RECORD NO. 08-6150

In The
United States Court of Appeals
For The Fourth Circuit

SCOTT LEWIS RENDELMAN,

Plaintiff – Appellant,

v.

NANCY ROUSE, Warden; SCOTT STEININGER, CDRM Correctional Dietary Regional Manager; CAROLYN A. THOMAS, Food Service Administrator, all defendants individually and in their official capacity,

Defendants – Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT BALTIMORE

BRIEF OF APPELLANT

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No. 08-6150 Caption: Scott Lewis Rendelman v. Nancy Rouse, et al.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiff pleaded federal claims under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. § 2000cc-1 *et seq*. This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal from a final judgment disposing of all claims. J.A. 97. The judgment was filed on October 22, 2007, and thus the 30-day deadline for filing a notice of appeal was November 21, 2007. Although Plaintiff's notice was dated November 19, 2007, it was not received by the district court until after the 30-day deadline. But the court entered an order on April 4, 2008 finding that Plaintiff's appeal was timely filed as of November 19, 2007. J.A. 104. That order was based on the fact that, as a result of various prison transfers, Plaintiff did not have notice of the summary judgment order until mid-November 2007; and upon receiving it, he immediately prepared a notice of appeal and left it with prison officials to mail for him. J.A. 101-03. In his informal brief in this Court, Plaintiff elaborated that he was under special restrictions prohibiting him from using the prison's internal mailing system without special screening procedures, which resulted in additional delays after he gave the notice of appeal to prison officials for mailing (before the 30-day appeal deadline).

STATEMENT OF THE ISSUES

1. Defendants are prison officials who enforce a dietary program. Plaintiff, an Orthodox Jewish inmate, requested accommodations so he could adhere to kosher dietary laws. When Defendants denied his requests, he brought this action under RLUIPA. The district court granted summary judgment for Defendants, holding they demonstrated that the burden they imposed on Plaintiff's religious exercise was the least restrictive means of furthering a compelling interest. Did the district court err in granting summary judgment on the RLUIPA claim?

2. Should this Court address in the first instance Defendants' affirmative defense of qualified immunity? If so, are they entitled to qualified immunity?

STATEMENT OF THE CASE

Scott Rendelman is an Orthodox Jew whose religious beliefs require him to abide by kosher dietary laws. J.A. 8, 39, 43. He was an inmate housed at Maryland Department of Correction (DOC) institutions in 2006 and 2007. J.A. 24-25. Defendants, who are DOC officials and employees, refused to make *any* accommodations from their generally applicable dietary program so that he could adhere to kosher dietary laws while maintaining adequate nutrition. Defendants told him he could choose to eat from one of the two menus they offer, neither of which provides a kosher diet, or he could choose not to eat. J.A. 26, 27. They rejected his two requested accommodations: (1) extra or substitute portions of

already available prison foods that he could eat without violating kosher laws (e.g., cold cereal); and (2) that his food be served on disposable paper plates (rather than reusable plates that are, under kosher laws, deemed contaminated by their contact with non-kosher foods). J.A. 26, 30, 33. After an unsuccessful administrative grievance process that lasted more than a year, he filed this RLUIPA action, contending that Defendants substantially burdened his religious exercise. J.A. 5.

On October 22, 2007, the district court granted summary judgment to Defendants on the merits of the RLUIPA claim, holding, as a matter of law, that they satisfied their burden (under strict scrutiny) of demonstrating that they pursued the least restrictive means of furthering compelling interests when they denied Rendelman kosher accommodations. J.A. 97. Rendelman appealed. J.A. 101. This Court assigned the undersigned counsel to represent him.

STATEMENT OF FACTS

I. RENDELMAN, AN ORTHODOX JEWISH INMATE, REQUESTED ACCOMMODATIONS SO HE COULD TO ADHERE TO KOSHER DIETARY LAWS, BUT DEFENDANTS REFUSED

Scott Rendelman is Jewish, and he believes that his religion requires him to abide by kosher dietary laws. J.A. 8. The events underlying this action began in January 2006 when he entered a Maryland DOC facility, the Maryland Correctional Institution – Hagerstown (MCI-H). J.A. 24.

The DOC gives prisoners a choice of two diets: a regular diet that is pork-free; and an alternative lacto-ovo vegetarian diet. J.A. 30. Although some foods served by DOC (such as fruit and cold cereal) do not violate kosher laws, neither diet is a kosher diet, because of the manner in which food is prepared and served and because the menus contain non-kosher foods. J.A. 8, 26, 33, 87. Having lost 30 pounds in his first four months at MCI-H as a result of his apparent inability to maintain an adequate diet in accordance with his religious beliefs, Rendelman repeatedly asked Defendants for accommodations so that he could practice Judaism and maintain adequate nutrition. J.A. 8, 26, 28, 33, 40, 43, 44, 87. Specifically, he requested two modest accommodations: (1) that Defendants permit him to take substitute or extra portions of already available foods in lieu of non-kosher foods; and (2) that Defendants serve his food on paper plates. J.A. 8, 26, 28, 30, 33, 43. He was "not demanding a kosher diet line or that any special food be ordered for him"; rather, he was seeking the modest accommodations described above. J.A. 39. Defendants, however, repeatedly rejected his requests. They categorically maintained that they did not have to make *any* accommodations from their generally applicable dietary program. J.A. 8, 26, 30, 33, 87.

II. BEFORE FILING SUIT, RENDELMAN ENDURED A LENGTHY ADMINISTRATIVE PROCESS, TO NO AVAIL

Rendelman pursued each step of Maryland's administrative grievance process, to no avail, enduring a one-year administrative odyssey that began in

February 2006 and ended in February 2007 with a dismissal by the Inmate Grievance Office (IGO), the last step in the process. J.A. 26, 30, 33, 39, 61, 85-86.

Rendelman began the administrative grievance process on February 14, 2006, shortly after arriving at MCI-H, by filing an informal complaint. J.A. 26. His complaint advised that kosher dietary laws did not permit him to eat foods that were "cooked" at the prison; that he had been denied extra and substitute portions of foods he could eat; and that he had been denied his requests to have his food served on paper plates. *Id.* He invoked the inmate handbook the prison had given him; it said the prison would "accommodate substitutions or alternate food selections, extra portions of acceptable menu items, etc., to conform to religious diets." *Id.* The same day he submitted his informal complaint, he informed the Food Service Supervisor that he had lost a substantial amount of weight "because there are so few items" he could eat, and that the matter was "urgent." J.A. 28. After receiving his written complaint, Defendant Thomas (the Food Services Administrator) consulted with Defendant Steininger (the Correctional Dietary Regional Manager). J.A. 26. Steininger told Thomas that Rendelman could not have accommodations, and that it was "up to the inmate whether he wants [a] meal or not." *Id.* Thomas proceeded to reject Rendelman's written complaint, *id.*, after Rendelman was informed that he had the "choice not to eat the food." J.A. 27.

A few days later, on February 18, 2006, he filed a complaint to Defendant Rouse, MCI-H's Warden, through the Administrative Remedy Process (ARP). J.A. 30. The Warden did not acknowledge receipt of his ARP complaint, and it went unanswered. J.A. 30, 85.

Interpreting the Warden's failure to respond as a denial, Rendelman submitted an ARP appeal to the DOC Commissioner, dated March 13, 2006. J.A. 30. In that appeal he again emphasized, "I am attempting to eat kosher, but MCI-H does not offer any substitutions or alternate food selections, and refuses to give any extra portions." *Id.* (emphasis in original). Again invoking the inmate handbook, he asked for "substitutions, alternate food selections, and/or extra portions of acceptable items." *Id.* He also wrote to Defendant Steininger, explaining again that "[t]here are actually enough kosher items on the regular fare" from which he could prepare a "balanced 'common fare' diet" if he were permitted substitutions or extra portions. J.A. 43. Rendelman offered in that letter to volunteer to prepare his own kosher meal as a volunteer food service worker. *Id.*

Warden Rouse, however, did not treat his March 13, 2006 ARP appeal as an appeal to the DOC Commissioner (ARP stage two); instead Warden Rouse treated it as an original ARP complaint directed to herself (thus putting Rendelman back at ARP stage one). J.A. 30, 85-86.

An ARP investigator was assigned to the matter. J.A. 31. He interviewed no witnesses or prison employees. *Id.* Instead his investigation entailed a review of three documents. J.A. 31-32. First, he reviewed the DOC dietary policy which says that DOC provides a master cycle (pork-free) menu and a lacto-ovo vegetarian alternative diet. *Id.* Second, he reviewed a 13-year-old letter (dated August 12, 1993) from a former DOC Commissioner to the Maryland Attorney General's office in which the Commissioner denied another inmate's request to receive kosher meals "from outside sources." J.A. 31, 36-37. The 13-year-old letter said that allowing food from outside sources posed the danger of smuggling contraband, and "could lead to unrest within the population and thereby create security concerns." J.A. 37. The letter also said that the dietary program "was designed to meet as broad a spectrum of religious dietary practices as possible while placing only minimal cost and management burdens on dietary operations." *Id.* Third, the investigator reviewed an eight-year-old newsletter (dated June 30, 1998) which noted (in a two-sentence piece titled, "Kosher? No, Sir!") that the Fourth Circuit had held that the DOC was not "constitutionally required" to give kosher food to Jewish prisoners. J.A. 31-32, 58.[1] Based on these documents, the investigator recommended no action. J.A. 32.

[1] The case to which the newsletter referred (see J.A. 38) was this Court's unpublished pre-RLUIPA decision in *Cooper v. Lanham*, No. 97-7183, 1998 WL 230913 (4th Cir. May 7, 1998). When told that Defendants were relying on

On May 9, 2006, based on the foregoing "investigation," Warden Rouse purported to dismiss the ARP appeal that Rendelman had directed to the DOC Commissioner nearly two months earlier, finding that accommodations from the generally applicable dietary program were not warranted. J.A. 30.

So Rendelman again submitted an ARP appeal to the DOC Commissioner. J.A. 33. He reiterated that "[n]either a 'pork free' diet nor the LOV [lacto-ovo] diet meet the requirements of a kosher diet," and that he needed substitutions or extra portions, on paper plates, to maintain a kosher diet with adequate nutrition. *Id.* Two months after receiving the appeal, the Commissioner dismissed it on July 18, 2006, concluding:

> The implementation of the master cycle and lacto-ovo menus replaced the practices of providing substitutes and extra portions of foods in order to attempt to comprise a religious diet. The two menus are intended to accommodate a broad range of religious dietary practices as possible while placing only minimal costs and management burdens on dietary operations. Warden Rouse will be advised to delete the reference to religious diets on page 56 of the MCIH Inmate Orientation Handbook [on which Rendelman was relying in requesting substitute foods and extra portions], as it is contrary to Division of Correction Policy.

Id.

Cooper, Rendelman became upset because they did not provide a case citation and *Cooper* was a constitutional decision that pre-dated RLUIPA. J.A. 45, 50-54. Rendelman explained to Steininger that *Cooper* was inapposite because RLUIPA would govern his case and because he was seeking more modest accommodations than did inmate Cooper, namely extra portions and paper plates. J.A. 51-54.

Three days later, on July 21, 2006, Rendelman appealed the Commissioner's dismissal to the IGO. J.A. 86.[2] Seven months later, on February 27, 2007, the IGO's Executive Director dismissed Rendelman's grievance as "wholly lacking merit." J.A. 61-62. The reason: ten months earlier, on April 21, 2007, Rendelman had filed an IGO grievance (which IGO never acted on) after he had received no response to his ARP appeal; the IGO said that the April 21 filing was premature and therefore the IGO would not address his July 21 challenge to the Commissioner's denial of his ARP appeal. *Id.*

Meanwhile, prison officials dismissed Rendelman's dramatic weight loss (to 128 pounds) on the basis that he still fell "within the normal weight limits for his height." J.A. 58. They concluded that his weight loss was a result of his "refusal to eat certain foods on this diet." *Id.* This "refusal" was based on his exercise of religion and his unwillingness to abandon his religious beliefs. J.A. 40.

III. RENDELMAN FILED THIS ACTION UNDER RLUIPA, AND THE DISTRICT COURT, WITHOUT DISCOVERY, GRANTED SUMMARY JUDGMENT TO DEFENDANTS ON THE MERITS

A week after receiving the IGO's dismissal letter, Rendelman, from MCI-H, filed this RLUIPA action *pro se* on March 7, 2007. J.A. 5. He named as

[2] This IGO submission is referenced in the record, J.A. 62, 86, but is not a part of the record. Defendants chose not to include it among their summary judgment exhibits. Nor did they include other documents he submitted in the grievance process. J.A. 30 (he refers to other ARP filings); J.A. 62 (referring to six other IGO submissions).

Defendants the DOC Correctional Dietary Regional Manager responsible for the region in which he was institutionalized (Steininger), the Food Service Administrator (Thomas), and the MCI-H warden (Rouse). *Id.* Rendelman sued them in both their official and individual capacities. *Id.* His complaint revealed his understanding that the official-capacity suit was a suit against the DOC. *Id.*

Defendants did not file an answer. Rather, after numerous extensions of time, they moved on August 15, 2007 to dismiss the complaint under Rule 12(b)(6) for failure to state a claim; and, in the alternative, they moved for summary judgment. J.A. 9. Their supporting memorandum revealed that, with respect to the merits of his RLUIPA claim, they were moving to dismiss under Rule 12(b)(6). J.A. 17-18. Their alternative summary judgment motion was based on their two affirmative defenses: (1) a qualified immunity defense to liability for damages in their individual capacities; and (2) a non-exhaustion defense under the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a). J.A. 18-20.

Rendelman was not served with the dispositive motion when it was filed on August 15, 2007, because he had been transferred to another Maryland prison. J.A. 3 (entries 17-19); J.A. 80. Recognizing this, on September 11, 2007 the district court ordered the clerk to serve the motion to Rendelman's new address. J.A. 3 (entry 18). Upon receiving it, he immediately prepared a response on September 15, 2007, but because he had been transferred, he no longer had his

papers. J.A. 85-86, 102-03. He thus included with his opposition to the dispositive motion (i) a request for a subpoena to the IGO for a complete copy of his grievance file so he could respond to the non-exhaustion argument, and (ii) a motion for an extension of time to supplement the record with documents from the administrative process to show that he did properly exhaust the process. J.A. 85-87.

The district court never acted on those requests. Instead the court granted summary judgment to Defendants on the merits, holding as a matter of law that they did not violate RLUIPA, on the basis of this reasoning from the court's earlier unpublished decisions in another case:

> The difficulties experienced, including additional costs and creation of perceived favoritism between religious groups, are legitimate compelling interests that override the burden placed on plaintiff's ability to follow a kosher diet. There is no requirement for accommodation of religious observances to take precedence over institutional security concerns. *See Cutter v. Wilkinson*, 544 U.S. 709, --, 125 S.Ct. 2113, 2122 (2005). The meal plans currently available are neutral in religious requirements, and are the least restrictive means available to advance the compelling interest in avoiding perceived favoritism between religious groups. *See e.g., Reimann v. Murphy,* 897 F. Supp. 398, 402-403 (E.D. Wis. 1995) (exclusion of racist literature advocating violence is least restrictive means of furthering the compelling state interest in preventing prison violence); *George v. Sullivan,* 896 F.Supp. 895, 898 (W.D. Wis. 1995) (same).

J.A. 95-96. Having so held on the merits, the court did not address Defendants' defense of qualified immunity.

Nor did the court resolve Defendants' non-exhaustion defense. Rendelman contended that he did properly exhaust; there was a dispute over whether Defendants failed to include all material grievance-related documents in the record; and Rendelman requested a subpoena for IGO records and additional time to supplement the record to show that the non-exhaustion defense had no merit (requests the district court never addressed). J.A. 30, 33, 85-87; *see* note 2, *supra*. By declining to grant summary judgment on the non-exhaustion defense after noting there was a dispute over exhaustion, J.A. 95 n.5, the court evidently concluded that the non-exhaustion defense could not properly be resolved on this summary judgment record. Because the court granted summary judgment on the merits of the RLUIPA claim, the court did not resolve Rendelman's request to subpoena IGO records or his motion to supplement to record with administrative grievance documents relating to exhaustion.

SUMMARY OF ARGUMENT

I. Congress enacted RLUIPA to protect and accommodate the exercise of religion by prison inmates. To that end, RLUIPA imposes a heavy burden on prison officials by restoring the type of "strict scrutiny" that used to apply under the Free Exercise Clause: a prison official violates RLUIPA if he imposes substantial burden on an inmate's exercise of religion, unless the prison official can demonstrate by specific evidence that the burden imposed on that inmate was the

least restrictive means to further a compelling governmental interest. In applying that test, context matters. Application of the test turns on facts relating to, among other things, the nature of the inmate's request (in this case, a request for paper plates and extra portions of already available prison foods) and the nature of the prison environment in which he is incarcerated.

Rendelman established a prima facie RLUIPA violation by establishing that Defendants imposed a substantial burden on his religious exercise. Defendants have not disputed that Rendelman is an Orthodox Jew or questioned the sincerity of his religious belief that he must adhere to kosher dietary laws. His adherence to kosher dietary laws unquestionably constitutes a religious exercise. And Defendants imposed a substantial burden on that religious exercise: by inhibiting his adherence to kosher dietary restrictions, they inhibited his adherence to his faith; by giving him food his faith did not permit him to eat, on plates from which he could not eat, they substantially pressured him to modify his behavior and abandon one of the precepts of his religion.

Because Rendelman established that Defendants substantially burdened his religious exercise, RLUIPA requires Defendants to demonstrate, with competent and persuasive evidence, that refusing to grant his requested accommodations for a kosher diet was the least restrictive means of furthering a compelling governmental interest. Defendants failed to meet that burden.

In holding that Defendants did meet that burden, the district court concluded as a matter of law that denying Rendelman's requests was necessary for Defendants to further two purportedly compelling interests: (a) avoiding "additional costs"; and (b) avoiding a risk of "perceived favoritism between religious groups" that might stoke "violence" and "security concerns." The district court's reliance on these purported compelling interests cannot withstand scrutiny.

First, with respect to costs, Defendants did not demonstrate with competent or persuasive evidence that Rendelman's requested accommodations would pose substantial costs. There is no cost data in this record.

Second, with respect to the purported interest in avoiding a risk of "perceived favoritism," that cannot rightly be a compelling interest under RLUIPA. A risk of perceived favoritism is always present when accommodations are made for inmates' religious exercises; thus, to conclude that institutions have a compelling interest in avoiding a risk of perceived favoritism is to conclude they have a compelling interest in *avoiding accommodations* for religious exercise. But this would turn RLUIPA on its head, because RLUIPA's purpose is to require prison officials to make accommodations for religious exercise, including accommodations from otherwise neutral policies of general applicability.

Even if avoiding a risk of perceived favoritism were a compelling interest, in this record there is no competent evidence that inmates would have perceived

favoritism if Rendelman had received his requested accommodations. Likewise, with respect to unidentified safety and security problems that the district court believed might flow from perceived favoritism, Defendants produced no competent or persuasive evidence demonstrating that their denial of kosher accommodations to Rendelman furthered any safety and security interests.

Aside from failing to demonstrate that they were furthering compelling interests by denying Rendelman extra portions of available food and paper plates, Defendants also failed to demonstrate that they used the least restrictive means to further any purported compelling interests. The district court did not even analyze whether there were alternative means less restrictive than a categorical denial of the accommodations that Rendelman requested.

Significantly, moreover, the Supreme Court has said that policies followed at other well-run institutions are relevant in determining whether a particular restriction is necessary to further a compelling interest. Rendelman explained that the Federal Bureau of Prisons and other State prison systems provide kosher diets. The practices in these other institutions show that kosher diets are compatible with safe and orderly prison administration. The district court failed to address this.

In sum, because Defendants did not demonstrate as a matter of law that they pursued the least restrictive means of furthering a compelling interest when they burdened Rendelman's religious exercise, summary judgment was improper.

Although Rendelman has been transferred to a Federal prison in Illinois under the custody of the Bureau of Prisons in connection with a Federal conviction, his transfer does not moot his RLUIPA claim. Even if his prayer for injunctive relief is moot (which he denies), his case is not moot, because his claim for damages against Defendants in their individual capacities remains alive.

II. Because the district court did not address Defendants' qualified immunity defense, this Court could remand the issue to the district court to address in the first instance. But should this Court address the issue, it should rule that Defendants are not entitled to qualified immunity at this stage. With respect to the first step of the qualified immunity analysis – whether the facts alleged, viewed in the light most favorable to Rendelman, show that Defendants violated his statutory right – the record shows that Defendants intentionally violated his free exercise right under RLUIPA without sufficient justification.

The second step of the qualified immunity analysis – whether the right was clearly established – is guided by this Court's RLUIPA decision in *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006). *Lovelace* held that a prison official was not entitled to summary judgment on qualified immunity because the unlawfulness of an intentional and unjustified deprivation of religious meals was clearly established under RLUIPA. Likewise, Rendelman had a clearly established right to a diet consistent with his religious scruples, and Defendants have not demonstrated as a

matter of law that they acted with sufficient justification. Therefore, they are not entitled to summary judgment on their qualified immunity defense.

STANDARD OF REVIEW

The district court granted summary judgment. This court reviews a summary judgment order *de novo*, drawing all reasonable inferences in the light most favorable to the non-moving party. *Garofolo v. Donald B. Heslep Assocs., Inc.*, 405 F.3d 194, 198 (4th Cir. 2005). If there is a genuine issue of material fact, or if Defendants are not entitled to judgment as a matter of law on this record, then summary judgment is inappropriate. Fed. R. Civ. P. 56(c).

ARGUMENT

I. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT ON RENDELMAN'S RLUIPA CLAIM

Prison officials who substantially burden a prisoner's religious exercise violate RLUIPA, unless they can demonstrate that they pursued the least restrictive means for furthering a compelling interest. 42 U.S.C. § 2000cc-1(a)(1)-(2). Without the benefit of discovery, and on a remarkably thin record, the district court concluded as a matter of law that Defendants met their heavy burden of demonstrating that they pursued the least restrictive means for accomplishing compelling interests, even though they refused to make *any* accommodations so that Rendelman could adhere to a kosher diet — not even paper plates or extra portions of already available foods. As shown below, that was error.

A. Congress Enacted RLUIPA To Protect And Accommodate The Exercise Of Religion By Prison Inmates

Before evaluating Rendelman's claim, it is important to understand why Congress enacted RLUIPA in 2000.

Decades ago, the Supreme Court evaluated claims under the First Amendment's Free Exercise Clause using strict scrutiny, even with respect to laws of general applicability that incidentally burdened religious exercise. Two leading cases were *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The Supreme Court later relaxed this standard in the prison context, however, holding in 1987 that a prison regulation does not unconstitutionally abridge First Amendment rights if it is "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). A few years later, in 1990, the Court went even further, holding (outside the prison context) that the Free Exercise Clause does not inhibit enforcement of neutral laws of general applicability that incidentally burden religious exercise. *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872, 878-82 (1990). "At the same time, however, the *Smith* Court openly invited the political branches to provide greater protection to religious exercise through legislative action." *Madison v. Riter*, 355 F.3d 310, 314-15 (4th Cir. 2003).

Congress responded by enacting the Religious Freedom Restoration Act of 1993 (RFRA). Pub. L. No. 103-141 (1993) (codified as amended at 42 U.S.C. §§ 2000bb *et seq*.). As enacted, RFRA applied to all federal and state laws, barring any federal, state, or local government (or official acting under color of state law) from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability[.]" *Id*. §§ 3(a), 5(1). Congress enacted RFRA to "restore the compelling interest test as set forth in [*Sherbert*] and [*Yoder*] and to guarantee its application in all cases where free exercise of religion is substantially burdened[.]" *Id.* § 2(b)(1). RFRA created a private cause of action: if the claimant establishes that a defendant substantially burdened his religious exercise, RFRA requires the defendant to demonstrate that the burden (1) was in furtherance of a compelling governmental interest and (2) was the least restrictive means of furthering that interest. *Id.* §§ 2(b)(2), 3(b)(1)-(2).

In 1997, however, the Supreme Court held that RFRA cannot constitutionally be applied to the States. *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997). In enacting RFRA, Congress had relied on its enforcement power under section 5 of the Fourteenth Amendment; the Supreme Court held that Congress exceeded that power because the statute was too "sweeping" in terms of the objects it would regulate. *Id.* at 532.

Congress again responded by convening hearings to consider narrower legislation. These hearings resulted in the enactment of RLUIPA in 2000, which Congress based on its Spending Clause and Commerce Clause powers. 42 U.S.C. § 2000cc-1(b). RLUIPA "mirrored the provisions of RFRA, but its scope was limited to laws and regulations concerning land use and institutionalized persons." *Madison*, 355 F.3d at 315. RLUIPA replicates RFRA's private cause of action: if the claimant shows that the defendant substantially burdened his religious exercise, the defendant must prove that the burden on that person's religious exercise "is in furtherance of a compelling governmental interest" and "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §§ 2000cc-1(a)(1),(2), 2000cc-2(a),(b). RLUIPA, therefore, restores strict scrutiny and puts the burden squarely on prison officials to meet it.

Congress had good reason to single out prisoners for "greater protection," because "inmates are subject to 'a degree of [governmental] control unparalleled in civilian society and severely disabling to private religious exercise.'" *Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005)). "Far more than any other Americans, persons residing in institutions are subject to the authority of one or a few local officials. Institutional residents' right to practice their faith is at the mercy of those running the institution[.]" 146 Cong. Rec. S7774-01, S7775 (2000) (joint statement of

RLUIPA co-sponsors Sen. Orrin Hatch and Sen. Edward Kennedy) (hereinafter "co-sponsors' joint statement"). Recognizing that prison administrators should receive due deference regarding "necessary regulations" required to maintain "good order, security and discipline," Congress enacted RLUIPA to eliminate "unnecessary" burdens on religious exercise arising from "indifference, ignorance, bigotry, or lack of resources," and to root out "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations[.]" *Id*. (quoting S. Rep. No. 103-111, at 10 (1993)).

Notably, RLUIPA's legislative history reveals concern about prison officials failing to accommodate religious diets. H.R. Rep. No. 106-219, at 11-12 (1999) (noting testimony of representatives of the American Jewish Congress and Aleph Institute); *see also Cutter*, 544 U.S. at 716 n.5 (Congress had evidence that Jewish inmates had not been accommodated); 146 Cong. Rec. S6678-02, S6688 (2000) (Senator Hatch citing this testimony when introducing RLUIPA in Senate).

B. Defendants Did Not Dispute Below That They Imposed A Substantial Burden On Rendelman's Religious Exercise

To state a prima facie claim under RLUIPA, a prisoner must show that his religious exercise was substantially burdened. 42 U.S.C. §§ 2000cc-1(a), 2000cc-2(a),(b). Defendants did not contest that issue below. J.A. 17-18. The district court implicitly concluded that Rendelman made that showing: the court addressed whether the burden imposed on him was the least restrictive means for furthering a

compelling interest, an issue that arises only if it is first determined that the claimant's religious exercise was substantially burdened. 42 U.S.C. § 2000cc-2(b).

At any rate, Defendants did substantially burden Rendelman's religious exercise. Before explaining why, some background on kosher dietary laws is warranted. From biblical text, Jewish scholars have derived many day-to-day obligations, or "mitzvot," that observant Jews are commanded to follow. Between 200 and 500 A.D., Jewish scholars and commentators authored a series of texts, collectively called the Talmud, interpreting the Bible and deriving from it the daily religious restrictions and obligations. *See* Alfred J. Kolatch, *The Jewish Book of Why* 3-5 (1981). One of the central commandments governing a Jew's relationship with God concerns Jewish diet; this system of law is collectively termed Kashrut. *Id.* at 84-86; *see Ashelman v. Wawrzaszek*, 111 F.3d 674, 675 (9th Cir. 1997) ("There is no question . . . that one of the central tenets of Orthodox Judaism is a kosher diet."). "Each person observing kashrut[] is treated as if he were in a direct relationship with God, observing what in other religions might be considered a priestly function at the table in the sequence of preparation and service of food and of prayers." *United States v. Kahane*, 396 F. Supp. 687, 692 (E.D.N.Y. 1975), *aff'd as modified*, 527 F.2d 492 (2d Cir. 1975). A Jew adhering to these laws believes his failure to do so taints both his body and his soul. *See Thompson v. Vilsack*, 328 F. Supp. 2d 974, 975 (S.D. Iowa 2004).

The laws of Kashrut can be separated into three main categories: (i) foods that are prohibited from consumption outright, (ii) the requirement that all ingredients of a food be kosher, and (iii) the prohibition against mixing meat and dairy products. *See* Book of Deuteronomy 14:3-21; Book of Leviticus 11:2-47; Isaac Klein, *A Guide to Jewish Practice* 360 (1992). Additionally, once a kosher item touches a non-kosher item (including a utensil or plate that has been exposed to a non-kosher item), the kosher item is "contaminated" and becomes non-kosher — contaminated in a spiritual sense. *See id.*; *Ashelman*, 111 F.3d at 675 n.2 ("Kosher food must remain physically separate from nonkosher food, as must utensils and plates. Disposable utensils satisfy kosher requirements."). Certain unprocessed foods, including raw fruits and vegetables, are inherently kosher. *See id.* However, food preparation is crucial: when, for example, a raw vegetable is prepared or cooked with non-kosher ingredients or using materials that were exposed to non-kosher foods, it becomes "contaminated" and non-kosher. *See Beerheide v. Suthers*, 286 F.3d 1179, 1187 (10th Cir. 2002) ("A vegetarian meal prepared in a non-kosher kitchen is not kosher."); *Toler v. Leopold*, No. 2:05CV82, 2008 WL 926533, *2 (E.D. Mo. Apr. 3, 2008) ("MDOC does provide a vegetarian alternative, but the offerings therein are not Kosher[.]"). Rendelman made Defendants aware of these obligations. J.A. 26 ("I cannot eat anything cooked here."); J.A. 28, 33.

1. Adherence to kosher dietary laws is a religious exercise

RLUIPA broadly defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A). Religious exercise "often involves" the "performance of . . . physical acts" such as "participating in sacramental use of bread and wine[.]" *Cutter*, 544 U.S. at 720 (quoting *Smith*, 494 U.S. at 877).

Defendants have not disputed Rendelman's claim that he is an Orthodox Jew or questioned the sincerity of his religious belief that he must adhere to kosher dietary laws. His adherence to kosher dietary laws unquestionably constitutes a religious exercise.

2. Defendants substantially burdened Rendelman's religious exercise

The Supreme Court has said that a substantial burden arises from policies or practices that have a "tendency to coerce individuals into acting contrary to their religious beliefs," *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988), or a substantial "tendency to inhibit" religious exercise, *Sherbert*, 374 U.S. at 404 n.6. This Court has reiterated that officials impose a "substantial burden on religious exercise" when, by "act or omission," they apply "substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Lovelace*, 472 F.3d at 187 (internal quotation marks omitted).

Defendants imposed a substantial burden on Rendelman's religious exercise. By inhibiting his adherence to kosher dietary restrictions, they inhibited his adherence to his faith. By giving him food his faith did not permit him to eat, on plates from which he could not eat, they substantially pressured him to modify his behavior and abandon one of the precepts of his religion. They offered him a substantially burdensome choice. On the one hand, he could consume non-kosher foods and eat from "contaminated" plates, thereby defiling himself under Jewish law. *See Beerheide*, 286 F.3d at 1187 (an alternative "vegetarian meal prepared in a non-kosher kitchen is not kosher," and therefore it is really "not an alternative at all"); *Ashelman*, 111 F.3d at 677 (eating non-kosher meals would require him "to defile himself" by doing something forbidden by his religion). On the other hand, Rendelman could follow the precepts of his religion by making a "choice not to eat the food," J.A 26, despite his need for and right to adequate nutrition. *See Gordon v. Pepe*, No. 00-10453, 2004 WL 1895134, at *1, *4 (D. Mass. Aug. 24, 2004) (plaintiff stated RLUIPA claim based on failure to accommodate religious diet; "the possibility that he . . . can simply choose not to eat is not a real alternative"). This purported choice caused him "hunger pains" and dramatic weight loss. J.A. 57. Defendants refused to give him extra or substitute portions of foods he could eat, despite prison officials acknowledging that his weight loss resulted from his "refusal to eat certain foods" because of his religious beliefs. J.A. 58.

Courts applying RLUIPA have not hesitated to find that the refusal to accommodate religious diets, including a kosher diet, imposes a substantial burden. *See, e.g.*, *Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008) ("manifest" substantial burden where prison officials refused to accommodate religious diet); *Madison v. Riter*, 240 F. Supp. 2d 566, 569 n.2 (W.D. Va. 2003) (denial of kosher diet imposed substantial burden), *rev'd on other grounds*, 355 F.3d 310 (4th Cir. 2003); *Toler*, 2008 WL 926533, at *2 (same); *Wolff v. N.H. Dep't of Corr.*, No. 06-cv-321-PB, 2007 WL 586687, at *1-2 (D.N.H. Feb. 20, 2007) (same). In *Lovelace* this Court held that a Muslim inmate sustained a substantial burden on his religious exercise when he was barred for 24 days from special Ramadan meals. 472 F.3d at 186-88. The burden here was no less substantial.

In sum, Defendants imposed a substantial burden on Rendelman's religious exercise. Therefore, he established a prima facie RLUIPA case.

C. Defendants Did Not Prove As A Matter Of Law That The Burden They Imposed On Rendelman's Religious Exercise Was The Least Restrictive Means Of Furthering A Compelling Interest

Once a prisoner makes out a prima facie case, the burden shifts to the defendants to prove that the "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)(1), 2000cc-2(b). Under the compelling interest standard, "[o]nly the gravest

abuses, endangering paramount interest, give occasion for permissible limitation[.]" *Sherbert*, 374 U.S. at 406 (internal quotation marks omitted). A compelling interest means an interest "of the highest order." *Yoder*, 406 U.S. at 215. An interest may be important yet not compelling. *Lovelace*, 472 F.3d at 190.

As explained below in subsection 1, to sustain their burden of persuasion under strict scrutiny, RLUIPA defendants must produce competent and persuasive evidence. As shown in subsection 2, Defendants did not demonstrate on this record that they were furthering a compelling interest. As shown in subsection 3, Defendants did not demonstrate that they chose the "least restrictive means."

1. Prison officials cannot satisfy RLUIPA's strict scrutiny standard without competent and persuasive evidence

To sustain their burden under strict scrutiny, RLUIPA defendants must produce competent and persuasive *evidence*. *Id.* at 190-91. Only then will a court give "'due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Id.* at 189-90 (quoting *Cutter*, 544 U.S. at 723).

This evidentiary requirement is a critical feature of RLUIPA. Congress intended RLUIPA to restore the brand of scrutiny that the Supreme Court had used in Free Exercise cases like *Sherbert* and *Yoder*. *See* part I.A, *supra*. Both cases emphasized the importance of evidence and fact-finding.

Sherbert involved a challenge to a State's denial of unemployment compensation benefits to those who could not work on Saturdays. The plaintiff could not work on Saturdays because of her religious beliefs, so she was denied benefits. 374 U.S. at 399-401. In defending the law, the State asserted an interest in avoiding the possibility of fraudulent claims by "claimants feigning religious objections to Saturday work." *Id.* at 407. But the Supreme Court held that the State failed to carry its evidentiary burden under strict scrutiny: "the record [did not] appear to sustain" the asserted compelling interest, because there was "no proof" that would "warrant" the asserted "fears of malingering or deceit." *Id.*

Yoder followed suit. The case involved a State's compulsory school attendance law requiring Amish parents to keep their children in school after eighth grade. The State asserted an interest in additional education, but the Court held that the interest was "highly speculative" in light of the record. 406 U.S. at 224. There was "*no specific evidence* of the loss of Amish adherents by attrition, nor [was] there *any showing* that . . . Amish children . . . would become burdens on society because of educational shortcomings." *Id.* (emphasis added). "There is nothing *in this record* to suggest," the Court continued, "that the Amish [children] . . . would fail to find ready markets in today's society." *Id.* (emphasis added).

RLUIPA codifies this evidentiary requirement. RLUIPA makes it unlawful to impose a substantial burden on religious exercise unless the defendant

"demonstrates" that the imposition was the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. §§ 2000cc-1(a), 2000cc-2(b). RLUIPA then defines "demonstrates" to mean "meets the burdens of going forward *with the evidence and of persuasion*." *Id.* § 2000cc-5(2) (emphasis added). "The burden of persuasion includes the burden of establishing before *a fact-finder* that a given proposition is correct." *United States v. Hollis*, 569 F.2d 199, 204 n.6 (3d Cir. 1977) (emphasis added). Thus, a persuasive evidentiary showing is required to satisfy strict scrutiny under RLUIPA. After all, "[t]he compelling interest test is a standard that responds to facts and context." 146 Cong. Rec. S7774-01, S7775 (2000) (co-sponsors' joint statement).

The Supreme Court emphasized the nature of this evidentiary burden in applying the cognate provisions of RFRA. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006). In *Gonzales* the Federal Government sought to prohibit a religious sect from drinking a sacramental tea (hoasca) containing a hallucinogen regulated under the Controlled Substances Act. At an evidentiary hearing, the Government presented evidence about the health risks posed by hoasca and the diversionary harm posed by a potential market in illicit use of hallucinogens. *Id.* at 426. The district court concluded that the Government did not sustain its burden of persuasion, however, because the evidence on compelling interests was "in equipoise." *Id.* at 426, 428.

The Supreme Court agreed. The Court emphasized that RFRA's language (the same language is in RLUIPA) required the Government to "demonstrate[]" by "evidence" that its actions were necessary to further a compelling interest. *Id.* at 428. Thus, a court must look "beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431. Under strict scrutiny, the Court stressed, government officials cannot demonstrate a compelling interest without "offering evidence that granting the requested religious accommodations would seriously compromise its ability to administer the program." *Id.* at 435. The Court also rejected the government's asserted interest in complying with a United Nations convention because "the Government did not even *submit* evidence addressing the international consequences of granting an exemption for [the religious group]." *Id.* at 438 (emphasis in original). Instead the "Government simply submitted two affidavits by State Department officials attesting to the general importance of honoring international obligations and of maintaining the leadership position of the United States in the international war on drugs." *Id.* Under strict scrutiny, the Court held, "invocation of such general interests, standing alone, is not enough." *Id.*

Likewise, this Court has emphasized that, to sustain their burden under RLUIPA, defendants must produce competent and specific evidence that their

actions were necessitated by a compelling interest. *Lovelace*, 472 F.3d at 190-91. In *Lovelace* this Court vacated a summary judgment order under RLUIPA because the defendants did "not adequately demonstrate[] on th[e] record that the [challenged] policy is the least restrictive means of furthering a compelling governmental interest." *Id.* at 190. They did "not present any evidence with respect to the policy's security or budget implications." *Id.* This Court acknowledged that safety and security may be compelling interests in an abstract sense, but the defendants could not prevail because these considerations were "not verified by any statement placed into the summary judgment record by a [prison] official." *Id.* There was "no sworn statement from the warden, the assistant warden, or any other prison official that discusses any security, safety, or cost consideration that justifies the restrictions in the . . . policy." *Id.* at 191.

In sum, RLUIPA defendants cannot satisfy strict scrutiny without competent and persuasive evidence justifying the necessity of their actions.

2. Defendants did not establish on this thin record that they were furthering a compelling governmental interest

Despite the foregoing law, Defendants moved to dismiss Rendelman's RLUIPA claim without creating an evidentiary record demonstrating that their refusal to accommodate his requests was necessary to accomplish a compelling interest. While they submitted affidavits on their non-exhaustion defense, none of the affiants testified, much less offered competent evidence establishing, that

denying Rendelman's requests for extra portions and paper plates was necessary to accomplish a compelling interest. Rather, Defendants moved to dismiss (see J.A. 18) by invoking an earlier decision by the same district judge rejecting a claim for kosher meals: *Wilkerson v. Beitzel*, No. 05-1270, 2005 WL 5280675 (D. Md. Nov. 10, 2005), *aff'd*, 184 Fed.Appx. 316, 2006 WL 1582704 (4th Cir. 2006).[3]

Relying on its *Wilkerson* decision, the district court below held, as a matter of law, that denying Rendelman's requested accommodations was necessary to further two purportedly "compelling interests": (a) an interest in avoiding "additional costs"; and (b) an interest in avoiding a risk of "perceived favoritism between religious groups" that might stoke "violence" and "security concerns." J.A. 95-96. These purported compelling interests are discussed below.

[3] This Court's three-sentence per curiam affirmance in *Wilkerson* (a *pro se* appeal without formal briefing) did not even mention RLUIPA. The order said that Wilkerson "appeal[ed] the district court's order denying him relief on his 42 U.S.C. § 1983 (2000) complaint," which the panel affirmed because it could "find no reversible error." The undersigned counsel has reviewed Wilkerson's complaint, and, putting aside that it is factually distinguishable (he demanded that the prison purchase pre-packaged hot kosher meals), he did not even plead a RLUIPA claim. He pleaded only a § 1983 claim alleging constitutional violations; and the defendants' motion to dismiss his complaint never mentioned RLUIPA. Because his complaint did not raise a RLUIPA claim, any error in the district court's dicta in *Wilkerson* regarding RLUIPA could not have been *reversible* error. Thus, when this Court's per curiam order said that it could find "no reversible error" in the denial of relief "on his [§1983] complaint," it was not ratifying any dicta regarding RLUIPA.

a. Additional costs

Unquestionably cost avoidance is a legitimate interest. Whether it can rise to the level of *compelling* interest, however, is a different question. *See Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974) (holding that "[t]he conservation of the taxpayers' purse is simply not a sufficient state interest" to withstand strict scrutiny). We will assume for argument's sake that it can, in appropriate cases. But the only way cost avoidance could rise to the level of a compelling interest is if the additional costs are documented to be *substantial* and shown to be beyond the means of the institution. *See Luckette v. Lewis*, 883 F. Supp. 471, 480 (D. Ariz. 1995) (holding, in a RFRA case, that the "additional expense is not a compelling governmental interest" because "the expense of providing Kosher meals to these few prisoners is minimal"). After all, every institution has limited resources and a fixed budget; if *any* cost avoidance were a compelling interest, RLUIPA would be largely meaningless, because it would not require institutions to make *any* accommodations that would cost money or time (i.e., labor costs). Again, Congress sought to eliminate burdens on prisoners' religious exercises arising from "indifference, ignorance, bigotry, or *lack of resources.*" 146 Cong. Rec. S7774-01, S7775 (2000) (co-sponsors' joint statement) (emphasis added). Indeed, RLUIPA's text expressly contemplates that

a prison may have to "incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3(c).

On this record, Defendants did not demonstrate with specific evidence that Rendelman's requested accommodations would pose substantial costs. There is no cost data in this record. *See Lovelace*, 472 F.3d at 191 ("we have no sworn statement from the warden, the assistant warden, or any other prison official that discusses any . . . cost consideration").

Courts have rejected attempts by RLUIPA defendants to justify their policies or practices by conclusory cost rationales or outdated cost information. *See, e.g.*, *Terrell v. Montalbano*, No. 7:07-cv-00518, 2008 WL 4679540, at *7-10 (W.D. Va. Oct. 21, 2008) (denying summary judgment to prison official because he failed to substantiate costs of providing religious diet to plaintiff); *Toler*, 2008 WL 926533, at *3 (ruling against defendants on claim for kosher diet because they "failed to offer any evidence at trial to quantify the economic impact of accommodating prisoners with Kosher meals"); *Kuperman v. N.H. Dep't of Corr.*, No. 06-CV-420-JD, 2007 WL 1200092 (D.N.H. Apr. 18, 2007), at *5 ("the evidence at the hearing was that accommodating Kuperman's kosher diet needs would cost the prison a small amount of money"; the cost is "minimal"); *Agrawal v. Briley*, No. 02-C-6807, 2004 WL 1977581, at *10 (N.D. Ill. Aug. 25, 2004) ("Defendants' bare assertion that accommodating prisoners' religious practice would impose

unquantified costs and administrative burdens cannot defeat Plaintiff's claim under RLUIPA."); *Luckette*, 883 F. Supp. at 480 (finding that the cost of providing kosher food "is not a compelling governmental interest" because "the expense of providing Kosher meals to these few prisoners is minimal"). Likewise, Defendants cannot rely on speculative or unsubstantiated cost concerns in this case.

Two additional points bear note. First, if the district court's cost concern was based on a belief that Rendelman was requesting the creation of a kosher kitchen or the acquisition of pre-prepared kosher meals, the record does not bear this out. He requested extra portions or substitutions of foods that were already served, and paper plates. *See Koger*, 523 F.3d at 800 (under RLUIPA, the asserted compelling interest "should be considered in light of the prisoner's request and circumstances at the detention facility"). There is no evidence quantifying the cost of these accommodations, much less establishing they would be substantial. *Cf. Ashelman*, 111 F.3d at 678 (holding defendants violated Jewish prisoner's rights by denying him a kosher diet; his "kosher TV-dinner could be supplemented with whole fruits, vegetables, nuts, and cereals that are not tough to come by" and the "evidence show[ed] that disposable utensils are also available, at modest cost").

Second, if the district court thought that granting his request might cause a proliferation of similar requests by *other* inmates, that was error. Under RLUIPA, the inquiry focuses on whether denying an accommodation for *the particular*

claimant would further a compelling interest. 42 U.S.C. § 2000cc-1(a) (defendant must "demonstrate[] that imposition of the burden on *that person*" is necessary to further a compelling interest) (emphasis added). As the Supreme Court stressed in interpreting RFRA's cognate provision, the statute "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales*, 546 U.S. at 430-31. Thus, the proper inquiry focuses on the impact of Defendants granting *Rendelman* an exemption from their generally applicable dietary program, and not on the hypothetical potential requests of other inmates.

But even if it were proper to aggregate hypothetical potential requests by *other* inmates similarly situated, the district court still erred. There is no evidence that Jewish prisoners comprise more than a *de minimus* inmate population. *See Luckette*, 883 F. Supp. at 480 (noting in RFRA case: "Only a few prisoners have legitimate religious beliefs which require they maintain a Kosher diet"). Insofar as the district court worried that *non*-Jewish prisoners might request kosher diets, there is no record evidence to support that. *Cf. Jolly v. Coughlin*, 76 F.3d 468, 479 (2d Cir. 1996) (rejecting security and safety rationales in a RFRA case because prison officials failed to produce evidence that exempting plaintiff from prison's tuberculosis-testing policy would "result in a flood of prisoners refusing to take the

TB test"). Indeed, the suggestion is counterintuitive, because "the repetitive and spartan nature of [the kosher] diet under prison conditions would undoubtedly discourage those who are not sincere." *Kahane*, 396 F. Supp. at 703; *see Love v. Reed*, 216 F.3d 682, 691 (8th Cir. 2000) (finding it "unconvincing" that accommodating an inmate's request for bread and peanut butter once a week "would open a floodgate of similar requests from other inmates").[4]

In sum, even if cost avoidance can be a compelling interest in an appropriate case, this is not that case. Not on this record.

b. Alleged security issues and violence arising from perceived favoritism

The district court also reasoned that accommodating Rendelman's requests might create a perception of favoritism that might produce violence and security concerns. J.A. 95-96. This speculative rationale, grounded on exaggerated fear, cannot withstand scrutiny, for the reasons that follow.

i. Perceived favoritism. Even if avoiding a risk of perceived favoritism is a "legitimate" penological interest, that does not make it a "compelling" interest. Virtually all prisons make some accommodations for religious practices. (The

[4] Moreover, non-Jewish inmates would face barriers in seeking kosher diets. RLUIPA protects only "sincerely held" religious beliefs, *Lovelace*, 472 F.3d at 187 n.2; and whether "a particular practice is in fact *mandated* [by a religious belief system] is 'surely relevant' to determining whether the burden is substantial." *Parks-El v. Fleming*, No. 06-7151, 2007 WL 81748, at *2 (4th Cir. Jan. 10, 2007) (emphasis added) (quoting *Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003)).

extent to which Defendants make religious accommodations in other contexts went unexplored by the district court; Rendelman never had an opportunity for discovery on the issue.) Moreover, prisons commonly accord differential treatment to prisoners based, for example, on age, health, or disability. Given the prevalence of these accommodations in day-to-day prison life, it is difficult to understand how avoiding a risk of perceived favoritism based on differential inmate treatment qualifies as a *compelling* interest justifying the denial of accommodations.

More to the point: a risk of perceived favoritism "is always present when special accommodations are made for religious beliefs," *Ashelman*, 111 F.3d at 677; thus, to conclude that institutions have a compelling interest in avoiding a risk of perceived favoritism is to conclude they have a compelling interest in *avoiding accommodations* for religious exercise. But, of course, RLUIPA's purpose is to require accommodations, so this rationale turns RLUIPA on its head. *See Cutter*, 544 U.S. at 721 ("RLUIPA . . . protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission *and accommodation* for exercise of their religion.") (emphasis added); *see also Gonzales*, 546 U.S. at 430-34 (RFRA requires "accommodations"). Indeed, as noted, Congress enacted RLUIPA to repudiate the Supreme Court's decision in *Smith*, which held that the Free Exercise Clause does

not require government to make accommodations from generally applicable, "neutral" regulations that burden religious exercise. *Smith*, 494 U.S. at 886-89 & n.3. *See* 42 U.S.C. § 2000cc-1(a) (RLUIPA's obligation to accommodate applies "even if the burden [on an inmate's religious exercise] results from a rule of general applicability"). Yet the district court below, in rejecting Rendelman's RLUIPA claim on "perceived favoritism" grounds, deemed it conclusive that Defendants were enforcing a "neutral" program of general applicability. J.A. 95-96. The court thus breathed *Smith*'s repudiated rationale into RLUIPA.

The implications of the district court's rationale are unsettling. If institutions may deny accommodations to "avoid[] perceived favoritism *between* religious groups," J.A. 96 (emphasis added), then an institution would also have a compelling interest in avoiding a perception by the *non*-religious that the institution is favoring the religious. This would let prisons justify the elimination of many religious exercises within their walls – such as allowing group prayers and allowing all religious groups to celebrate their holy days. After all, denying *those* accommodations could be said to advance an interest in avoiding perceived favoritism (for those inmates with sincerely held religious beliefs vis-à-vis the non-religious). Again, such an approach would be contrary to the intent of Congress, which enacted RLUIPA to protect and accommodate religious exercise in prisons.

At any rate, even if avoiding a risk of perceived favoritism were a compelling interest, in this record there is no competent evidence that inmates would have perceived favoritism if Rendelman had received his requested accommodations. *Cf. Cutter*, 544 U.S. at 721 n.10 (expressing "doubt that all accommodations would be perceived as 'benefits,'" and citing as an example one correctional system's kosher diet); *Hunafa v. Murphy*, 907 F.2d 46, 47-48 (7th Cir. 1990) (regarding prison's contention that inmate's request for religious diet would be perceived as "special treatment" that would "ripple throughout the prison," court deemed it "implausible" and not supported by the "skimpy record").

In fact, the record undermines a purported interest in avoiding perceived favoritism. According to the district court, the DOC believes that its current two-tier dietary program *already* "accommodate[s] the religious preferences of several religious groups" that demand pork-free or vegetarian diets. J.A. 95. If Defendants are *already* accommodating several other religious groups with *their* religious diets, it is difficult to understand, in the absence of persuasive evidence to the contrary, why anyone would perceive favoritism if Defendants accommodate another group, Orthodox Jews, that was left out of the mix.

ii. Safety and security. The district court reasoned that perceived favoritism might lead to "prison violence" and "security concerns." J.A. 95-96. This is a highly speculative rationale, *see Yoder*, 406 U.S. at 224 (rejecting "highly

speculative" rationale), and it rests on exaggerated fear. It is precisely what RLUIPA was intended to forbid. Again, RLUIPA was enacted to combat "prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations," even when offered in the name of "good order, security and discipline." 146 Cong. Rec. S7774-01, S7775 (2000) (co-sponsors' joint statement) (quoting S. Rep. No. 103-111, at 10 (1993)). Thus, under RLUIPA, "prison officials cannot simply use the words 'security' and 'safety,' and expect that their conduct will be permissible." *Singh v. Goord*, 520 F. Supp. 2d 487, 499 (S.D.N.Y. 2007). The "invocation of such general interests, standing alone, is not enough" to satisfy strict scrutiny; the asserted necessity must be "scrutinized" on the record, as must the government's explanations as to "why the denied exemptions could not be accommodated." *Gonzales*, 546 U.S. at 435, 438 (RFRA case); *see also Lovelace*, 472 F.3d at 190 (defendants "do not present any evidence with respect to the policy's security . . . implications"); *id.* ("Given the superficial nature of the defendants' explanation, we cannot at this stage conclude that the asserted interest [in order and safety] is compelling as a matter of law.").

There is simply no competent or sufficient evidence in this record explaining how granting kosher accommodations would stoke violence and undermine security. The proposition is not self-evident. It is counterintuitive. *See Luckette*, 883 F. Supp. at 481 ("Clearly, provision of a Kosher diet would not implicate any

safety concerns."); *Toler*, 2008 WL 926533, at *3 ("[T]he Court finds Defendants' speculations regarding the increased risk associated with providing Kosher food to be undermined by the undisputed fact that Defendants have provided numerous alternative menus for medical reasons without incident or impact."). Therefore, summary judgment was unwarranted on this record.[5]

This case is reminiscent of the First Circuit's recent RLUIPA decision in *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33 (1st Cir. 2007), where the court reversed a summary judgment order. There a prison system banned all prison preaching by prisoners in the interest of maintaining prison order. It submitted an affidavit in support of its position. The court was not impressed: "This affidavit, which cites no studies and discusses no research in support of its position, simply describes the equation thus: if Spratt is a preacher, he is a leader; having leaders in prison (even those sanctioned by the administration) is detrimental to prison security; thus, Spratt's preaching activity is detrimental to prison security." *Id.* at 39. To prevail on summary judgment, the court emphasized, prison officials "must do more than merely assert a security concern." *Id.* (internal quotation marks omitted).

[5] The record contains a 15-year-old letter (dated Aug. 1993) written by a former DOC Commissioner to deny an inmate's request to receive kosher meals from outside sources. J.A. 36-37. The letter says, *ipse dixit*, that to make exceptions from the generally applicable diet plan "would be exhibiting partiality among an inmate population of 19,000 individuals, which could lead to unrest within the population and thereby create security issues." J.A. 37. This letter, which is neither sworn nor grounded in evidence, is not competent to satisfy strict scrutiny.

Tellingly, the district court below based its anti-violence rationale *not* on any evidence that kosher accommodations produce violence, but instead on a pair of 1995 district court decisions from Wisconsin which did not involve any dietary requests, much less kosher food. J.A. 96. Rather, they involved the exclusion of racist materials published by white-supremacy groups, materials that "*explicitly advocate[d] violence*"; they "advocated the taking of human life and advocated violence against non-white races." *Reimann v. Murphy*, 897 F. Supp. 398, 400, 406 (E.D. Wis. 1995) (emphasis added). Accordingly, the Supreme Court has read these two Wisconsin cases to mean that courts "may be expected to recognize the government's countervailing compelling interest *in not facilitating inflammatory racist activity* that could imperil prison security and order." *Cutter*, 544 U.S. at 723 n.11 (emphasis added). The Supreme Court cited those two racial-violence cases for a proposition that evaded the district court below: in applying RLUIPA's compelling-interest standard, "context matters." *Id.* at 722-23. Under a standard where "context matters," one cannot rightly equate a white-supremacy group's interest in advocating racial violence with Rendelman's interest in adhering to dietary laws that Jews have followed peacefully for thousands of years.

In sum, the district court erred in holding, as a matter of law, that Defendants demonstrated that they were furthering a compelling interest by rejecting Rendelman's request for modest kosher accommodations.

3. The district court independently erred by failing to consider whether there were alternative means less restrictive than a categorical denial of kosher accommodations

To carry their RLUIPA burden, Defendants had to demonstrate more than a compelling interest. They also had to demonstrate that refusing to make *any* kosher dietary accommodations was the least restrictive means of accomplishing a compelling interest. 42 U.S.C. §§ 2000cc-1(a)(2), 2000cc-2(b), 2000cc-5(2); *Lovelace*, 472 F.3d at 190 (defendants must "demonstrate" this "on th[e] record"). To satisfy this element, Defendants had to produce evidence, rather than superficial self-serving statements. *Id.* at 190-92. This they did not do.

The "least restrictive means" test trains on whether the asserted compelling interests could have been advanced by alternative accommodations. The purpose of the test is not to consider whether the regulation in question has some effect in furthering the asserted compelling interests; the test assumes that it does. Rather, the purpose is to ensure that a claimant's protected right is restricted no further than necessary to achieve the asserted compelling interests. *See Ashcroft v. ACLU*, 542 U.S. 656, 666 (2004). To satisfy the test, Defendants must demonstrate that making accommodations would defeat their ability to accomplish their asserted compelling interests. *See Sherbert*, 374 U.S. at 407. If the compelling "interests could be achieved by narrower [restrictions] that burdened religion to a far lesser degree," the defendants have not used the least restrictive means available. *Church*

of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 546 (1993).

On this record, Defendants did not demonstrate that they used the least restrictive means. The district court did not even consider the reasonable and modest alternatives that Rendelman requested — paper plates and extra portions of available foods. Accordingly, the summary judgment order should be reversed. *See Lovelace*, 472 F.3d at 191-92 (reversing on "least restrictive means").

An instructive RLUIPA case on "least restrictive means" is *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979 (8th Cir. 2004). There a prison feared that group worship for the plaintiff's religion would lead to violence. *Id.* at 981-82. The court held that the defendant (MDOC) did not prove as a matter of law that barring group worship was the least restrictive means of preventing violence:

> There exists a question of fact as to whether there are means available to MDOC less restrictive than the total preclusion of group worship for CSC members. It is not clear that MDOC seriously considered any other alternatives, nor were any explored before the district court. The only evidence MDOC submitted to support its claim of security concern was testimony suggesting that Murphy is a racist and that his religion requires that only Anglo-Saxon individuals may participate. We cannot conclude from this limited evidence that MDOC has met its burden of establishing that its limitation on Murphy's religious practices constituted the least restrictive means necessary to ensure the prevention of racial violence within the prison.

Id. at 989. Likewise, in *Greene v. Solano County Jail*, 513 F.3d 982 (9th Cir. 2008), the court held that a prison had failed to demonstrate it was furthering its interest in security by the least restrictive means when it barred maximum security

prisoners from worshiping in groups. "[I]n light of RLUIPA," the court held, "no longer can prison officials justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison. RLUIPA requires more. Prison officials must show that they actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Id.* at 989-90 (internal quotation marks omitted).

Finally, it is significant that Defendants have not explained in this record why they could not provide the types of kosher dietary accommodations that *other* prisons, including the Federal Bureau of Prisons (BOP), are providing around the country. The Supreme Court has said that "the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." *Procunier v. Martinez,* 416 U.S. 396, 414 n. 14 (1974), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401 (1989); *accord Turner*, 482 U.S. at 97-98 (the fact that Federal BOP generally allowed inmate marriages suggested there were alternatives to State prison's prohibition on marriages). Thus, "the failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means." *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005); *see also Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008); *Spratt*, 482 F.3d at 42.

In this connection, Rendelman explained to Defendants that the Federal BOP and other State prison systems provide kosher diets, and indeed that the county prison in Montgomery County, Maryland (the Montgomery County Correctional Facility, which is not a DOC facility) provides kosher meals. J.A. 54, 87.[6] And in his verified response to the motion to dismiss his RLUIPA claim, he informed the district court that a hearing would be necessary on the "least restrictive means" issue because "Plaintiff's evidence will include evidence of other well run institutions, including [those in] California, New York, Florida, Pennsylvania, and the Federal BOP, all of which provide kosher acceptable diets to inmates within their budgetary and security perameters [sic], which the Plaintiff hopes will persuade the Court that the same can be done within the DOC." J.A. 87. Maryland's neighbor, Virginia, apparently accommodates Jewish inmates with a common fare menu that provides a kosher diet for religious adherents at all Virginia Department of Corrections institutions. *See Terrell*, 2008 WL 4679540, at *7, *10 (W.D. Va. Oct. 21, 2008). The truth is, institutions in many States provide kosher meals, a fact that can be documented in discovery on remand.

The practices in these other institutions show that providing kosher dietary accommodations is compatible with safe and orderly prison administration. If kosher accommodations truly produce violence and undermine security, if they

[6] For a case discussing the BOP's kosher diet program, see *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 810 (8th Cir. 2008).

inevitably break a prison's budget, presumably these others systems would not have instituted kosher diets, or would have discontinued them. There is nothing in this record explaining why kosher accommodations made by these other institutions would be unworkable in Maryland DOC institutions. It is thus difficult to understand how Defendants can claim as a matter of law, on this record, that they pursued the least restrictive means by denying Rendelman's modest requests. *See Spratt*, 482 F.3d at 42 ("[I]n the absence of any explanation by [the defendant] of significant differences between the [prison in question] and a federal prison that would render the federal policy unworkable, the Federal Bureau of Prisons policy suggests that some form of inmate preaching could be permissible without disturbing prison security."); *Shakur*, 514 F.3d at 890-91.

In sum, Defendants did not demonstrate as a matter of law that their dietary program was the least restrictive means of furthering a compelling interest. Therefore, summary judgment was improper.

D. The District Court Relied On Cases That Have No Bearing On Rendelman's RLUIPA Claim

Aside from the racial-violence cases discussed above, the district court also cited other cases that are readily distinguishable. The district court cited this Court's 40-year-old decision in *Abernathy v. Cunningham*, 393 F.2d 775 (4th Cir. 1968), for the proposition that an inmate need not receive a "special religious diet if [he] can maintain an adequate diet by choosing items from the available menu."

J.A. 93. But *Abernathy* is inapposite, both legally and factually. It is legally distinguishable because it is a pre-RLUIPA case that does not appear to apply strict scrutiny. And it is factually distinguishable in key respects.

In *Abernathy* a Muslim inmate complained that the prison frequently served pork or food cooked in grease or lard, which he could not eat. An evidentiary hearing was held (something denied to Rendelman), and the testimony showed that in fact the inmate had "unfettered choice in the selection of his meal from among the [other] items served" on a cafeteria-style line, all of which he could eat consistent with his religious beliefs while maintaining adequate nutrition. *Id.* at 778. The Court's opinion indicates that the prisoner was able to choose his portion size and substitute one food for another, so long as he ate all the food he selected. *Id.* That, of course, was an accommodation that Defendants denied to Rendelman. They did not permit him extra portions of food he could eat, and this led to hunger pains and substantial weight loss. Unlike the inmate in *Abernathy*, Rendelman has presented a factual issue as to whether he was given enough food so he could adhere to his religious beliefs and maintain adequate nutrition. Moreover, unlike the prisoner in *Abernathy*, Rendelman could not eat the foods consistent with his religious beliefs because Defendants insisted on serving him food on "contaminated" plates rather than paper plates.

The district court below also relied on *Boyd v. Lehman*, No. C05-0020, 2006 WL 1442201, at *6 (W.D. Wash. May 19, 2006), for the proposition that "[o]ther courts have found a legitimate penological interest in providing inmates a ovo-lacto vegetarian diet rather than a kosher diet, in light of the high costs in providing kosher meals which, as they are to be prepared in a separate kitchen with separate utensils, are generally prepared off-site by an outside vendor." J.A. 95. Putting aside that this was the wrong legal standard ("legitimate penological interest" refers to the pre-RLUIPA, low-level scrutiny that applied under *Turner* and *O'Lone*, *supra*), *Boyd* is not only distinguishable, it actually helps Rendelman.

The challenge in *Boyd* was brought by a Muslim inmate. The court noted that the prison was offering *six* meal plans, including *kosher meals to Jewish inmates*. *Boyd*, 2006 WL 1442201, at *1, *11. So the prison in *Boyd* evidently did not deem the denial of kosher meals to Jewish inmates to be necessary to advance a compelling interest. The court's ultimate holding was that a lacto-ovo vegetarian diet was a reasonable alternative for Muslim inmates because that diet "does not appear to contain any items that are *forbidden by plaintiff's religion*." *Id.* at *8 (emphasis added). *See also id.* at *10. In so holding, *Boyd* relied on *Ashelman*, 111 F.3d at 677, a case in which a Jewish prisoner prevailed on his kosher diet claim. Specifically, *Boyd* relied on *Ashelman*'s rationale that "requiring a believer to defile himself by doing something that is completely forbidden by his religion is

different from (and more serious than) curtailing various ways of expressing beliefs for which alternatives are available." *Boyd*, 2006 WL 1442201, at *8. Applying that forbidden-practices principle, the court concluded that the "ovo-lacto vegetarian diet may fall short of full accommodation of [the Muslim] plaintiff's religious dietary requirements . . . but it does provide him with a diet which is apparently sufficient to sustain him in good health, and which does not require him to eat any foods which are *specifically forbidden* by the Quran." *Id.* at *8 (emphasis added); *see also id.* at *10.

The same cannot be said of Rendelman, an Orthodox Jew adhering to the laws of Kashrut. Eating foods from the lacto-ovo menu would require him to "defile himself," because that menu is not kosher, and the foods are served on "contaminated" plates. That *Boyd* relied on *Ashelman* makes the district court's reliance on *Boyd* particularly ironic: *Ashelman* held that prison officials violated a Jewish prisoner's Free Exercise Clause rights by denying him additional kosher foods and disposable utensils. *Ashelman*, 111 F.3d at 677-78.

For the foregoing reasons, the district court erred in granting summary judgment to Defendants.

E. Despite Rendelman's Transfer, His Claim Is Not Moot

The district court concluded that Rendelman's prayer for injunctive relief was moot because he "was transferred out of the Maryland Division of Correction

and is currently confined at the Federal Detention Center in Philadelphia, Pennsylvania." J.A. 92 (at n.1). He was transferred temporarily to Philadelphia because he was awaiting trial for a Federal offense on which he was indicted after he filed this civil action (hereinafter the "Federal Criminal Case"). J.A. 90. But evidently because the U.S. Marshals Service contracts with the Maryland DOC to house federal prisoners awaiting trial or sentencing, Rendelman ended up back at a DOC prison after his brief stay in Philadelphia; and he was in a DOC facility (again denied a kosher diet) when the district court issued its summary judgment order on October 22, 2007. J.A. 99, 102. (See p.7 of his Fourth Circuit Informal Brief filed on Feb. 25, 2008.) After Rendelman filed his notice of appeal in this matter, he informed this Court that he was transferred to a Federal prison in Marion, Illinois, under the BOP's custody. (See Fourth Circuit Docket Entry No. 13 in No. 08-6150.) He is currently incarcerated there, serving a long-term sentence from the Federal Criminal Case, in which judgment was entered on April 25, 2008.

Rendelman has appeals pending in this Court to challenge his conviction and sentence in the Federal Criminal Case (Fourth Circuit Docket Nos. 08-4486 and 08-7646). He wishes to advise the Court that if he is successful on appeal and is returned to Maryland for retrial or resentencing, he may end up back in a Maryland DOC facility, where the U.S. Marshal's service previously detained him while he

awaited trial in the Federal Criminal Case, because the U.S. Marshals Service evidently places prisoners in Maryland DOC prisons while they await trial. Therefore, he faces the prospect of again being denied a kosher diet at a Maryland DOC facility as a Federal detainee; and his detention there would not be long enough to exhaust administrative remedies. He thus believes the RLUIPA violation is capable of repetition yet evading review. *See Withers v. Levine*, 615 F.2d 158, 161 (4th Cir. 1980) (although prisoner was transferred, claim for injunctive relief was not moot, given reasonable expectation he might again be transferred back under temporary detention, combined with inadequate time to litigate harmful action if he were transferred back), *abrogation on other grounds recognized by Moore v. Winebrenner*, 927 F.2d 1312, 1315-16 (4th Cir. 1991). We raise this in recognition that this Court generally considers a request for injunctive relief to be moot if a prisoner is transferred to a different location where he is no longer subject to the challenged policy or condition. *See Incumaa v. Ozmint*, 507 F.3d 281, 285-89 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 2056 (2008).

At any rate, if his prayer for injunctive relief is moot, his case is not moot, because his claim for damages against Defendants in their individual capacities remains alive. J.A. 8. *See Slade v. Hampton Roads Reg'l Jail*, 407 F.3d 243, 248-49 (4th Cir. 2005) (release of detainee mooted claim for injunctive relief but not claim for monetary relief); *Williams v. Spencer*, 622 F.2d 1200, 1204-05 (4th Cir.

1980); *Henson v. Honor Comm. of U. Va.*, 719 F.2d 69, 72 n.5 (4th Cir. 1983). With respect to damages, Defendants never contended below that RLUIPA does not permit individual-capacity damages from prison officials who intentionally violate RLUIPA.[7] For these reasons, Rendelman's transfer does not moot his appeal. The district court can address any damages issues on remand. *See Lovelace*, 472 F.3d at 196 n.7 ("[Defendant] has not raised (and we leave open) the issue of whether RLUIPA allows damages against state and local officials sued in their individual capacities."); *Madison*, 474 F.3d at 130 n.3 ("The district court can address the question of whether RLUIPA permits individual damages actions in the first instance if the issue is presented on remand.").

II. DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY AT THIS STAGE

Because the district court did not address Defendants' qualified immunity defense, this Court could remand the issue to the district court to address in the first instance. *Andrews v. Daw*, 201 F.3d 521, 526 n.3 (4th Cir. 2000) ("Because the district court has yet to address this claim, we decline [defendant's] invitation

[7] Indeed, Defendants proceeded below as if RLUIPA does permit individual damages. They cited (J.A. 18) this Court's RLUIPA sovereign-immunity decision in *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006), which held that RLUIPA does not allow monetary relief in an *official* capacity claim but left open whether individual damages are permitted. *Id.* at 130-31 & n.3. With respect to *individual* damages, Defendants did not argue that individual damages are not available under RLUIPA (a Rule 12(b)(6)-type argument); instead they moved for summary judgment on qualified immunity, a generic defense to individual damages that applies when a claim otherwise permits individual damages. J.A. 20-21.

to affirm the district court's dismissal of [the] complaint on the ground of qualified immunity."); *Jennings v. University of N.C.*, 482 F.3d 686, 702 (4th Cir. 2007) (en banc) (same). But if this Court does address qualified immunity, it should rule that Defendants are not entitled to qualified immunity at this stage, for the reasons explained below.

Qualified immunity is a defense available to government officials performing discretionary duties, a defense against "liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In determining whether qualified immunity is available, the court applies a two-step analysis. *Lovelace*, 472 F.3d at 197 (citing *Saucier v. Katz*, 533 U.S. 194 (2001)). First the court determines if the facts alleged, viewed in the light most favorable to the plaintiff, show that the defendants violated a constitutional or statutory right. *Id.* If so, the court next determines if that right was clearly established at the time of the violation. *Id.*

As for the first step: the facts, viewed in the light most favorable to Rendelman, show that Defendants violated his rights under RLUIPA by imposing a substantial burden on his religious exercise without justification. RLUIPA gives prisoners a right to exercise sincerely held religious beliefs free from substantial and unnecessary burdens. It requires accommodations unless prison officials

demonstrate that the accommodations are necessary. Yet Defendants intentionally refused to make *any* accommodations for Rendelman. They deliberately acted as if RLUIPA does not require any accommodations from a neutral, generally applicable policy, when it plainly does. *See* part I.A, *supra.* They told him, a man who already had lost substantial weight, that he if he wanted to adhere to his religious beliefs, he should choose not to eat. At the very least, at this stage there is a factual issue precluding a finding that Defendants did not intentionally violate his rights under RLUIPA.

The second step of the qualified immunity analysis — whether the right was clearly established — is guided by this Court's decision in *Lovelace,* which held that a prison official was not entitled to summary judgment on qualified immunity because the plaintiff's RLUIPA right was clearly established at the time of the incident in question (November 2002). "Although the outer boundaries of RLUIPA may have been uncharted at the time," this Court said, "its core protections were not." *Lovelace,* 472 F.3d at 198. The Court continued that under "RLUIPA in its most elemental form, a prisoner has a 'clearly established . . . right to a diet consistent with his . . . religious scruples,'" and a "prison official violates this clearly established right if he intentionally and without sufficient justification denies an inmate his religiously mandated diet." *Id.* at 199 (citation omitted). "Thus," this Court concluded, under "*any straightforward interpretation of*

RLUIPA, the unlawfulness of intentional and unjustified deprivations of [religious] meals was apparent at the time of the incident." *Id.* (emphasis added). Therefore, this Court held that if the defendant acted intentionally, a reasonable person in the defendant's position would have understood that his conduct violated clearly established rights under RLUIPA. *Id.* Because the defendant's state of mind could not be resolved on summary judgment, this Court held that he was not entitled to summary judgment on qualified immunity; the matter was remanded. *Id.* [8]

Significantly, when this Court in *Lovelace* found that the right to a religious diet was clearly established (and that Defendants therefore were not entitled to qualified immunity at the summary judgment stage), the Court relied on *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003). In *Ford* the Second Circuit rejected the notion that the defendant prison officials were entitled to summary judgment on qualified immunity, because it was clearly established that a prisoner has right to diet consistent with his religious scruples; and for support, the Second Circuit relied on *Kahane v. Carlson*, 527 F.2d 492 (2d Cir.1975). *Kahane* is a seminal kosher-diet case. *Kahane* held that a Jewish prisoner has a right to "a diet sufficient to sustain the prisoner in good health without violating the Jewish dietary laws . . . ." 527 F.2d at 496. *Kahane* did so by applying the brand of constitutional

[8] Other courts, too, have refused to recognize qualified immunity in religious diet cases under RLUIPA, including kosher diet cases. *See, e.g.*, *Koger*, 523 F.3d at 802, 804; *Fegans v. Norris*, 537 F.3d 897, 901 (8th Cir. 2008); *Blount v. Johnson*, No. 7:04-cv-00429, 2007 WL 1577521, at *8-9 (W.D. Va. May 30, 2007).

strict scrutiny that RLUIPA was designed to restore. *See* part I.A., *supra.* And *Kahane* relied on, *inter alia*, this Court's decision in *Ross v. Blackledge*, 477 F.2d 616 (4th Cir. 1973), a religious-diet case in which this Court held that the district court erred in granting prison officials a summary dismissal and remanded for an evidentiary hearing. *Id.* at 617.

In sum, reasonable prison officials would have known that Rendelman had a clearly established right to a diet consistent with his religious scruples. Defendants are not entitled to summary judgment on qualified immunity because they have not demonstrated as a matter of law that they acted with sufficient justification.

CONCLUSION

The summary judgment order should be reversed.

REQUEST FOR ORAL ARGUMENT

Plaintiff-Appellant respectfully requests that this Court hear oral argument in this case. This case presents an important opportunity to reaffirm that, under RLUIPA, prison officials cannot deny accommodations for religious exercise by relying on speculation and exaggerated fears. The decisional process may be significantly aided by oral argument.

Respectfully submitted,

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ADDENDUM

42 U.S.C. § 2000cc–1. Protection of religious exercise of institutionalized persons

(a) General rule

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

> **(1)** is in furtherance of a compelling governmental interest; and
> **(2)** is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

> **(1)** the substantial burden is imposed in a program or activity that receives Federal financial assistance; or
> **(2)** the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc–2. Judicial Relief

(a) Cause of action
A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

(b) Burden of persuasion
If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit
Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners
Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter
The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation
If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc–3. Rules of Construction

(a) Religious belief unaffected
Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated
Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected
Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected
Nothing in this chapter shall—

> **(1)** authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or
> **(2)** restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise
A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law
With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction
This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal
Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability
If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

42 U.S.C. § 2000cc–5. Definitions

In this chapter:

(1) Claimant
The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates
The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause
The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government
The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;
(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation
The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity
The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general
The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule
The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND VOLUME LIMITATIONS

Pursuant to Fed. R. App. P. 32(a)(7)(C):

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface, 14-point Times New Roman, using Microsoft Word 2003.

I further certify that this brief complies with the volume limitation in Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), this brief contains 13,939 words.

/s/ Sean E. Andrussier
Sean E. Andrussier

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 10th day of November 2008, I caused this Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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