a gang-like fashion. *See* Trial Tr. at 757:11-758:5. 766:11-18.

30 One, who claimed to be a former member and participant in illegal activities on behalf of the Five Percenters, also admitted to having participated in numerous stabbings and other acts of violence, including altercations with members of the Latin Kings gang and inmates he identified as "the Muslims," even after the period he was allegedly a Five Percenter. *See* Trial Tr. at 814:9-816:7, 818:3-820:12, 823:8-824:8, 826:5-20. Yet, he claimed that his safety is at risk because Five Percenters were seeking to retaliate against him for "going against" the gang in a fight and thereafter leaving the group. *See* Trial Tr. at 799:22-800:2; Trial Tr. at 805:18-806:11. The other, a former Latin Kings gang "captain," admitted to having "snitched" on four other Latin Kings members after they had killed a fellow prisoner who was a Five Percenter, making it difficult for us to gauge his claims that he feared for his safety because of the potential for retaliation from Five Percenters in addition to the Latin Kings. *See* Trial Tr. at 846:10-20, 851:20-852:1, 853:7-854:1.

31 We note that, according to plaintiff's prison security and administration expert Toni Bair, such reports are "[o]ne of the most unreliable sources of information we have in prisons" because they are obtained from individuals ("snitches") who are often desperate to get themselves out of some kind of trouble and view it as beneficial to name groups rather than individuals in order to insure that they be placed in protective custody. Trial Tr. at 244:10-245:14.

32 First, there are a substantial number of duplicates among the transfer requests that DOCS submitted as trial exhibits, *see e .g.,* Def. Trial Ex. A at Bates Nos. 018 & 023, 019 & 024, 010 & 026, 012 & 027, 013 & 028, and it is possible that such duplicates could be affecting the number of "hits" contained in DOCS' separatee chart as well. Second, some of the transfer requests and unusual incident reports were of questionable relevance to the Five Percenter gang activities that were alleged, raising similar concerns about the relevance of the separatee reports underlying DOCS' summary chart of relevant "hits." *See e.g.,* Def. Trial Ex. A at Bates Nos. 032, 109, 116 (transfer requests); Def. Trial Ex. C. at Bates Nos. 006, 043 (unusual incidents). Third, DOCS has defined the Five Percenters as a security threat group for some time and apparently trains its employees to recognize them as such, which undoubtedly affects the reports. *See* Trial Tr. at 488:12-19 (Dale Artus explaining that DOCS' crisis intervention unit devotes a four-hour portion of its two week basic training specifically to unauthorized groups); Trial Tr. at 632:19-23 (Superintendent Joseph Smith testifying that his understanding of the Five Percenters as a gang came in part "from training"). Fourth, because DOCS treats any organizing activity associated with an unauthorized group as a threat to prison safety and security, its classification of the Five Percenters as "unauthorized" is in some sense self-fulfilling. Activities that would be permissible were they conducted by a religious group, such as recruiting, gathering, passing on literature, are deemed threatening and fuel both the group's and individuals' negative reputations reflected in the various reports. *See e.g.,* Trial Tr. 521:20-24 (John LoConte explaining that, at the time he first learned about the Nation, he was hearing that "[both the Nation of Islam, the Nation of Gods and Earths ... they were attempting to infiltrate the Muslim community in order to establish a congregation the opportunity to the [*sic*] meet together. They were problematic."); Def. Trial Ex. D at Bates No. 014 (stating-with a negative connotation-that the Five Percenters were going to "take some action to establish themselves in the facility"); Def. Findings ¶¶ 89-90 (treating as negative the notion that plaintiff's alleged religious beliefs would require him to teach civilization to others).

33 For example, one of the inmates who testified on DOCS' behalf in this case referred repeatedly to altercations between himself and "Muslims" and replied "Yes sir" when he was asked whether there were any Muslim gangs. *See* Trial Tr. at 814:9-10. We also note that a number of the unusual incident reports containing the term "Five Percenter" proffered by DOCS also contain the term "Muslim." *See* Trial Tr. 243:16-21. Clearly, however, none of this would lead us to conclude either that Islam is not a religion or that Muslims would properly be classified by DOCS as a security threat group.

Additionally, at least one Second Circuit decision appears to document a street gang whose teenage founders were apparently Five Percenters, but nonetheless existed separately from the Nation of Gods and Earths. *See United States v. Miller,* 116 F.3d 641 (2d Cir.1997) (discussing the formation of the "Supreme Team" gang by a group of teenage Five Percenters in the mid-1980's).

34 The Court posed a similar hypothetical to Shawangunk Superintendent Joseph Smith, *see* Trial Tr. at 646:2-21, who replied: "[are we going to say that we are no longer going to permit religious services or participation in religious holidays, I would say, no, that would be very unlikely, because I am going to go on a limb and say that this group that you have described would be limited to a few, and that once we were able to take proper action we should be able to go on as business as usual." Trial Tr. at 646:22-647:3. Superintendent Smith added, with regard to the Five Percenters: "Well, I can only answer that as we deal with them today. They are not an authorized religion at this point within our system." Trial Tr. at 647:25-648:2. Similarly, plaintiff's counsel posed hypothetical questions concerning violence by members of the NAACP to Dale Artus, the former director of DOCS' crisis intervention unit, who testified that he would recommend that the violent individuals "be held individually accountable for their acts" and "would not recommend that the overall program be disbanded" because he viewed the overall NAACP program as positive and it was, unlike the Five Percenters, an authorized organization. *See* Trial Tr. at 491:13-493:13. The DOCS officials' testimony stands in sharp contrast to that of Ron Holvey, who DOCS called as an expert on gangs and gang management, as well as the status Five Percenters in the New Jersey State Correctional system (which segregates those identified as "core members" from the rest of its prison population). When asked whether he would declare the Catholic Church to be a security threat group if numerous prisoners identified as Catholics were being written up for violent acts, he responded: "Within the prison, we would have to, yeah, oh yeah, and I'm sure I would be sitting in another courtroom for that one." Trial Tr. at 748:23-749:4.

35 For example, in addition to testifying that his perception of the Five Percenters as a gang came in part "from training," *see* Trial Tr.

632:19-23, Shawangunk Superintendent Joseph Smith agreed that the Nation's unauthorized status makes it "easy" for him to treat the whole group as a gang when he would otherwise seek to distinguish sincere believers from disruptive members of a mainstream religious group. Trial Tr. at 647:25-648:6. Similarly, in response to plaintiff's counsel's questioning about DOCS' basis for treating the Nation as a gang in comparison to other authorized groups, DOCS official Richard Roy responded: "I would go the other way; they were not an authorized organization, so therefore they could not participate as an organization." Trial Tr. at 390:10-12.

36 DOCS official Richard Roy, for example, testified that he found an article in *The Five Percenter* expressing the opinion that the death penalty was a form of legalized genocide and that the white man has always used his laws to justify "devilishment" potentially dangerous to prison security because it was hateful toward members of another race, and moreover that he and other DOCS employees reviewed the content of *The Five Percenter* when DOCS was making the decision to ban the Nation's materials. *See* Trial Tr. 419:15-412:14. Joseph Smith also agreed that he believes that the Five Percenter materials are dangerous. *See* Trial Tr. 673:16-18. Ron Holvey-though not a DOCS official-testified that he found the racist aspects of the Nation lessons a threat to prison security and that he objected to the Nation's beliefs because "the overall nature of the group promotes violence," but that these views had nothing to do with his characterization of the Nation as a security threat group. *See* Trial Tr. at 737:7-738:19.

37 We acknowledge that there is some case law in tension with our decision in this case. *See Fraise v. Terhune,* 283 F.3d 506 (3d Cir.2002) (finding the New Jersey Department of Corrections' treatment of Five Percenters as a security threat group justified for summary judgment purposes under a *Turner v. Safley* analysis); *In re Long Term Administrative Segregation of Inmates Designated as Five Percenters,* 174 F.3d 464 (4th Cir.1999) (same with regard to the South Carolina Department of Corrections); *Lord Natural-Self Allah v. Annucci,* No. 97 Civ. 607, 1999 WL 299310 (W.D.N.Y. March 25, 1999) (Heckman, M.J.) (finding for preliminary injunctive purposes that DOCS' ban on Five Percenter materials was justified under *Turner*); *Buford v. Goord,* 258 A.D.2d 761, 686 N.Y.S.2d 121 (3d Dep't.1999) (dismissing, in an Article 78 proceeding, a *pro se* litigant's claim that DOCS' policies banning his receipt of Five Percenter materials violated his first amendment rights). Each of these cases, however, applied a more deferential standard of review than the RLUIPA analysis we apply in this decision, and the three federal case involving free exercise claims all assumed that Five Percenter beliefs would receive free exercise protection, which accords with our ruling in this case. Moreover, these other courts do not appear to have had an equally well-developed evidentiary record concerning the Nation's legitimate existence outside prison as we did in this case. Finally, we simply disagree with some of the findings and conclusions reached by those courts, most fundamentally the notion that prison policies classifying and treating an entire group as a gang can be upheld despite the fact that they are predicated on a faulty assumption that the group has no legitimate existence as a religion.

38 Such a remand, which was requested by DOCS at trial, *see* Def. Findings at 26, is consistent with both the federal courts' tradition of deference and the Supreme Court's guidance concerning their appropriate supervisory role in prisoner litigation: "We have said that '[t]he strong considerations of comity that require giving a state court system that has convicted a defendant the first opportunity to correct its own errors ... also require giving the States the first opportunity to correct the errors made in the internal administration of their prisons." ' *Preiser v. Rodriguez,* 475 U.S. 475, 492 (1973).

39 In accordance with our remand of plaintiff's requests to possess Nation symbols and other materials, we make no ruling at this time concerning what symbols, if any, DOCS must permit plaintiff to receive and display along with the 120 Degrees.

40 Again, in accordance with our remand of the remainder of plaintiff's claims to DOCS, we make no ruling at this time about whether plaintiff can possess or display Five Percenter symbols in conjunction with his possession of the Supreme Alphabet and Mathematics.

41 DOCS' claims that maintaining a library copy of *The Five Percenter* would be infeasible because it would entail "separating plaintiff from other inmates" and "designating a separate room for plaintiff, and a separate secure space to secure the newspapers, assigning one or more staff members to supervise his movement to and from the room and assigning one or more members to issue him the Newspaper [*sic*] and to retrieve it," as well as elevating the group's statute through such special treatment. *See* Def. Findings ¶¶ 106-108. This "parade of horribles" seems rather exaggerated.

42 We would also be remiss if we failed to express the Court's gratitude to *pro bono* counsel for their excellent effort and professionalism throughout this case and to Sullivan & Cromwell for its sponsorship of their *pro bono* positions.