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

REPLY BRIEF OF APPELLANT

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ARGUMENT

I. DEFENDANTS DID NOT ESTABLISH AS A MATTER OF LAW THAT THEY MET RLUIPA'S STRICT SCRUTINY STANDARD

Defendants do not dispute that they imposed a substantial burden on Rendelman's religious exercise and that he has therefore established a prima facie RLUIPA violation. Instead they contend they have met their burden of demonstrating, as a matter of law on summary judgment, that a flat denial of accommodations was the least restrictive means of maintaining security and avoiding runaway costs. But Defendants have no competent and persuasive evidence to discharge their RLUIPA burden as a matter of law. Instead they predictably ask for deference. But as the opening brief explained (at pp. 27-31), prison officials are due deference only if they first produce competent and persuasive evidence establishing that they were pursuing compelling interests by the least restrictive means. *Lovelace v. Lee*, 472 F.3d 174, 189-90 (4th Cir. 2006). This Court does not "rubber stamp or mechanically accept the judgments of prison administrators." *Id.* at 190. Defendants proceed as if *Rendelman* bears the burden of demonstrating that they acted unreasonably. This is contrary to RLUIPA. 42 U.S.C. § 2000cc-2(b). It is the approach that RLUIPA was designed to supplant.

What is more, Defendants divert attention from *this* case by failing to acknowledge the accommodations that Rendelman requested. He requested only paper plates and extra/substitute portions of foods he was being served. Opening

Br. 4. Defendants offer no justification for denying these modest accommodations, and indeed their brief never mentions them. Instead they argue against "all Kosher requirements" (Br. of Appellees 5, 8, 21, 27), as if Rendelman sought procurement of specialty foods, a Kosher kitchen, or a Kosher line. As shown in the opening brief, however, RLUIPA focuses on *the claimant* and *his* accommodation request. Opening Br. at 28-30, 35-36; 42 U.S.C. § 2000cc-1(a) (the burden on "that person" must be justified); *Koger v. Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) (under RLUIPA, the asserted compelling interest "should be considered in light of the prisoner's request and circumstances at the detention facility").

A. The Record Lacks Competent Evidence That Denying Paper Plates And Substitute Portions Was Necessary For Security

The *only* record item that Defendants cite for their security theory is a 15-year-old letter denying an inmate's request to receive Kosher meals from outside sources. J.A. 36. The letter, written long before RLUIPA, says, *ipse dixit*, that letting an inmate receive special food from outside sources "could lead to unrest within the population and thereby create security issues." J.A. 37. This unsworn letter is not competent to satisfy strict scrutiny. *See Lovelace*, 472 F.3d at 190-91.

Defendants' security theory is based on a purported risk of perceived favoritism that they suggest would arise if other inmates observe the accommodations. But Rendelman was *in segregation* for much of the time, not in a group setting subject to observation; his meals were brought to him in his cell, on

prepared trays. J.A. 24-25, 44, 64. Thus, the risk of perceived favoritism is particularly spurious in this case.

Defendants' contention that accommodating Rendelman would have created an unacceptable appearance of partiality toward his religion is logically incoherent, since they also contend that "DOC's menu options were designed to accommodate the diets of several religious groups." Br. of Appellees 5. Defendants never explain why accommodating an Orthodox Jew carries an unacceptable risk of perceived favoritism, but accommodating other religious groups does not.

Defendants also ignore cases that have rejected the notion that providing Kosher accommodations would undermine security. Opening Br. 41-42. Instead Defendants cite two grooming-policy cases: *McRae v. Johnson*, No. 06-7548, 2008 WL 80202 (4th Cir. Jan. 7, 2008), and *Hoevenaar v. Lazaroff*, 422 F.3d 366 (6th Cir. 2005). But the grooming policies were aimed at risks that have nothing to do with Kosher diets, and in both cases there was a hearing or bench trial at which the defendants produced evidence, with sworn testimony, of contraband smuggling and past injurious or violent conduct. Here, in contrast, Defendants have no such evidence; there has been no evidentiary hearing.

B. The Record Lacks Competent Evidence That The Requested Accommodations Posed A Compelling Budgetary Problem

RLUIPA's duty applies even if removing a burden on religious exercise entails additional cost. Opening Br. 32-33. Even if cost-avoidance can be a

compelling interest in certain cases, *see id.*, these Defendants moved for summary judgment on a record that contains no sworn affidavit or data on costs.

Lacking record evidence, Defendants cite some cases, but cases are not substitutes for evidence. Moreover, the cases have no bearing here, because they did not involve requests for paper plates and substitute portions. For example, the Maryland cases involved requests to procure or prepare specialty meals. *Wilkerson v. Beitzel*, No. JFM-05-1270, 2005 WL 5280675 (D. Md. Nov. 10, 2005), *aff'd*, No. 05-7888, 2006 WL 1582704 (4th Cir. June 6, 2006); *Cooper v. Rogers*, 788 F. Supp. 255 (D. Md. 1991), *aff'd in part*, No. 91-7735, 1992 WL 60240 (4th Cir. Mar. 30, 1992); *Cooper v. Lanham*, No. 97-7183, 1998 WL 230913, at *2 (4th Cir. May 7, 1998) ("Defendants have put forth evidence demonstrating the substantial costs associated with purchasing, storing, and preparing kosher meals" and "that the already strained kitchen facilities at MDOC are not equipped to handle the preparation and storage of special meals[.]").[1]

Likewise, in *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007), the plaintiff sought a separate Kosher kitchen or food prepared outside the prison, and

[1] The *Wilkerson* complaint not plead a RLUIPA claim. Opening Br. 32 n.3. The *Cooper* cases pre-date RLUIPA, so strict scrutiny did not apply, and the inmate bore the burden of demonstration. In fact, in the first *Cooper* case, which involved a request for special catered breakfasts (in addition to the prepackaged Kosher lunches and dinners the prison already provided), this Court affirmed on the narrow ground that "Cooper failed to produce sufficient evidence . . . on the issue of whether prison policy impinged his free exercise rights," 1992 WL 60240, at *1, i.e., he had not even shown that his religious exercise was substantially burdened.

defendants submitted "uncontroverted" sworn affidavits. *Id.* at 118, 125. The court held that "[t]he uncontroverted . . . evidence submitted by Defendants establishes that [the prison's] budget is not adequate to cover the increased expense of either providing a separate kosher kitchen or bringing in kosher food from the outside[.]" *Id.* at 125. Similarly, *Andreola v. Wisconsin*, No. 06-1491, 2006 WL 3724633 (7th Cir. Dec. 18, 2006), involved the procurement of prepackaged Kosher meals. And that unpublished decision applied the wrong legal standard: it invoked the pre-RLUIPA standard from *Turner v. Safley*, 482 U.S. 78 (1987), finding "a *legitimate* interest" in cost control (rather than a compelling interest) after citing a Third Circuit case that was decided in relevant part under the *Turner* standard. *Andreola*, 2006 WL 3724633, at *3 (emphasis added).

In short, while Rendelman disagrees with the reasoning of these cases, they are readily distinguishable. Meanwhile, Defendants ignore the RLUIPA cases that have rejected the cost-avoidance excuse for denying Kosher accommodations. Opening Br. 24-25.

Defendants' assertion that providing Kosher diets "would overwhelm most states' institutional food service budgets" is not supported by record evidence and is refuted by the fact that so many States make Kosher meals available to inmates. Opening Br. 46-48. The law review note that Defendants cite (which is based on now-outdated hearsay telephone interviews regarding procurement of prepackaged Kosher meals prepared outside the prisons) does not support the proposition. In

fact, it confirms that prisons have been able to provide cost-effective Kosher meals by using screening procedures. *In the Belly of the Whale: Religious Practice in Prison*, 115 Harv. L. Rev. 1891, 1907-08 (2002).

C. On This Record, Defendants Cannot Establish As A Matter Of Law That They Adopted The Least Restrictive Means

On the issue of "least restrictive means," Defendants say that "DOC was very deliberative in its process of developing inmate dietary policies." Br. of Appellees 28. Whether or not that is true (their two record cites are far from compelling), it is beside the point. The issue is their failure to accommodate an Orthodox Jew's requests for paper plates and extra/substitute portions so that he could refrain from defiling himself. Defendants contend they are enforcing a "neutral" rule of general applicability. In effect, they contend they are not required to make *any* exceptions to a generally applicable program. This is the discredited rationale of *Employment Div., Dept. of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878-82 (1990), which RLUIPA supplants. Opening Br. 18-19, 38-39.

Defendants do not even discuss the modest accommodations that Rendelman requested. And they cannot refute the relevant fact that *more substantial* Kosher accommodations are provided by other prison systems that have the same security and budget interests — i.e., that other institutions have been able to accomplish these same security and budgetary interests by less restrictive means than a ban on Kosher accommodations. Opening Br. 46-47.

II. RENDELMAN MAY RECOVER NOMINAL DAMAGES FROM DEFENDANTS

Defendants now argue that Rendelman's individual-capacity action must be dismissed on the ground that RLUIPA does not authorize damages against them in their individual capacities. Defendants never raised this theory below. In the district court, they argued only against damages in their *official* capacities on the basis of sovereign immunity, citing *Madison v. Virginia*, 474 F.3d 118 (4th Cir. 2006), a sovereign-immunity case that explicitly declined to address individual-capacity damages. J.A. 18. Indeed, Defendants proceeded below as if RLUIPA *does* allow such damages: they moved for summary judgment on qualified immunity, a defense that applies only if individual-capacity damages are permitted by statute. *See Morse v. Frederick*, 127 S. Ct. 2618, 2624 n.1 (2007). Because Defendants never raised this theory against individual-capacity damages below (despite being put on notice of Rendelman's transfer), the district court proceeded to address the merits of his RLUIPA claim on the apparent assumption that his request for individual-capacity damages remained alive despite his transfer.

Since Defendants failed to raise below their no-damages theory, it is waived on appeal. *United States v. Kelly*, 510 F.3d 433, 439 (4th Cir. 2007) (waiver rule); *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993) ("[I]ssues raised for the first time on appeal generally will not be considered."). This Court has held that it will exercise its discretion to affirm a summary judgment on alternative grounds *if* the

alternative argument was properly raised below. *Beverati v. Smith*, 120 F.3d 500, 503 (4th Cir. 1997) ("[W]hen this court reviews the grant of summary judgment, it . . . addresses the properly preserved arguments raised by the appellant and, if necessary, all *properly preserved* alternative bases for affirmance advanced by the appellee.") (emphasis added); *Hager v. Gibson*, 109 F.3d 201, 208 (4th Cir. 1997) ("[T]he Trustee, as appellee, would be entitled also to urge as a basis for affirmance of the summary judgment any alternative ground *that she urged as a basis for the judgment in the bankruptcy court*.") (emphasis added); *Nyonteh v. Peoples Sec. Life Ins. Co*., 958 F.2d 42, 45 (4th Cir. 1992) ("[T]his Court may affirm on alternative grounds raised by the parties in the district court.").

It would not be unjust to apply waiver here. *See Lovelace*, 472 F.3d at 196 n.7. *Lovelace* involved an individual-capacity RLUIPA claim against an officer (Lester). Because Lester did not properly preserve the argument that RLUIPA does not authorize individual-capacity damages, this Court declined to affirm on that alternative ground. *Id.* The damages claim went forward.

If the Court does consider Defendants' argument, it should be rejected. As shown below in part I.A, Congress imposed RLUIPA's duty on prison officials personally and provided inmates with a right of action against them in their individual capacities. As shown in part I.B, when a right of action exists, the law presumes that damages are available, unless Congress says otherwise; in RLUIPA,

Congress did not categorically bar damages. As shown in part I.C, RLUIPA's text, legislative history, and purpose give clear notice that individual-capacity damages are available, subject to the Prison Litigation Reform Act (PLRA), which will limit recovery in most cases to nominal damages. As shown in part I.D, Defendants' arguments are unpersuasive.[2]

A. As This Court Has Held, Congress Provided A Right Of Action Against Prison Officials In Their Individual Capacities

In RLUIPA, as in RFRA, Congress defined "government" exceedingly broadly to mean not only government entities and officials, but also "any other person acting under color of State law." 42 U.S.C. § 2000cc-5(4). This language tracks Section 1983, which provides a right of action against officials personally. *Id.* § 1983. By virtue of RLUIPA's expansive definition of "government," therefore, Congress imposed RLUIPA's substantive duty on prison officials personally. *Id.* § 2000cc-1(a). And Congress provided inmates with a corresponding private right of action prison officials personally. *Id.* § 2000cc-2(a).

Defendants do not dispute this, nor can they, since this Court has already held that RLUIPA does provide a cause of action against prison officials in their individual capacities when they intentionally violate RLUIPA. *Lovelace*, 472 F.3d at 194. On this point, the *Lovelace* panel was unanimous. *See id.* at 204-05

[2] The entire argument that follows assumes *arguendo* that RLUIPA may not be enforced through Section 1983. 42 U.S.C. § 1983. Section 1983 allows individual-capacity damages. *Davis v. Passman*, 442 U.S. 228, 248 (1979).

(Wilkinson, J., concurring in the judgment in part and dissenting in part) ("The majority rightly holds that Lovelace has presented an issue of triable fact as to whether correctional officer Lester intentionally violated his religious liberty, and that RLUIPA provides a cause of action to redress this type of infringement."); *id.* at 217 ("I agree that prison officials may be sued in their individual capacities.").

B. Because RLUIPA Provides A Right Of Action Against Prison Officials In Their Individual Capacities And Does Not Bar Damages, The Law Presumes That Damages Are Available

Once it is determined that a right of action exists against officials in their individual capacities, the question then becomes what relief is available. Here the law presumes the availability of all "appropriate relief," *including damages*, "unless Congress has expressly indicated otherwise." *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 66 (1992); *see also id.* ("'[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done.'") (quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946)). "'A disregard of the command of the statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, *the right to recover the damages from the party in default is implied*, according to a doctrine of the common law . . . .'" *Id.* at 67 (emphasis added; citation omitted). "The general rule, therefore, is that absent clear direction to the contrary by Congress, the

federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." *Id.* at 70-71. It is assumed that Congress legislates with awareness of this presumption. *See id.* at 68-69, 72.

Franklin, a Title IX case, confirmed that this presumption applies to damages under Spending Clause legislation. The Court rejected the argument "that the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause power." *Id.* at 74. The Court made clear that *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981), did not dictate a different result. *Franklin*, 503 U.S. at 74-75.

Applying the *Franklin* presumption, damages are available against officials under RLUIPA, since RLUIPA creates a private cause of action against them in their individual capacities and does not categorically bar damages.[3] In any event, as shown below, an analysis of RLUIPA's text, legislative history, and purpose confirms that RLUIPA authorizes damages (subject to the PLRA).

C. Congress Intended To Permit Damages Against Prison Officials Who Intentionally Violate RLUIPA, Subject To The PLRA

As just shown, in 1992, in the context of Spending Clause legislation, the Supreme Court in *Franklin* confirmed that, unless Congress provides otherwise,

[3] *Cf.* 18 Op. Off. Legal Counsel 180, 183 (1994) (interpreting identical language from RFRA, the predecessor to RLUIPA, and advising, "Because RFRA's reference to 'appropriate relief' does not clearly exclude money damages, there is a strong argument that under the *Franklin* standard money damages should be made available to RFRA plaintiffs in suits against non-sovereign entities.").

federal courts will presume the availability of "appropriate relief," a term of art the Court repeatedly used, and one the Court applied to include damages. *Id.* at 66, 68, 69, 70, 71, 74; *see also id.* at 66, 74 ("appropriate remedies").

When Congress enacts a statute shortly after a Supreme Court decision, the decision "provides a valuable context for understanding the statute." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 176 (2005). The year after *Franklin*, Congress enacted RLUIPA's predecessor, RFRA. Tracking *Franklin*'s terminology, RFRA created a right of action to obtain "*appropriate relief*." Pub. L. No. 103-141 § 3(c) (1993) (emphasis added). The use of the same terminology is significant. *See Reich v. Cambridgeport Air Sys., Inc.*, 26 F.3d 1187, 1191 (1st Cir. 1994) (court interpreted "appropriate relief" in statute to include monetary damages: "It is hard to believe that the Supreme Court – having . . . construed [the term in *Franklin*] to include 'monetary damages' . . . – would construe less generously Congress's similar phrase, 'all appropriate relief.'").

In the wake of RFRA's passage, the Office of Legal Counsel advised that there was a "strong argument" that RFRA's "appropriate relief" language authorized individual-capacity damages. *See* note 3, *supra*. Courts concluded that RFRA did authorize such damages, *see, e.g.*, *Jama v. U.S.I.N.S.*, 343 F. Supp. 2d 338, 376 (D.N.J. 2004), including the Seventh Circuit's decision (by Judge Posner) in *Mack v. O'Leary*, 80 F.3d 1175, 1177 (7th Cir. 1996) ("Mack was entitled to sue

the prison officials" personally where he sought "only damages by way of relief"), *vacated on other grounds sub nom. O'Leary v. Mack*, 522 U.S. 801 (1997).

Mack was vacated because the Supreme Court held in 1997 that RFRA exceeded Congress's enforcement power under the Fourteenth Amendment. *Id.* Congress then held hearings for new legislation that would become RLUIPA. In the hearings, Professor Douglas Laycock, a key witness and author of a leading casebook on remedies, explained that the proposed private cause of action for "appropriate relief" was "based on the corresponding provision of RFRA" and "should be read against a large body of federal law on remedies and immunities under other civil rights legislation." Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 106th Cong. (May 12, 1999), pp. 205-06, 218. "Appropriate relief," he explained, "includes declaratory judgments, injunctions, *and damages*," with qualified immunity as a defense. *Id.* (emphasis added).

The committee report for the bill that became RLUIPA gave notice of Congress's intention to provide for damages against officials personally:

> This section [creating a claim] provides remedies for violations. Sections 4(a) and (b) track RFRA, *creating a private cause of action for damages*, injunction, and declaratory judgment, and creating a defense to liability, and providing for attorneys' fees. These claims and defenses lie against a government, *but the Act does not abrogate the Eleventh Amendment immunity of states. In the case of violation* by a state, *the Act must be enforced by suits against state officials and employees.*

H.R. Rep. No. 106-219, p. 29 (1999) (emphasis added). Thus, as RLUIPA's co-sponsor reiterated, RLUIPA's right of action "tracks RFRA, creating a *private cause of action for damages*" in "suits against state officials or employees." 146 Cong. Rec. E1563-01 (Sept. 22, 2000) (statement of Rep. Canady) (emphasis added).

RLUIPA's text itself makes this clear. First, in RLUIPA Congress chose to retain from RFRA the same broad language ("appropriate relief") that had led courts to allow individual-capacity damages claims to proceed under RFRA. "'[W]hen a legislature borrows an already judicially interpreted phrase from an old statute to use it in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase.'" *Long v. Director, Office of Workers' Comp. Programs*, 767 F.2d 1578, 1581 (9th Cir. 1985) (quoting *Fusco v. Perini North River Assocs.*, 601 F.2d 659, 664 (2d Cir. 1979), *vacated on other grounds*, 444 U.S. 1028 (1980)).

Second, the Supreme Court held, before RLUIPA, that the "ordinary meaning" of "appropriate relief" in a statute is one that "confers broad discretion on the court." *School Comm. of the Town of Burlington v. Dep't of Educ.*, 471 U.S. 359, 369-370, 374 (1985) (holding that "the ordinary meaning" of statute providing for "such relief as the court determines is appropriate" authorized compensatory "reimbursement" award entailing payment of funds).

Third, in subsection (f) of the very same section that creates the private action for "appropriate relief," Congress created a separate right of action for the United States. 42 U.S.C. § 2000cc-2(f). Subsection (f) provides, "The United States may bring an action *for injunctive or declaratory relief* to enforce compliance with this Act." *Id.* (emphasis added). This is significant:

> Had Congress intended in § 2000cc-2(a) to limit relief available to individuals to injunctive or declaratory relief, Congress could have used the same language it used in § 2000cc-2(f). By choosing a more expansive definition ['appropriate relief'] with regard to the private cause of action, Congress likely intended that something more than injunctive or declaratory relief be available.

Agrawal v. Briley, No. 02C6807, 2006 WL 3523750, at *10 (N.D. Ill. Dec. 6, 2006). The only way to make sense of the different language used by Congress is to conclude that "appropriate relief" in subsection (a) is broader than "injunctive or declaratory relief" in subsection (f). The Court should "'refrain from concluding here that the differing language in the two subsections has the same meaning in each.'" *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 454 (2002).

Fourth, RLUIPA's text must be interpreted to permit individual-capacity damages to avoid rendering a statutory subsection superfluous: subsection (iii) of 42 U.S.C. § 2000cc-5(4). In subsections (i) and (ii) of that section, Congress provided that the cause of action would lie against a government entity and "any . . . official of [such] entity." *Id.* § 2000cc-5(4)(i),(ii). Thus, in subsections (i) and (ii), Congress created official-capacity liability (and abrogated sovereign

immunity) for declaratory and injunctive relief. *See Madison*, 474 F.3d at 130-31. In subsection (iii), however, Congress went further, subjecting prison officials *personally* to suit. *See* part II.A, *supra.* If the only remedy against these officials were declaratory and injunctive relief, then subsection (iii) would add nothing beyond subsection (ii)'s official-capacity action. Given the "cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant," *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal quotation marks omitted), subsection (iii) must subject officials to damages in their individual capacities. *Agrawal*, 2006 WL 3523750, at *11.

Fifth, Congress inserted in RLUIPA a rule of "Broad construction," which requires that RLUIPA "be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." 42 U.S.C. § 2000cc-3(g). Thus, Congress gave clear notice that even if a term is ambiguous, the construction favoring inmates controls.

For these reasons, RLUIPA puts prison officials on notice that they are exposed to liability for damages.

This exposure, however, is subject to the PLRA, 42 U.S.C. § 2000cc-2(e), which in all but the rarest of cases will limit recovery to nominal damages. The PLRA has a "Limitation on recovery" section providing that a prisoner may not

recover compensatory damages "for mental or emotional injury suffered while in custody without a prior showing of physical injury." *Id.* § 1997e(e)). But the Circuits have consistently held, often in religious-rights cases, that this PLRA limitation does not foreclose *nominal damages* when prisoners are seeking to vindicate rights.[4] After all, nominal damages have long been imposed to vindicate rights without proof of actual injury. *Carey v. Piphus*, 435 U.S. 247, 266-67 (1978); 24 Williston on Contracts § 64:6 (4th ed. 2004). They "are not compensation for loss or injury, but rather recognition of a violation of rights." *Calhoun*, 319 F.3d at 941 (internal quotation marks omitted).

So, for example, the Eighth Circuit, applying the PLRA in a RLUIPA case, affirmed nominal damages for the denial of Kosher meals. *Fegans v. Norris*, 537 F.3d 897, 908 (8th Cir. 2008). Likewise, in another recent RLUIPA case, the Seventh Circuit directed entry of judgment for nominal damages against prison officials in their individual capacities. *Koger*, 523 F.3d at 803-04.

Defendants' position — that *no* relief is "appropriate relief" — is contrary to the principle "'that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded.'" *Franklin*, 503 U.S. at 66

[4] *See, e.g., Hutchins v. McDaniels*, 512 F.3d 193, 197-98 (5th Cir. 2007); *Royal v Kautzky*, 375 F.3d 720, 722-23 (8th Cir.2004); *Calhoun v. DeTella*, 319 F.3d 936, 940 (7th Cir. 2003); *Oliver v. Keller*, 289 F.3d 623, 630 (9th Cir. 2002); *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002); *Searles v. Van Bebber*, 251 F.3d 869, 878-79 (10th Cir. 2001); *Allah v. Al-Hafeez*, 226 F.3d 247, 250-51 (3d Cir. 2000).

(citation omitted). And their position is contrary to RLUIPA's purpose. Congress enacted RLUIPA to restore the protection available before *Smith*, when free-exercise claims were brought under Section 1983, which permits individual-capacity damages, *Davis*, 442 U.S. at 248. Recovery of damages under RLUIPA fulfills Congress's purpose of restoring the full measure of pre-*Smith* protection. *See* S. Rep. No. 103-111, at 1902, U.S. Code Cong. & Admin. News 1993, pp. 1892, 1902 ("To be absolutely clear, [RFRA] does not expand, *contract or alter the ability of a claimant to obtain relief in a manner consistent with the Supreme Court's free exercise jurisprudence . . . prior to Smith.*") (emphasis added).

In conclusion, RLUIPA subjects Defendants to liability in their individual capacities, and, at the very least, nominal damages would be "appropriate relief" for Rendelman. *Cf. Franklin*, 503 U.S. at 76 (damages were the appropriate relief so that plaintiff would not be "remediless"). Because he may recover nominal damages in his individual-capacity action, his action is not moot. *Covenant Media of S.C., LLC v. City of N. Charleston*, 493 F.3d 421, 429 (4th Cir. 2007).

D. Defendants' Arguments Against Damages Are Unavailing

In contending that no damages, not even nominal damages, are ever available from prison officials, Defendants and the RLUIPA cases on which they rely largely ignore the authorities and logic discussed above.

Defendants cite *Madison*'s conclusion that RLUIPA does not unequivocally authorize damages. *Madison*, 474 F.3d at 131-32. But putting aside that *Madison* did not address many of the textual arguments or the legislative history discussed above, *Madison* was a sovereign-immunity case; the Court applied the rule that an unequivocal textual authorization of damages must be found to waive sovereign immunity. *Id. See also id.* at 130 n.3 (stating that "the issue presented here is a narrow one" regarding "only the [district] court's ruling that Virginia waived its sovereign immunity for damages claims," and recognizing that individual-capacity damages were a separate issue). Sovereign immunity is not at issue in an individual-capacity suit. Therefore, it would not be "anomalous," as Defendants say, to hold that damages are not "appropriate" relief against the State but that damages are appropriate relief against Defendants in their individual capacities.

Defendants' reliance on *Pennhurst* is also misplaced. *Pennhurst* involved a request to impose an unexpected substantive obligation on States, not the remedies available for noncompliance. *Bell v. New Jersey*, 461 U.S. 773, 790 n. 17 (1983). "*Pennhurst* does not bar a private damages action" for intentional conduct that violates a clear statute. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 642 (1999); *Jackson*, 544 U.S. at 181-84; *Franklin*, 502 U.S. at 74-75. Under *Pennhurst*, "Congress need not 'specifically identif[y] and proscrib[e]' each condition" in Spending Clause legislation. *Davis*, 526 U.S. at 650 (brackets in

Davis) (quoting *Bennett v. Kentucky Dep't of Educ.*, 470 U.S. 656, 665-66 (1985)).

Defendants also rely on Title IX and Rehabilitation Act cases. But they are inapposite. They dealt with whether a *right of action even exists* against officials in their individual capacities (under statutes that provided no private right of action at all). In finding no right of action against officials personally, the courts relied on statutory interpretation. *See, e.g., Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1018-19 (7th Cir. 1997); *Lollar v. Baker*, 196 F.3d 603, 608-09 (5th Cir. 1999). But, as noted above, as a matter of statutory interpretation, this Court has already confirmed that RLUIPA is different than Title IX and the Rehabilitation Act; this Court has held that RLUIPA *does* provide a private right of action against prison officials in their individual capacities. *See* part II.A, *supra.*

Because the Title IX and Rehabilitation Act cases were resolved as a matter of statutory interpretation, moreover, they cannot stand for the proposition that Congress is *constitutionally forbidden* from imposing individual liability should it choose to do so, as it did in RLUIPA. None of the Title IX or Rehabilitation Act cases cited by Defendants held that "Congress cannot use its spending authority to authorize suits against private parties who are not themselves recipients of the federal funding." Br. of Appellees 15.[5]

[5] The same day this Court in *Lovelace* held that officials may be sued in their individual capacities under RLUIPA, this Court in *Madison* rejected a Spending Clause challenge to RLUIPA.

It is an entirely appropriate exercise of the spending power for Congress to impose liability and a remedy against officials of funding recipients, particularly those who participate in the design, implementation, or enforcement of programs that receive federal funding, or in the allocation of funds. Defendants here are not third parties unrelated to a funding recipient. They act under color of State law and are otherwise accountable for the government's obligations under Section 1983. They are already liable in their official capacities for RLUIPA's obligations, so holding them personally accountable would not impose any additional substantive obligation. They occupy positions of authority enabling them to burden and accommodate religious exercise within federally-funded institutions. Because "[p]risoner rehabilitation and protection of religious liberties are legitimate congressional aims related to federal funding of state prisons," *Madison*, 474 F.3d at 126, and because officials who impede these objectives impair the integrity of the funding, Congress may use the spending power and the Necessary and Proper Clause to hold them personally accountable. *Cf. Sabri v. United States*, 541 U.S. 600, 605-08 (2004) (upholding use of spending power to impose criminal liability against individuals who are not funding recipients).

This says nothing of the Commerce Clause, on which RLUIPA is separately grounded. Defendants suggest (at p. 19) that RLUIPA is facially invalid under the Commerce Clause. But RLUIPA contains a jurisdictional element. *See* 42 U.S.C.

§ 2000cc-1(b)(2) (liability applies in any case in which "the substantial burden [on religious exercise] affects, or removal of that substantial burden would affect, [interstate] commerce"); *id.* § 2000cc-2(g) (government bears burden of demonstrating "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 [interstate] commerce"). The presence of a jurisdictional element, which provides a nexus with interstate commerce, distinguishes RLUIPA from the types of statutes the Supreme Court has invalidated under the Commerce Clause. *See, e.g.*, *United States v. Nathan*, 202 F.3d 230, 234 (4th Cir. 2000) (discussing significance of jurisdictional element); *United States v. Cobb*, 144 F.3d 319, 321-22 (4th Cir. 1998) (same).

In this case, the nexus is evident. The relevant conduct regulated by RLUIPA — institutional food service — is of a commercial character and is directly connected with commercial transactions such as procurement and distribution. The case concerns denial of access to and consumption of articles of commerce. Defendants have not demonstrated that prison dietary policies and accommodations, in the aggregate, do not substantially affect interstate commerce. *Cf. Gibbs v. Babbitt*, 214 F.3d 483, 492 (4th Cir. 2000) (rejecting Commerce Clause challenge to regulation imposing liability for harming threatened species); *Hoffman v. Hunt*, 126 F.3d 575, 587-88 (4th Cir. 1997) (rejecting challenge to

statute imposing liability for burdening access to clinics). The fact that Congress was not pursuing economic objectives in RLUIPA is, of course, immaterial to the statute's legitimacy under the Commerce Clause. *See Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 257 (1964) (rejecting challenge to Title II of Civil Rights Act of 1964, which imposed civil liability and was based on Commerce Clause); *Gibbs*, 214 F.3d at 493 n.2.

As Defendants point out, other courts have split on the availability of individual-capacity damages under RLUIPA.[6] But the cases denying damages are contrary to the authorities and analysis above, and thus are unpersuasive. Indeed, some of these cases concluded, contrary to this Court's *Lovelace* decision, that RLUIPA does not even provide a cause of action against individuals, so it was not surprising that they rejected damages. *See, e.g., Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1067 (D. Haw. 2002). Moreover, some of the cases concluded, contrary to this Court's *Madison* decision, that RLUIPA *does* permit damages against prison officials in their *official capacities*, *see, e.g., Smith v. Allen*, 502 F.3d 1255, 1269-71 (11th Cir. 2007), thus making recovery of individual-capacity damages gratuitous. As for *Malik v. Ozmint*, No. 8:07-387-

[6] Defendants cite some cases that have allowed individual-capacity damages. Others include: *Koger*, 523 F.3d at 801-04 (2008); *Dupree v. Laster*, No. 02-cv-1059-DRH, 2007 WL 2746852, at *3-4 (S.D. Ill. Sept. 19, 2007); *Bess v. Alameida*, No. CIV-S-03-24982007, 2007 WL 2481682, at *21 (E.D. Cal. Aug. 29, 2007); *see also Mack*, 80 F.3d at 1177 (RFRA); *Jama*, 343 F. Supp. 2d at 373-75 (RFRA).

RBH-BHH, 2008 WL 701517 (D.S.C. Feb. 13, 2008), it was short lived: the district court explicitly declined to adopt the magistrate judge's unreasoned conclusion on damages. *Malik v. Ozmint*, No. 8:07-387-RBH, 2008 WL 701394, at *4 n.1 (D.S.C. Mar. 13, 2008).

At the end of the day, a nominal damages award is appropriate relief in Rendelman's individual-capacity action. But this Court should not even address the matter since Defendants failed to make the argument below.

III. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON QUALIFIED IMMUNITY

Defendants' qualified immunity argument is directly contrary to this Court's *Lovelace* decision. As explained in the opening brief, *Lovelace* held that an institutionalized person has a clearly established right to a diet mandated by his sincerely held religious beliefs, so that he is not compelled to defile himself by doing something that his religion forbids. *Lovelace*, 472 F.3d at 198-99. This Court relied, in part, on cases like *Ford v. McGinnis*, 352 F.3d 582 (2d Cir. 2003), which rejected qualified immunity for prison officials at the summary judgment stage. *Id.*; Opening Br. 57-58. In their response, Defendants do not address these cases. Nor do Defendants address other RLUIPA-diet cases rejecting qualified immunity. *See*, *e.g.*, *Koger*, 523 F.3d at 802-03.

Defendants try to distinguish *Lovelace*, but their effort is unavailing. They note that *Lovelace* was decided in December 2006, but the events at issue in

Lovelace occurred in, and this Court determined that the right was clearly established in, *2002* — years before Defendants injured Rendelman. *Lovelace*, 472 F.3d at 181-83. This Court held that RLUIPA's "core protections," including protection of dietary rights, were clearly established upon RLUIPA's passage in 2000. *Id.* at 198-99. Indeed, because RLUIPA was enacted to reinstate RFRA and to *restore* the free-exercise protection that governed over two decades ago, RLUIPA put prison officials on notice that they were subject to decisional law from the earlier regime, when free-exercise protection was at its zenith.

Defendants argue that *Lovelace* involved an allegation that the defendant *intentionally* interfered with an inmate's rights. So does this case. Defendants also contend that *Lovelace* did not involve an institutional policy, but that is incorrect. *Lovelace* involved a policy *and* a claim that prison officials applied the policy in violation of RLUIPA. *Id.* at 194 ("Having addressed [in Lovelace's favor] Lovelace's claim that the policy as issued violates RLUIPA, we now consider his claim that the defendants applied the policy in violation of RLUIPA.").

Moreover, there is a genuine factual issue as to whether Defendants were merely implementing DOC institutional policy when they denied Rendelman's two requested accommodations (paper plates and substitute portions) — i.e., whether DOC policy *required* them to deny these accommodations and force Rendelman to choose between defiling himself and not eating. DOC's policy provides general

meal plans, and on this record there is nothing in the policy that forbids a warden or dietary manager to accommodate the type of modest requests that Rendelman made. J.A. 63-78. In fact, the policy says each warden must implement the policy with an institutional directive, J.A. 65-66, thus affording local discretion.

Defendants also advance a thinly-veiled attack on *Lovelace*'s holding by advocating an overly broad theory of qualified immunity. Specifically, Defendants argue that they are entitled to qualified immunity because this Court and the Supreme Court had not specifically held in a particularized manner that RLUIPA requires Kosher accommodations to a Jewish inmate. But, of course, *Lovelace* did not rely on Supreme Court or Fourth Circuit precedent holding that RLUIPA required prison officials to allow group Ramadan prayers or special meals beyond the accommodations that were otherwise offered to Muslims. Rather, this Court acknowledged that "the outer boundaries of RLUIPA may have been uncharted at the time," but held that RLUIPA's "core protections were not," including the right to a diet consistent with religious scruples. *Lovelace*, 472 F.3d at 198-99.

This approach was faithful to the Supreme Court's application of qualified immunity, which Defendants' theory is not. The Supreme Court has long rejected the notion that qualified immunity must apply "unless the very action in question has previously been held unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). And the Court has "expressly rejected a requirement that previous cases be

'fundamentally similar'" to defeat qualified immunity. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) ("officials can still be on notice that their conduct violates established law even in novel factual circumstances"). "Although earlier cases involving 'fundamentally similar' or 'materially similar' facts 'can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to such a finding.'" *Jones v. Buchanan*, 325 F.3d 520, 531 (4th Cir. 2003) (quoting *Hope*, 536 U.S. at 739).

Thus, as this Court has repeatedly said, "'[c]learly established' . . . includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core . . . principle invoked." *Iko v. Shreve*, 535 F.3d 225, 240 (4th Cir. 2008) (citation omitted); *Henry v. Purnell*, 501 F.3d 374, 377 (4th Cir. 2007). "'[G]eneral statements of the law are not inherently incapable of giving fair notice and clear warning[.]'" *Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 313 (4th Cir. 2006) (quoting *Hope*, 536 U.S. at 741). The availability of qualified immunity boils down to whether Defendants had "fair warning" they were violating RLUIPA. *See Hope*, 536 U.S. at 741; *Iko*, 535 F.3d at 240; *Jones*, 325 F.3d at 531. In this connection, "the reasoning of [a prior] case may establish a 'premise' regarding [wrongfulness] that can give an officer fair notice that his conduct is objectively unreasonable." *Id.* at 531-32 (quoting *Hope*, 536 U.S. at 741). These principles are lost on Defendants.

Citing *Pritchett v. Alford*, 973 F.2d 307 (4th Cir. 1992), which *denied* immunity, Defendants argue that they may have committed "mistakes of judgment traceable to unsettled law." Br. of Appellees 31-32. But the record shows they did not make a "mistake of judgment" about RLUIPA's protection when they denied Rendelman's requests: they willfully turned a blind eye to RLUIPA by relying on an unpublished *pre-RLUIPA* (and post-RFRA) case, *Cooper v. Lanham*, *supra* 1998 WL 230913 (4th Cir. 1998), which applied minimal scrutiny under the First Amendment. J.A. 32, 38, 53-57. *Cooper* was the type of decisional law that RLUIPA was designed to supplant. Reasonable officials would have known this. Rendelman told Defendants so. J.A. 45, 50-52, 53-55, 56-57. They ignored him.

Defendants' appellate brief repeats this error. They rely on *Cooper* and also on *Wilkerson*, 2005 WL 5280675, a case in which the inmate did not plead a RLUIPA claim. Opening Br. 32 n.3. And, as noted, *Wilkerson* (like *Cooper*) involved requests more substantial than Rendelman's requests for substitute portions and paper plates. *Id.* An official would not have reasonably relied on these readily distinguishable cases in evaluating Rendelman's RLUIPA rights. That they were *unpublished* makes reliance on them for qualified immunity additionally problematic. *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996) (en banc); *Torcasio v. Murray*, 57 F.3d 1340, 1347-48 (4th Cir. 1995); *Cerrone v. Brown*, 246 F.3d 194, 202 (2d Cir. 2001).

In sum, Defendants are not entitled summary judgment on their qualified immunity defense. But, as explained in the opening brief, this Court need not reach the immunity issue.

CONCLUSION

Defendants have not sustained their burden of demonstrating that they are entitled to summary judgment.

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Respectfully submitted,

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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 6,944 words.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 12th day of January, 2009, I caused this Reply 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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