No. 08-6150

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SCOTT LEWIS RENDELMAN,

Plaintiff-Appellant,

v.

NANCY ROUSE, WARDEN, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Maryland
(J. Frederick Motz, District Judge)

BRIEF OF APPELLEES

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ISSUES PRESENTED FOR REVIEW

1. Is an inmate's claim for injunctive relief moot where his demand for Kosher dietary accommodations cannot be addressed by the defendants, because he is no longer in the custody of the Maryland Division of Correction?

2. Did the district court properly dismiss the inmate's claims for monetary damages under the Religious Land Use and Institutionalized Persons Act, because

that statute does not authorize an award of damages against officials sued in their individual capacity?

3. Did the district court properly reject the inmate's demand for Kosher dietary accommodations on the grounds that the Maryland Division of Correction's pork-free and vegetarian menu options represent a reasonable accommodation of religious practices?

4. Are the defendants entitled to qualified immunity where there is no clearly established law recognizing an inmate's right to be served a Kosher diet?

STATEMENT OF THE CASE

This case presents the question of whether damages are recoverable against state officials under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc-1 *et seq*., as well as a test of the merits of a RLUIPA claim based on the failure of the Maryland Division of Correction ("DOC") to provide certain Kosher dietary accommodations to a Jewish inmate. On March 7, 2007, Scott Rendelman, then an inmate in the custody of DOC, brought this action against three DOC officials under RLUIPA and 42 U.S.C. § 1983, asserting that he was improperly denied a Kosher diet and seeking both injunctive relief and monetary damages. (J.A. 8.) The three defendants were sued in both their official and individual capacities. (J.A. 5.) The defendants filed a motion to dismiss or, in the

alternative, for summary judgment, arguing, among other things, that Mr. Rendelman was not entitled to relief under RLUIPA and that they were entitled to qualified immunity.[1] (J.A. 9.) Mr. Rendelman opposed the motion, renewing his assertion that the denial of a full Kosher diet violated RLUIPA. (J.A. 85-89.) After filing his opposition, but prior to the district court's ruling on the motion, Mr. Rendelman filed a notice indicating that he had been transferred to the custody of a federal institution and was no longer incarcerated in the DOC. (J.A. 90.)

In an October 22, 2007 memorandum opinion, the district court granted the defendants' motion for summary judgment, finding "no violation under the First Amendment or RLUIPA." (J.A. 95.) The court noted that the DOC had "made reasonable efforts to accommodate the religious preferences of several religious groups by providing neutral master-cycle and lacto-ovo menus." (*Id.*) The district court rejected Mr. Rendelman's First Amendment Free Exercise claim brought under § 1983, holding that the DOC's efforts to develop a broadly accommodating diet were "reasonably related to promoting legitimate penologicial interests."[2] (*Id.*) Turning

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[1] The defendants also argued that Mr. Rendelman had not fully exhausted his administrative remedies. The district court did not address this defense, and the defendants do not pursue this argument on appeal.

[2] Mr. Rendelman has not appealed the entry of summary judgment in favor of the defendants on his § 1983 Free Exercise claim, which is not addressed in his brief (continued...)

to the RLUIPA claim, the court applied the strict scrutiny standard required by the statute and found that budgetary constraints and the need to avoid perceived favoritism between inmate religious groups are compelling interests and that the religiously neutral meal plan was the least restrictive means to further these interests. (J.A. 95-96.) The court also held that Mr. Rendelman's transfer out of DOC custody rendered his claim for injunctive relief moot. (J.A. 92.)

STATEMENT OF FACTS

As of September 1, 1992, the DOC offers two meal plans for inmates: a master cycle menu and a lacto-ovo vegetarian menu. (J.A. 34.) The master cycle diet provides protein primarily through fish, poultry, and meat products, but excludes pork and pork products. (J.A. 35.) The lacto-ovo diet provides non-meat sources of protein such as legumes, nuts, and cereals, in addition to eggs and dairy products such as milk and cheese. (J.A. 35, 59.) Both meal plans meet the recommended dietary allowances established by the Food and Nutrition Board of the National Academy of Sciences. (J.A. 35.)

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[2](...continued)
or mentioned in any document filed with this Court as part of this appeal. In any case, this Court has previously held that the DOC's dietary policies do not violate the First Amendment under the analysis required by the Supreme Court in *Turner v. Safely*, 482 U.S. 78 (1987). *See Cooper v. Lanham*, 145 F.3d 1323, 1998 WL 230912 (4th Cir. 1998) (*per curiam*) (unpublished).

The two menus offered by the DOC were developed to remove foods that are offensive to Muslim and Jewish inmates. (J.A. 59.) The DOC's intent was to accommodate as "broad a range of religious dietary practices as possible" while "placing only minimal costs and management burdens on dietary operations." (J.A. 33.) In addition to these concerns about budgetary and administrative burdens, DOC officials have noted that providing religion-specific diets such as a true Kosher diet would exhibit "partiality among an inmate population" and could lead to "unrest within the population and thereby create security issues." (J.A. 37.)

While incarcerated in the DOC, Mr. Rendelman made multiple requests for a Kosher diet. (J.A. 26, 30, 43, 45, 58.) Many of these requests were accompanied by obscene threats of violence to prison employees and other officials. (J.A. 45-47,48-49, 60.) In his requests for a change in diet, Mr. Rendelman indicated he could eat some but not all of the foods offered on the DOC menus, and he claims to have lost 23 to 30 pounds as a result. (J.A. 28, 40.) A registered dietician, however, determined that his weight was "within the normal limits for his height." (J.A. 58.) In response to his inquiries regarding a Kosher diet, Mr. Rendelman was informed on several occasions that the DOC's menu options were designed to accommodate the diets of several religious groups and that DOC could not provide a meal plan that conformed to all Kosher requirements. (J.A.30, 33, 60.)

After filing his complaint in this action, Mr. Rendelman was transferred out of the DOC to the custody of the United States Marshal's Service for trial on a federal criminal offense. (J.A. 102.) Mr. Rendelman was returned to DOC custody for a short period beginning in October 2007. (J.A. 102.) On December 14, 2007, he was convicted of several counts of mailing threatening communications in violation of 18 U.S.C. § 876(c), and on April 21, 2007, he was sentenced to 180 months imprisonment to be served in the custody of the federal Bureau of Prisons ("BOP"). *See United States v. Rendelman*, Case No. 07-RWT-331, Documents 45, 52 (D. Md. 2007). Mr. Rendelman is currently in the custody of the BOP serving this sentence and has noted an appeal of his federal criminal convictions to this Court. (Case Nos. 08-7646 and 08-4486.)

SUMMARY OF ARGUMENT

Because Mr. Rendelman is not entitled to monetary damages against the defendants under RLUIPA and his claims for injunctive relief are moot, this case is not in a posture requiring this Court to rule on the merits of his RLUIPA claim.

Mr. Rendelman has been transferred from DOC to BOP custody, where he is serving a lengthy sentence. As a result, he is no longer subject to DOC dietary policies, and his request for injunctive relief has therefore been rendered moot. Mr. Rendelman's conjecture regarding the possibility that his federal convictions could

be overturned on appeal and that he could possibly be returned to DOC custody do not satisfy the standard for the exception to the mootness doctrine for cases that are capable of repetition yet evading review.

Mr. Rendelman is not entitled to monetary damages under RLUIPA. This Court held in *Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006), that the Eleventh Amendment bars suits for damages against the State and that RLUIPA does not abrogate this immunity. Because suits against state officials in their official capacity are the same as actions against the State itself, monetary damages are not available under RLUIPA and are not available in claims against state officials sued in their official capacity. Although this Court has not squarely addressed the question of whether RLUIPA authorizes claims for monetary damages against officials sued in their individual capacity, the Court has previously recognized the existence of authority holding that such claims are not authorized, and a proper Spending Clause analysis confirms the correctness of that conclusion. Congress cannot use its spending authority to authorize suits against private parties who are not themselves recipients of the federal funding. This analysis has been applied to several other spending clause statutes, resulting in a bar on claims under those statutes for individual-capacity monetary damages.

Even if RLUIPA provides the relief Mr. Rendelman seeks, the district court

correctly ruled that the DOC's dietary policies did not violate RLUIPA. The DOC determined that providing a Kosher diet rather than the current options of a pork-free meat diet or a vegetarian diet would be too costly. Additionally, the provision of a Kosher diet would be perceived as a display of favoritism among inmate religious groups and would generate unrest. The DOC attempted to minimize budgetary and security concerns with its diet options while also attempting to accommodate a broad range of religious dietary practices. The DOC's menu options, therefore, are the least restrictive means for furthering the compelling government interests of fiscal soundness and institutional security.

Finally, the defendant DOC officials are entitled to qualified immunity. There is no clearly established law that would put Maryland DOC officials on notice that RLUIPA requires them to provide additional dietary accommodations for a Jewish inmate who has demanded a Kosher diet. In fact, the DOC's experience in litigation regarding Kosher food accommodations has been the exact opposite, rejecting inmates' claims that prison officials are required to provide diets that conform to all Kosher requirements.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews the district court's order granting summary judgment *de novo,* applying the same legal standards as the district court. *See Nguyen v. CNA Corp.,* 44 F.3d 234, 242 (4th Cir. 1995). The order granting summary judgment "may be affirmed on different grounds than that on which the district court relied." *Id.* (citations omitted); *see also Ostrzenski v. Seigel*, 177 F.3d 245, 253 (4th Cir. 1999) (court may affirm on "any ground supported by the record, even if it is not the basis relied upon by the district court").

II. MR. RENDELMAN IS NOT ENTITLED TO RELIEF UNDER RLUIPA BECAUSE HIS CLAIM FOR INJUNCTIVE RELIEF IS MOOT, AND RLUIPA DOES NOT AUTHORIZE AN AWARD OF MONETARY DAMAGES AGAINST PRISON OFFICIALS.

While Mr. Rendelman argues that this Court should hold as a matter of law that RLUIPA mandates the provision of particular Kosher dietary accommodations to a Jewish inmate, this case is not in a posture that requires the Court to reach that issue. Mr. Rendelman's transfer has mooted his request for injunctive and declaratory relief, and he is not entitled to monetary damages under RLUIPA. Because Mr. Rendelman is not entitled to relief, this Court need not address the merits of his RLUIPA claim.

A. Mr. Rendelman's Claim for Injunctive Relief Has Been Rendered Moot by His Transfer out of the Custody of the Maryland Division of Correction.

Mr. Rendelman filed this action while still housed in the DOC, seeking injunctive and declaratory relief regarding his claim for Kosher dietary accommodations. Prior to the district court's decision in this case, he was transferred out of the DOC and is now serving a lengthy federal sentence in a federal institution. This transfer has mooted any actual controversy regarding equitable relief because Mr. Rendelman is no longer subject to the DOC's policy regarding Kosher food. The district court correctly ruled that Mr. Rendelman's transfer out of the DOC rendered his claim for injunctive and declaratory relief moot. (J.A. 92.)

There must be an "actual controversy" in federal actions at all times or the case must be dismissed as moot. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). The actual controversy "must be extant at all stages of review, not merely at the time the complaint is filed." *Id.* In particular, the transfer or release of a prisoner ordinarily renders moot any claim for declaratory or injunctive relief relating to conditions prior to release or transfer. *See Williams v. Griffin*, 952 F.2d 820, 823 (4th Cir. 1991) (transfer to another facility mooted inmate's claims for injunctive relief); *Taylor v. Rogers*, 781 F.2d 1047, 1048 n. 1 (4th Cir. 1986) (same); *Magee v. Waters*, 810 F.2d 451, 452 (4th Cir. 1987) ("Because the prisoner has been

transferred, his request for injunctive relief is moot.").

Mr. Rendelman acknowledges the mootness rule but attempts to avoid its result by arguing that his request for a Kosher diet in the DOC is "capable of repetition yet evading review." (Brief of Appellant at 52-53.) He speculates that because he has pending appeals regarding his criminal conviction, there is a possibility that the conviction could be overturned and he could temporarily be held in the Maryland DOC pending retrial or re-sentencing. (*Id*.) This kind of conjecture, however, has been explicitly addressed and rejected by the Supreme Court in *Murphy v. Hunt*, 455 U.S. 478 (1982) (*per curiam*). In *Murphy*, an inmate argued that his criminal convictions could be overturned on appeal, thus avoiding the mootness doctrine regarding his challenges to bail proceedings. The Court rejected this argument, holding that "a mere physical or theoretical possibility" of repetition is not enough to avoid the mootness doctrine. *Murphy*, 455 U.S. at 482. Instead, there must be a "'reasonable expectation' or a 'demonstrated probability' that the same controversy will recur involving the same complaining party." *Id*. (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) *(per curiam*)).

This Court also imposes a high burden to establish the "capable of repetition yet evading review" exception to the mootness doctrine. In fact, this Court has quoted the "demonstrated probability" standard from *Murphy* and added that

"'conjecture as to the likelihood of repetition has no place in this exceptional and narrow grant of judicial power.'" *Incumaa v. Ozmint,* 507 F.3d 281, 289 (4th Cir. 2007 (quoting *Abdul-Akbar v. Watson*, 4 F.3d 195, 207 (3d Cir. 1993)), *cert denied*, 128 S. Ct. 2056 (2008). Moreover, the burden of establishing this high standard falls on the party attempting to invoke the exception to the mootness doctrine. *See id*.

Mr. Rendelman's speculation about the possibility that his federal convictions will be overturned fall far short of establishing the "capable of repetition yet evading review" exception to the mootness doctrine. In *Murphy,* the Supreme Court specifically held that speculation regarding the possibility of a conviction being overturned on appeal does not make an issue capable of repetition yet evading review. It is far more likely that Mr. Rendelman will never step foot in a Maryland DOC institution again and will never be subject to the DOC's dietary policies. As a result, there is no actual controversy in this case, and Mr. Rendelman's claim for injunctive and declaratory relief has been rendered moot.

B. RLUIPA Does Not Authorize Claims for Monetary Damages Against Officials Sued in Their Individual Capacity.

Mr. Rendelman brought this RLUIPA action against the three defendants in both their individual and official capacities, seeking monetary damages in addition to his request for injunctive relief. (J.A. 5, 8.) RLUIPA, however, does not authorize an action for monetary damages. This Court has previously held that RLUIPA does

not authorize claims for monetary damages against officials sued in their official capacity. *See Madison v. Virginia*, 474 F.3d 118, 131 (4th Cir. 2006). Although this Court has not yet ruled on the issue, the same is true for individual-capacity monetary damages.

RLUIPA is based on Congress' spending power as it applies to programs that "receive Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1). RLUIPA provides that a person may claim "appropriate relief against a government." 42 U.S.C. § 2000cc-2(a). The term "government" is defined to include state and local government entities, but also "any other person acting under color of State law." 42 U.S.C. § 2000cc-5(4)(i)-(iii). The term "appropriate relief" includes injunctive and declaratory relief. *See Madison,* 474 F.3d at 130-131. This phrase should not be construed, however, to encompass monetary damages, in addition to injunctive and declaratory relief.

This Court has previously held that RLUIPA's language authorizing claims for "appropriate relief against a government" "falls short of the unequivocal textual expression" required to subject the states to damages claims, because it is "susceptible to more than one interpretation" and could either be read to include damages remedies or "be read to preclude them." *Madison*, 474 F.3d at 131-32 (internal quotations and citations omitted). Because an action asserted against a State

official in his official capacity is considered an action against the State, the holding of *Madison* bars monetary damages against officials sued in their official capacity pursuant to RLUIPA. *See Lovelace v. Lee*, 472 F.3d 174, 193 (4th Cir. 2006) (barring monetary damages against State officials in their official capacity based on *Madison*); *see also Hafer v. Melo*, 502 U.S. 21, 25 (1991) (suit against state officials in their official capacity treated as suit against State). In both *Madison* and *Lovelace,* this Court expressly declined to address whether RLUIPA authorizes suits for monetary damages against defendants named in their individual capacity, an issue that was not squarely presented in either case. *See Madison,* 474 F.3d at 130 n.3; *Lovelace,* 472 F.3d at 197 n. 7.

Using its Spending Clause power,[3] "Congress may attach conditions on the receipt of federal funds." *South Dakota v. Dole*, 483 U.S. 203, 206 (1987). As a result, "legislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The legitimacy of Spending Clause legislation, therefore, "rests on whether

[3] The Spending Clause provides: "Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States." U.S. Const. art. I, § 8, cl. 1.

the State voluntarily and knowingly accepts the terms of the 'contract'" *Id*.

While Congress can use its spending authority to authorize suits against the State, Congress cannot use its spending authority to authorize suits against private parties who are not themselves recipients of the federal funding. This is exactly the reasoning this Court used when it addressed another spending power statute, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq*., and held that "Title IX was enacted pursuant to Congress's spending power" and "[b]ecause school officials are not funding recipients under Title IX, school officials may not be sued in their individual capacity." *Jennings v. University of North Carolina*, 444 F.3d 255, 268, n. 9 (4th Cir. 2006), *vacated on rehearing en banc*, 482 F.3d 686 (4th Cir. 2007)(en banc); *see also Kinman v. Omaha Pub. Sch. Dist.*, 171 F.3d 607, 611 (8th Cir. 1999); *Smith v. Metropolitan Sch. Dist.*, 128 F.3d 1014, 1018-19 (7th Cir. 1997), *cert. denied*, 524 U.S. 951 (1998).

Another statute based on the congressional spending authority, the Rehabilitation Act, 29 U.S.C. §§ 794 *et seq*., has also regularly been held to prohibit individual capacity damages based on Spending Clause limitations. *See Vinson v. Thomas*, 288 F.3d 1145 1156 (9th Cir. 2002) (individuals cannot be sued under ADA and RA), *cert. denied*, 537 U.S. 1104 (2003); *Garcia v. S.U.N.Y. Health Sciences Ctr.*, 280 F.3d 98, 107 (2d Cir. 2001) (RA does not provide for individual-capacity

actions); *Lollar v. Baker*, 196 F.3d 603, 608-09 (5th Cir. 1999) (State official is not subject to suit in individual capacity because she was not a funding recipient). This Court came to the same conclusion in an unpublished opinion when it held that the Rehabilitation Act allows only official-capacity damages. *Shepard v. Irving*, 77 Fed. Appx. 615, 619, n.3 (4th Cir. 2003) (unpublished).

Relying on the limitations of the congressional spending power, numerous Courts have held that RLUIPA does not allow damages against officials in their individual capacity. *See Smith v. Allen*, 502 F.3d 1255, 1275 (11th Cir. 2007) (RLUIPA cannot be construed as creating a private actions against defendants for monetary damages); *Pugh v. Goord*, 571 F. Supp. 2d 477, 507 (S.D.N.Y. 2008) (adopting the reasoning of *Smith v. Allen* and holding that RLUIPA does not allow individual-capacity monetary damages); *Sisney v. Reisch*, 533 F. Supp. 2d 952, 967-68 (D.S.D. 2008) (RLUIPA cannot be construed as creating a private action against individual defendants for monetary damages); *Daker v. Ferrero*, 475 F.Supp.2d 1325, 1341-42 (N.D. Ga. 2007) (RLUIPA does not provide for damages against individuals) *order vacated on other grounds on reconsideration*, 506 F. Supp. 2d 1295 (2007); *Boles v. Neet*, 402 F. Supp. 2d 1237, 1241 (D. Colo. 2005) ("appropriate relief" under RLUIPA does not appear to include a claim for damages); *Hale O Kaula Church v. Maui Planning Comm'n*, 229 F. Supp. 2d 1056, 1067 (D. Haw. 2002) (RLUIPA does

not appear to allow actions against individuals).[4] The *Daker* Court summerize the argument well when holding that "imposing liability on non-recipients of federal funding" would constitute "an unprecedented and untested exercise of Congress' spending power." *Daker*, 475 F.Supp.2d at 1341-42.

While there are cases holding that RLUIPA does allow for individual capacity monetary damages, these cases are in the minority and usually merely assume the availability of individual-capacity damages under RLUIPA without engaging in a spending clause analysis. *See, e.g., Shidler v. Moore*, 409 F. Supp. 2d 1060, 1071 (N.D. Ind. 2006) (assuming RLUIPA allows monetary damages against individual capacity defendants); *Agrawal v. Briley,* 2006 WL 3523750, at *9-*13 (N.D. Ill. 2006) (concluding language of RLUIPA permits individual damages without engaging in spending clause analysis); *Charles v. Verhagen,* 220 F. Supp. 2d 937, 953 (W.D. Wis. 2002) (allowing individual damages claim without analysis); *Orafan v. Goord*, 2003 WL 21972735, at *9 (N.D.N.Y. 2003) (language of RLUIPA "contemplates individual liability"). Indeed, one court has declined to follow these

[4] A host of unpublished decisions have refused to allow individual-capacity monetary damages claims under RLUIPA. *See, e.g., Sharp v. Johnson*, 2008 WL 941686, at *19 (W.D. Pa 2008) ("RLUIPA does not support damage claims against state officials in their individual capacities."); *Gibb v. Crain*, 2008 WL 744249, at *3 (E.D. Tex. 2008) (same); *Malik v. Ozmint*, 2008 WL 701517, at *12 (D.S.C. 2008) (same); *Bock v. Gold*, 2008 WL 345890, at *7 (D. Vt. 2008) (same).

cases, precisely because they "engage in little or no analysis regarding the availability of individual capacity money damages, and are thus unpersuasive authority." *Pugh*, 571 F. Supp. 2d at 507.

RLUIPA also does not explicitly authorize a monetary damages remedy. This is in stark contrast to 42 U.S.C. § 1983, which specifically provides that a person "shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress." There is no similar language in RLUIPA; instead, it merely provides for "appropriate relief" against "others acting under color of State law." 42 U.S.C. § 2000cc-5. Several courts have found, therefore, that RLUIPA does not "explicitly authorize a monetary damages remedy" and should not be construed to provide such a remedy. *Daker*, 475 F. Supp. 2d at 1337; *see Boles*, 402 F. Supp. 2d at1241.

A Construction of the "appropriate relief" language of RLUIPA that does not authorize individual-capacity monetary damages is consistent with this Court's interpretation of the same language in *Madison*. RLUIPA's authorization of claims for "appropriate relief" applies equally to each of the types of defendants that the statute defines with the term "government." It would be anomalous for the term "appropriate relief" to exclude monetary damages when a plaintiff proceeds "against a government," that is "a State . . . governmental entity" under clause (i) of the

statute's definition of "government," but for the same term to include monetary damages when a plaintiff proceeds "against a government" that is a "person acting under color of state law" under clause (iii) of the statute's definition of "government.

RLUIPA also attempts to have a Commerce Clause underpinning. *See* 42 U.S.C. § 2000cc-1(b). RLUIPA, however, has never been upheld by the Supreme Court or this Court on Commerce Clause grounds. The Commerce Clause underpinning for RLUIPA is suspect as "there is no evidence that a state prison's denial of a individual prisoner's request for a religious item would affect interstate commerce." *Smith*, 502 F.3d at 1274 n.9. As a result, RLUIPA "hinges on Congress' Spending Power, rather than its Commerce Clause Power." *Id; see also Daker*, 475 F. Supp. 2d at 1342-47 (individual-capacity monetary damages not authorized as exercise of Commerce Clause power).

Mr. Rendelman attempts to sidestep the monetary damages issue by asserting that "Defendants never contended below that RLUIPA does not permit individual-capacity damages from prison officials who intentionally violate RLUIPA." (Appellant's Brief at 54.) This is incorrect. The defendants did argue below that "RLUIPA does not confer an entitlement to a monetary judgment for an alleged violation of the statute where there is simply general participation in a federal program or receipt of federal funds." (J.A. 18.) In any case, this Court has made it

clear that it "may affirm the dismissal by the district court on the basis of any ground supported by the record even if it is not the basis relied upon by the district court." *Ostrzenski,* 177 F.3d at 253th.

III. THE DISTRICT COURT CORRECTLY CONCLUDED THAT THE DOC DIETARY ACCOMMODATIONS SATISFY THE REQUIREMENTS OF RLUIPA.

RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the government can demonstrate that the burden is "the least restrictive means" of furthering a "compelling government interest." 42 U.S.C. § 2000cc-1(a). Under RLUIPA, the government must show that the "burden in question is the least restrictive means of furthering a compelling governmental interest." *Lovelace*, 472 F.3d at 186. In applying this standard, however, this Court has observed that a court "owes 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 190 (quoting *Cutter v. Wilkinson,* 544 U.S. 709, 723 (2005)). Indeed, the Supreme Court noted that lawmakers "were mindful of the urgency of discipline, order, safety, and security in penal institutions" when they adopted RLUIPA. *Cutter*, 544 U.S. at 722-23. Lawmakers also anticipated that RLUIPA would be applied with "due

deference to the experience and expertise of prison and jail administrators." *Id.* RLUIPA, therefore, should not be read in a way "to elevate accommodation of religious observances over an institution's need to maintain order and safety." *Cutter*, 544 U.S. at 722. Thus, while the *Cutter* Court upheld RLUIPA's strict scrutiny standard, it also provided "repeated injunctions for caution." *Lovelace,* 472 F.3d at 210 (Wilkinson, J., dissenting).

The district court, relying on *Cutter*, held that the DOC's provision of pork-free and vegetarian diets to accommodate religious dietary restrictions, rather than a diet that conformed to all Kosher requirements, did not violate RLUIPA's strict scrutiny standard. (J.A. 95-96.) In coming to this conclusion, the court found that two compelling interests were served by the DOC dietary policy: (1) the security issues that would be created by perceived favoritism among inmates; and (2) the additional costs that would be incurred if a full Kosher diet had to be provided. (*Id.*) The court applied the proper RLUIPA standard in coming to this conclusion when it held that the "DOC's policy not to provide meal plans tailored to any particular religion is the least restrictive means of furthering a compelling government interest." (J.A. 95.)

A. The Security Concerns Created By Perceived Favoritism Among Inmates Is A Compelling Government Interest.

If a diet that conformed to all Kosher requirements were provided to Jewish inmates, inmates of other religions would likely perceive that either Jewish inmates

are receiving preferential treatment or that their own religion is being slighted. "It is not difficult to imagine one inmate perceiving all sorts of slights to his religious faith because another inmate down the corridor received some special religious privilege or unique form of treatment." *Lovelace*, 472 F.3d at 216 (Wilkinson J., dissenting). Avoiding this kind of inmate unrest is a compelling interest. Indeed, the record in this case established that providing religion-specific diets such as a Kosher diet would exhibit "partiality among an inmate population" and could lead to "unrest within the population and thereby create security issues." (J.A. 37.)

Security concerns certainly rise to the level of a compelling government interest. As this Court has held, "[w]ithout question, prison safety and security is a legitimate, indeed compelling, penologicial interest." *Morrison v. Garraghty*, 239 F.3d 648, 660 (4thth Cir. 2001)*; see also In Re Five Percenters*, 174 F.3d 464, 469 (4th Cir.) (providing secure, safe, and orderly institution is compelling interest), *cert. denied*, 528 U.S. 874 (1999); *Hines v. South Carolina Dep't of Corr.*, 148 F.3d 353, 358 (4th Cir. 1998) (maintaining discipline and security is compelling government interest). Maintaining order and security in prisons is of the upmost importance because it involves issues of safety for inmates and officers. Indeed, running a prison is a "difficult and dangerous business." *In Re Five Percenters*, 174 F.3d at 469.

The district court's holding that security concerns are compelling is consistent

with other circuits that hold such concerns are compelling for purposes of RLUIPA. *See Longoria v. Drake*, 507 F.3d 898, 903-04 (5th Cir. 2007) (maintaining security in prison is a compelling interest); *Borzych v. Frank*, 439 F.3d 388, 390-91 (7th Cir. 2006) (same); *Haevenaar v. Lazaaroff*, 422 F.3d 366, 370-72 (6th Cir. 2005)(prison hairstyle regulation least restrictive means of furthering compelling interest in maintaining security), *cert. denied*, 549 U.S. 875 (2006). This Court has also held that security issues constitute compelling interests in an unpublished RLUIPA case. *See McRae v. Johnson*, 261 Fed. Appx. 554, 558 (4th Cir. 2007) (*per curiam*) (unpublished) (maintaining discipline and security of inmates is a compelling interest). In *McRae*, this Court reaffirmed that in the analysis of RLUIPA's compelling interest and least restrictive means standard, the Court owes "'due deference to the experience of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration with costs and limited resources.'" *Id.* at 558 (quoting *Lovelace*, 472 F.3d at 190 (quoting *Cutter*, 544 U.S. at 723)).

The Fifth Circuit's decision in *Haevenaar* is particularly instructive regarding the importance of safety concerns in RLUIPA actions. *Haevenaar* involved hair length regulations in place for security purposes in an institution where the warden refused to allow religious exceptions to the regulation because it "would cause

resentment among other inmates." *Haevenaar*, 422 F.3d at 371. The lower court recognized that prison administrators are to be given due deference in regard to safety concerns, but went on to criticize the warden's wholesale ban on excessive hair growth and held this policy violated RLUIPA. *See id*. The Fifth Circuit reversed and held that the lower court's analysis "does not reflect the requisite deference to the expertise and experience of prison officials, as required by case law interpreting the RFRA and RLUIPA." *Id*. The Fifth Circuit found that the lower court had improperly "discounted" the warden's concerns regarding the issue of resentment among inmates. *See id*. Here, the record also establishes that providing religion-specific diets such as a Kosher diet would exhibit "partiality among an inmate population" and could lead to "unrest within the population and thereby create security issues." (J.A. 37.)

Mr. Rendelman attempts to downplay security and safety concerns as compelling government interests. (Appellant's Brief at 40-41.) Inmates, of course, often claim that security concerns are exaggerated, and it must be remembered that "[a] prisoner's view of what promotes prison security is hardly objective." *Borzych*, 439 F.3d at 391 (rejecting, in RLUIPA case, inmate's claim that prison officials exaggerated security concerns). Mr. Rendelman's attempt to reduce security concerns to an "exaggerated fear" must fail, as this and other Circuits have repeatedly held that

security and safety concerns are a "compelling, penologicial interest." *Morrison,* 239 F.3d at 660.

B. Avoiding The Budgetary Issues That Would Be Incurred By The Provision of a Kosher Diet is a Compelling Government Interest.

The second compelling interest relied upon by the court below is the burden of the additional costs that would be associated with providing a Kosher diet. The record in this case establishes that the Maryland DOC developed its two menu options with the express purpose of "placing minimal costs and management burdens on dietary operations." (J.A. 33.) Such concerns are compelling government interests for purposes of RLUIPA's strict scrutiny analysis.

The court below had previously recognized the high cost of providing Kosher diets in other cases analyzing inmates' religious rights. *See Wilkerson v. Beitzel*, 2005 WL 5280675, at *4 (D. Md. 2005) (avoiding additional cost of Kosher diet is compelling interest), *aff'd,* 184 Fed. Appx. 316 (4th Cir. 2006); *Cooper v. Rodgers*, 788 F. Supp 255, 260 (D. Md. 1991) (noting Kosher meals cost the State $7.50 a day while the budget allows only $1.79 a day), *aff'd*, 959 F.2d 231(4th Cir. 1992). In a related vein, this Court has noted that the Maryland DOC is "economically and administratively" unable to accommodate religious dietary requests of inmates. *See Cooper v. Lanham*, 145 F.3d 1323, 1998 WL 230913, at *1 (4th Cir. 1998)

(unpublished). Maryland is not alone in this regard – the provision of Kosher diets would overwhelm most states' institutional food service budgets. *See In The Belly of the Whale: Religious Practice in Prison*, 115 Harv. L. Rev. 1891, 1907-08 (2002) (author conducts survey of several states regarding provision of Kosher diet to Jewish inmates). Indeed, "[t]he sheer number of religious dietary requirements could stress the chef of a gourmet restaurant, much less an overburdened staff in a prison kitchen." *Lovelace*, 472 F.3d at 216 (Wilkinson, J., dissenting).

Due to the problems caused by limited resources, the Fifth Circuit has held that cost issues are compelling interests and justify the denial of a religious diet pursuant to RLUIPA. *See Baranowski v. Hart*, 486 F.3d 112, 125-126 (5th Cir.) (controlling costs is a compelling government interest), *cert. denied*, 128 S. Ct. 207 (2007); *see also Andreola v. Wisconson,* 211 Fed. Appx. 495, 498-99 (7th Cir. 2006) (unpublished) (security and cost issues justify denial of Kosher diet under RLUIPA), *cert. denied*, 128 S. Ct. 118 (2007); *Linehan v. Crosby*, 2008 WL 3889604, at *10 (N.D. Fla. 2008) (cost and unrest among inmates justified not providing a Kosher diet under RLUIPA). In *Baranowski,* the Fifth Circuit found that the denial of a Kosher diet to Jewish inmates was justified not only by the compelling interest in controlling expenses, but also by the interest in minimizing resentment among inmates. *See* 486 F.3d at 125-26.

The fiscal impact of providing additional menu accommodations that conform to all Kosher diet requirements is particularly important given the current economic situation in the State of Maryland. Maryland is facing a 2009 budget deficit totaling at least several million dollars, and projections indicate a possible one billion dollar deficit in 2010. *See* State of Maryland FY 2009 Budget Reductions.[5] The 2009 budget for the Department of Public Safety and Correctional Services has been cut by ten million dollars and the agency has lost 161 job positions. *See id*. at 11. Budgetary impacts on state correctional services are an issue even in prosperous times, but in the current budgetary environment, a court should hesitate to mandate any increase in food service costs.

C. Providing Menu Options That Accommodate A Broad Range of Religious Dietary Requirements is the Least Restrictive Means of Furthering These Compelling Government Interests.

Once the government's compelling interests have been established, it is necessary to determine whether the DOC's dietary policies are the least restrictive means of furthering these interests. *See Lovelace*, 472 F.3d at 189. The court below correctly held that the DOC meals plans are "neutral in religious requirements" and that these policies were "the least restrictive means available to advance compelling

[5] http://www.governor.maryland.gov/documents/BPWdetail081014.pdf.

government interests." (J.A. 96.)

The DOC was very deliberative in its process of developing inmate dietary policies. Maryland officials were aware of the wide spectrum of religious dietary practices, and the stated purpose of their dietary policy is to "accommodate a broad range of religious dietary practices." (J.A. 33.) This policy was developed with the goal of placing "only minimal costs and management burdens on dietary operations." (J.A. 33.) The DOC was also motivated by the desire to reduce the perception of partiality among inmate religious groups. (J.A. 37.) The DOC has determined, therefore, that the least restrictive method of accommodating various religious diets without overburdening resources or creating a perception of preferential treatment is by offering both a pork-free meat diet and a vegetarian diet.

The Fifth Circuit's decision in *Baranowski* is again instructive on this issue. The correctional officials in *Baranowski*, like Maryland officials, did not provide Kosher diets to Jewish inmates based on issues of cost and the avoidance of showing preferential treatment to inmates. *See* 486 F.3d at 125-26. In addition to finding these reasons compelling, the Fifth Circuit held that "the administrative and budgetary interests at stake cannot be achieved by any different or lesser means." *Id*. Maryland officials have similarly found the least restrictive means for furthering these compelling interests.

III. THE DEFENDANTS ARE ENTITLED TO QUALIFIED IMMUNITY.

The defendants are entitled to qualified immunity because their provision of a pork-free and lacto-ovo vegetarian menu rather than a Kosher diet was objectively reasonable, assessed in light of the legal rules that were clearly established at the time the action was taken. Qualified immunity is a defense against damages for conduct that does not violate "clearly established" rights of which "a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The first step of the qualified immunity analysis is addressed above and demonstrates that Mr. Rendelman's rights under RLUIPA were not violated. *See Saucier v. Katz*, 533 U.S. 194, 201 (2001); *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Even if this Court concludes otherwise – or determines that the record does not provide an adequate basis for evaluating Mr. Rendelman's claim or the DOC's justification for its policy – the Court may proceed to the second step of the *Saucier* analysis,[6] and affirm the district court on the grounds that any right claimed by Mr. Rendelman was not clearly established by pre-existing law at the time of the alleged violation. *Saucier,* 533 U.S. at 201*; Wilson*, 526 U.S. at 609. Pre-existing law for purposes of determining qualified immunity is law that "has been authoritatively decided by the Supreme

[6] The defendants note that the Supreme Court has directed the parties in *Pearson v. Callahan,* No. 07-751, a case being heard this term, to brief the issue of whether the two-step sequence prescribed in *Saucier* should be revised.

Court, the appropriate United States Court of Appeals, or the highest court of the state," *Wilson v. Layne*, 141 F.3d 111, 114 (4th Cir. 1998) (*en banc*) (quotations and citation omitted), *aff'd*, *Wilson v. Layne*, 526 U.S. 603 (1999).

To be clearly established for purposes of qualified immunity, the contours of the right must have been so conclusively drawn that the unlawfulness of the challenged act would be apparent to a reasonable official. *Wilson v. Layne*, 526 U.S. at 614-15. Thus, qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law," *Malley v. Briggs*, 475 U.S. 335, 341 (1986), and shields officials from liability for "bad guesses in gray areas," ensuring that public officials are liable only for "transgressing bright lines," *Maciarello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992), *cert. denied*, 506 U.S. 1080 (1993).

Maryland DOC officials were not on notice that RLUIPA might be interpreted to require that a Jewish inmate be provided with Kosher accommodations that went beyond the accommodations already reflected in the DOC's dietary policy. The DOC has litigated several cases regarding Kosher diets, and in every case the litigation resulted in a ruling that a Kosher diet was not required. *See Cooper v. Lanham*, 145 F.3d 1323, 198 WL 230913 (4th Cir. 1998) (unpublished); *Wilkerson v. Beitzel*, 2005 WL 5280675 (D. Md. 2005). Although these decisions were unpublished, the DOC was a party in these actions and aware of, and subject to, these

decisions. This, coupled with the fact that neither this Court nor the district court has ever held that a Kosher diet is required by RLUIPA or the First Amendment, makes it easy to understand why DOC officials would reasonably believe that provision of a Kosher diet was not required.

Mr. Rendelman attempts to circumvent the important protections of qualified immunity with a misplaced reliance on this Court's decision in *Lovelace v. Lee*. *Lovelace* itself cannot serve as notice to the defendants in this case because it was decided on December 29, 2006, and the events of this case concluded prior to December of 2006. More importantly, the analysis in *Lovelace* is not applicable to this case, as it was restricted to one officer's intentional interference with an inmate's Ramadan meals. *See* 472 F.3d at 198-99. Indeed, this Court noted that the officer was not entitled to qualified immunity because the "unlawfulness of *intentional* and unjustified deprivations of Ramadan meals was apparent." *Id*. at 199 (emphasis added). Here, the denial of a Kosher diet was not one officer's interference with an inmate's religious rights; it was an institutional policy based on the DOC's reasonable determination that there were sufficient justifications for the denial of a Kosher diet. These justifications, and the resulting denial of Kosher food, have been upheld on several occasions and there have been no indications that such justifications were improper. At the very least, the DOC's dietary policies are "mistakes of judgment

traceable to unsettled law." *Pritchett v. Alford*, 973 F.2d 307, 313 (4th Cir. 1992).

The passage of RLUIPA itself cannot serve as the "clearly established law" giving the defendants notice that inmates have an established right to a Kosher diet. The DOC has been involved in RLUIPA litigation and found not to have an obligation to provide Kosher diets. *See Wilkerson v. Beitzel*, 2005 WL 5280675 (D. Md. 2005). More importantly, the right alleged to have been violated needs to be established in a "more particularized, and hence more relevant sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson,* 483 U.S. at 640; *see also Brosseau v. Haugen,* 534 U.S. 194, 198-99 (2004). Given the current state of the law, it cannot be said that a reasonable Maryland DOC official would understand that his failure to provide a Kosher diet violates any rights.

Mr. Rendelman also argues that this Court should remand the issue of qualified immunity because the district court did not address this issue. (Appellant's Brief at 54.) This Court, however, "may affirm the dismissal by the district court on the basis of any ground supported by the record, even if it is not the basis relied upon by the district court." *Ostrzenski v. Seigel*, 177 F.3d at 253. Although the district court did not resolve the defendants' motion on the grounds of qualified immunity, and was not required to, that argument was presented to the district court and this Court may

affirm on that alternative basis. *See, e.g., Ridpath v. Board of Governors of Marshall Univ.,* 447 F.3d 292, 305-06 (4th Cir. 2006) (exercising discretion to consider qualified immunity defense raised for first time in trial court reply memorandum). The Supreme Court has "repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation." *Saucier*, 533 U.S. at 201 (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*)). This policy would not be served by remanding the case for further proceedings. Accordingly, this Court should affirm the district court's order granting summary judgment, either on the merits or on the basis of qualified immunity.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief contains 7,473 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(1)(7)(B)(iii).

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 this brief has been prepared in a proportionally spaced typeface using Word Perfect 3X in Times New Roman 14 point.

CERTIFICATE OF FILING AND SERVICE

I HEREBY CERTIFY that on this 22nd day of December, 2008, I electronically filed the foregoing Brief of Appellee 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:

James E. Coleman, Jr.
Sean E. Andrussier, Esq.

DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

Nancy Rouse (name of party/amicus) who is Appellee (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☑ NO

2. Does party/amicus have any parent corporations?
☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
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5. Is party a trade association? (amici curiae do not complete this question)
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If yes, identify any trustee and the members of any creditors' committee:

/s/ Phillip M. Pickuas (signature) December 22, 2008 (date)

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

Carolyn A. Thomas (name of party/amicus) who is Appellee (appellant/appellee/amicus),

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If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
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If yes, identify any trustee and the members of any creditors' committee:

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

Scott Steininger (name of party/amicus) who is Appellee (appellant/appellee/amicus),

makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
☐ YES ☑ NO

2. Does party/amicus have any parent corporations?
☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
☐ YES ☑ NO
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/s/ Phillip M. Pickuas (signature) December 22, 2008 (date)