STATE OF WISCONSIN | CIRCUIT COURT BRANCH 14 | DANE COUNTY

State of Wisconsin ex rel.
JERRY CHARLES
6949 Schroeder Road #108
Fitchburg, WI 53711-2481

Plaintiff,

v.

Case No. 04 CV 2853

MATTHEW J. FRANK
Secretary Department of Corrections
3099 East Washington Avenue
Madison, WI 53704-4338,

and

SUSAN CLARK
1730 West Snell Road
Oshkosh, WI 54901-1140,

Defendants.

PLAINTIFF'S BRIEF IN RESPONSE TO DEFENDANTS' SECOND MOTION FOR SUMMARY JUDGMENT

Jerry Charles ("Mr. Charles" or "plaintiff"), by and through his attorneys, Sidley Austin LLP and LaFollette Godfrey & Kahn LLP, respectfully asks the Court to deny the Defendants' Second Motion For Summary Judgment in its entirety. Mr. Charles submits this brief in support of his position and requests oral argument.

ISSUES PRESENTED

1. Whether defendants established their refusal to accommodate Mr. Charles's religious dietary request for *halal* meats was the "least restrictive means" of accomplishing any "compelling governmental interest" under RLUIPA, when they marshal no evidence beyond mere administrative concerns, unjustifiably restricted their search for *halal* meat vendors, and completely failed to consider any less restrictive alternatives.

2. Whether defendants established their refusal to accommodate Mr. Charles's religious dietary request for *halal* meats was rationally related to any legitimate governmental interest under the Free Exercise Clause, when such refusal was an exaggerated response to prison concerns.

3. Whether defendants established their refusal to accommodate Mr. Charles's religious dietary request for *halal* meats was rationally related to any legitimate governmental interest under the Equal Protection Clause, when discriminatory intent is presumed in facially discriminatory regulations, and defendants simultaneously accommodate similarly situated Jewish inmates' religious dietary requests for *kosher* meats.

4. Whether this Court should revisit its prior correct ruling that defendants are not entitled to qualified immunity.

5. Whether the "Limitation on Recovery" of Congress' Prison Litigation Reform Act ("PLRA") prevents Mr. Charles from recovering any compensatory damages, when Mr. Charles's state-court lawsuit is neither a "Federal civil action," nor (as Mr. Charles is currently on parole) is it "brought by a prisoner confined in a jail, prison, or other correctional facility."

6. Whether this Court should revisit its prior correct ruling that Mr. Charles's claim for declaratory relief is not moot.

STATEMENT OF THE CASE

This case raises fundamentally important questions regarding the extent to which a state prison can refuse to accommodate a Muslim inmate's religious dietary request, when it simultaneously accommodates analogous religious dietary requests for Jewish inmates.

A. Procedural History.

Mr. Charles sues defendants in their official and personal capacities for violating his rights under the Free Exercise and Equal Protection Clauses, *see* 42 U.S.C. § 1983, and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), *id.* §§ 2000cc–2000cc-5. Formerly an inmate at Oshkosh Correctional Institution ("Oshkosh"), Mr. Charles was released on parole on November 8, 2005. Defendant Matthew Frank is the Secretary of the Department of Corrections ("DOC"), and defendant Susan Clark is an Oshkosh chaplain. Last August, this Court denied defendants' initial motion for summary judgment with respect to Mr. Charles's claims that defendants violated his rights under the Free Exercise Clause, the Equal Protection Clause, and RLUIPA. *See* Decision Regarding Defendants' Motion For Summary Judgment (Aug. 31, 2006) (hereinafter "Decision") (Dct. No. 92).

Specifically, rejecting defendants' mootness argument, the Court ruled that because Mr. Charles could proceed with his *halal* claim for damages, he could also continue to seek declaratory relief. *Id.* at 11. Likewise, the Court rejected defendants' qualified immunity argument. *Id.* at 14. Indeed, the Court instinctively recognized how troubling defendants' conduct was, given that the U.S. Supreme Court recently "noted with concern that a 'state prison in Ohio refused to provide Moslems with Hallal food, even though it provided Kosher food [to Jewish inmates].'" *Id.* at 13 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 717 n.5 (2005)). Accordingly, the Court ultimately ruled that (1) "'a constitutional right would have been violated on the facts alleged,'" and (2) it is "clearly established" and "fundamental" that "one religion cannot be preferred over another in the prison context" absent sufficient penological justification. *Id.* at 14.

B. Defendants' Policy And Rationale Regarding Religious Diets.

Despite failing to garner legislative approval, Docs. 411-412, 416-417 (Peterson Aff. Ex. A), defendants promulgated a regulation, IMP 6B (Peterson Aff. Ex. B), regarding requests for religious diets. In relevant part, IMP 6B allows Wisconsin prisons to accommodate Jewish inmates' requests for *kosher* meals with meat, but prevents Muslim inmates from having *halal* meals with meat. Instead, Muslim inmates who desire to keep *halal* must self-select or consume a vegetarian or vegan diet.

Although defendants believe this religious dietary policy was sufficiently justified by their penological concerns, the evidence betrays their contention. Indeed, defendants' own religious expert recognized defendants' policy was "nonsensical":

> Q. If Islam does not promote vegetarianism and veganism in Muslims, why does the Department of Corrections?
>
> . . . .
>
> A. Okay, I don't know.
>
> Q. Do you not know because it doesn't make sense?
>
> A. Man, you're sharp, wow. It is nonsensical.

Beyah Dep. (Mar. 12, 2007) (Peterson Aff. Ex. C) at 79:15-80:21 (emphasis added).

Per IMP 6B, defendants candidly admit they refuse to accommodate Muslim inmates' religious dietary requests for *halal* meats, while accommodating Jewish inmates' religious dietary requests for *kosher* meats, because they incarcerate very few Jews and too many Muslims, and do not want to spend any additional money. *See* Defendants' Response To Plaintiff Jerry Charles' Second Set Of Interrogatories And Requests For Production Of Documents (Peterson Aff. Ex. D) (hereinafter "Defs.' 2d Discovery Response") No. 9. Moreover, although defendants' corporate-representative witness, Christine Althaus, claims

halal meats were not "available and affordable" in 2001-2002, Althaus Dep. (Mar. 12, 2007) (Peterson Aff. Ex. E) at 20:21, their religious expert, Ronald Beyah, a practicing Muslim, has long been aware that there were "more than 30 [*halal* meat distributors] in the Midwest (Illinois, Indiana, Michigan, and Wisconsin)" that "distributed halal in 2001 or 2002." Doc. 536 (Peterson Aff. Ex. F).

After complaining that there are too many Muslim inmates from an administrative cost perspective, defendants shift gears and complain there are too few Muslim inmates from an administrative efficiency perspective to prepare individualized meals. Defs.' 2d Discovery Response No. 5. Accordingly, defendants artificially restricted their search for *halal* meat vendors to those providing "single serving," "prepackaged" *halal* meat meals, *id.* Nos. 3, 5, instead of purchasing *halal* meat in bulk. Had they searched for bulk *halal* meat, they would have discovered many such vendors. Carey Aff. ¶ 2.

Aside from these minor administrative concerns, defendants never cite any evidence to support their contention that the provision of *halal* meats would undermine prison security. Nor could they. Althaus Dep. at 66:14-69:11, 81:19-82:5 (explaining the security concerns for providing *kosher* and *halal* meals are practically identical). Finally, defendants admit they failed to consider any less restrictive means of accommodating Mr. Charles's dietary request. Althaus Dep. at 44:17-22, 48:14-49:3, 54:18-21, 69:3-11.

C. Mr. Charles's Sincere Religious Beliefs And Injuries.

As part of his sincere belief in Islam, Mr. Charles sincerely believes his faith encourages him to eat *halal* meat. Charles Aff. ¶¶ 2-3. Defendants' failure to accommodate this aspect of his sincere religious belief left Mr. Charles no alternative means of eating *halal* meats, which caused him to experience stomach aches, nausea, weakness, and weight loss. *Id.* ¶¶ 4-6.

STANDARD OF REVIEW

Under Wis. Stat. § 802.08(2), summary judgment is appropriate only if the moving party has shown that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law. Summary judgment movants (here, defendants) bear the burden of establishing "a record sufficient to demonstrate . . . that there is no triable issue of material fact on any issue presented." *Heck & Paetow Claim Serv., Inc. v. Heck*, 93 Wis. 2d 349, 356, 286 N.W.2d 831, 834 (1980). Additionally, the Court must "draw all reasonable inferences from the evidence in the light most favorable to the non-moving party," (here, Mr. Charles). *Burbank Grease Servs., LLC v. Sokolowski*, 2006 WI 103, ¶ 40, 294 Wis. 2d 274, 303, 717 N.W.2d 781, 796.

ARGUMENT

Given that the law is in Mr. Charles's favor and there are genuinely disputed material facts, defendants are not entitled to summary judgment.

I. DEFENDANTS' REFUSAL TO PROVIDE ANY *HALAL* MEATS TO MR. CHARLES VIOLATED RLUIPA.

Defendants cannot establish their total refusal to provide any *halal* meats to Mr. Charles whatsoever — especially considering that defendants provide *kosher* meats to Jewish inmates — was lawful under RLUIPA, 42 U.S.C. §§ 2000cc–2000cc-5. Indeed, defendants fail to appreciate how dramatically RLUIPA changed the legal landscape for prisoners' religious freedom claims. Congress enacted RLUIPA because it was alarmed that state prisons had restricted religious liberty "in egregious and unnecessary ways." 146 Cong. Rec. S7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy). As this Court previously recognized, *see* Decision at 13, both Congress and the U.S. Supreme Court noted "a typical example" of such a restriction was a "'state prison in Ohio [that] refused to provide Moslems

with Hallal [*sic*] food, even though it provided Kosher food [to Jewish inmates]." *Cutter v. Wilkinson*, 544 U.S. 709, 716 n.5 (2005) (quoting Hearing on Protecting Religious Freedom After *Boerne v. Flores* Before the Subcomm. on the Constitution of the House Comm. on the Judiciary, 105th Cong., pt. 3, at 11, n.1 (1998) (prepared statement of Marc D. Stern, Legal Director, American Jewish Congress)). That is precisely what defendants have done here, so their conduct violated RLUIPA.

Pertinent here, RLUIPA provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person —
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a) (emphases added).

Per this statutory framework, Mr. Charles initially bears the "burden of persuasion" that defendants imposed a "substantial burden" on his "religious exercise" by refusing to provide him *halal* meats.[1] *Id.* § 2000cc-2(b). Then, the burden of persuasion shifts to defendants to demonstrate this refusal was the "least restrictive means" of furthering a "compelling governmental interest." *Id.* Notably, RLUIPA explicitly provides it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution." *Id.* § 2000cc-3(g) (emphases added).

[1] Defendants apparently do not quarrel with the proposition that Mr. Charles was "a person residing in or confined to an institution, as defined in section 1997 of this title." 42 U.S.C. § 2000cc-1(a).

A. Mr. Charles Suffered A "Substantial Burden" On His "Religious Exercise."

Defendants failed to show (as is their burden on summary judgment) that Mr. Charles cannot satisfy his initial burden of showing a "substantial burden" on his "religious exercise," for two primary reasons.

First, Mr. Charles's request to consume a religious diet with *halal* meats undeniably concerns a "religious exercise." For example, defendants halfheartedly riposte (without citing any evidence) that Mr. Charles's desire for a religious diet with *halal* meats is neither "truly held," nor "rooted in religion."[2] Defs.' Br. 10; *see also id.* 15 (asserting "Charles' preference for meat is not a sincerely held belief"). These contentions stray far from the mark. Not only are they false, *see* Charles Aff. ¶¶ 2-3, but they run directly afoul of RLUIPA's explicit language. *See* 42 U.S.C. § 2000cc-5(7)(A) (protecting "<u>any</u> exercise of religion, <u>whether or not compelled by, or central to, a system of religious belief</u>" (emphases added)).[3] As defendants' own religious expert[4] testified, even though "[t]here is no Tenet of Islam that <u>requires</u> Muslims to eat meat," Beyah Aff. ¶ 11 (emphasis added), Muslims are "encouraged" to eat *halal* meat.

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[2] Indeed, defendants obliquely suggest Mr. Charles's views are "[p]urely secular," and "'so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection.'" Defs.' Br. 11 (citations omitted). It is difficult to understand how or why defendants would feel so cavalierly dismissive about *halal*, a fundamental religious precept for the roughly 1.3 billion Muslims worldwide, CIA, *The World Factbook 2007* (rev. ed. 2007), *available at* https://www.cia.gov/cia/publications/factbook/index.html, and 6 million Muslim-Americans, Ilyas B. Yunus & Kassim Kone, *Muslims in the United States* 37 (2006).

[3] To this end, defendants seem to confuse RLUIPA's standards with the old standards for state prisons under the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb–2000bb-4. But they should carefully be distinguished:

> Under RFRA, the protection of religious exercise for inmates was generally understood as limited to the "central tenets" or "mandated" practices of a belief system. However, RLUIPA defines religious exercise in sweeping terms as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." RFRA's heavier "substantial burden" requirement meant that many requests did not meet the threshold necessary to advance a claim; under RLUIPA, the threshold appears to be only whether the beliefs are "sincere" and "religious," not whether they are "essential" or "central."

Developments in the Law—In the Belly of the Whale: Religious Practice in Prison, 115 Harv. L. Rev. 1891, 1895 (2002) (footnotes omitted). Of course, since *City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (holding Congress exceeded its authority under § 5 of the 14th Amendment when it enacted RFRA), RFRA cannot constitutionally be applied to the States.

[4] For purposes of this Brief, plaintiff does not contest Mr. Beyah's credentials and admissibility as an expert witness. Nevertheless, plaintiff reserves the right to file, at a later date, any motions to exclude or cabin his testimony.

Beyah Dep. at 77:17-18 (testifying "the prophet ate meat, we should eat meat"), 78:17-21 (testifying "I'm aware that Muslims understand that the prophet Muhammad, peace be upon him, ate meat and I'm aware that Muslims should try to emulate the prophet in most ways"), 89:24-25 (testifying "if you're following the sunnah,[5] you're going to eat meat").[6]

Second, defendants did not (and cannot) show that Mr. Charles cannot demonstrate their impositions constituted a "substantial burden." RLUIPA's silence regarding how to define "substantial burden" has led to a federal circuit split and a variety of tests. *E.g.*, *McEachin v. McGuinnis*, 357 F.3d 197, 202 n.4 (2d Cir. 2004) (holding "substantial burden" exists where "the state 'puts substantial pressure on an adherent to modify his behavior and violate his beliefs'"); *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (holding there is a "substantial burden" on "a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs"); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (holding "substantial burden" arises when defendant's imposition "necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable"); *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (holding prison's imposition is a "substantial burden" where it "den[ies]" inmates "reasonable opportunities to engage in those activities that

[5] *Sunnah* means "way of." *See* Beyah Dep. 55:14-56:9 (explaining "when we talk about sunnah, we're talking about the way of the prophet Muhammad, but also the sunnah also talks about the way of his companions"). The sunnah is collected in *hadiths*, which are "reports." *See id.* at 56:25-57:10 (explaining "when we talk about Hadith, we're talking about the report on the sunnah of the prophet, the way of the prophet, and in many cases the other two generations that followed the prophet").

[6] Despite such testimony, defendants unjustifiably snipe at the clarity of Mr. Charles's Second Amended Complaint. *See* Defs.' Br. 15 (stating "at no time does he allege that he sincerely believes consuming Halal meat is a dietary requirement of Islam"). But Wisconsin civil procedure requires notice pleading, nothing more. Wis. Stat. § 802.02; *Doe v. Archdiocese of Milwaukee*, 2005 WI 123, ¶ 35, 284 Wis. 2d 307, 328-29, 700 N.W.2d 180, 190-91. Mr. Charles alleged defendants "[c]ategorically refus[ed] to provide [him] with *halal* meat, poultry, or fish," and "[r]equir[ed] [him] to adopt a vegetarian diet or eat religiously forbidden meat, poultry, or fish." 2d Am. Compl. (Jan. 25, 2006) (Dct. No. 66) ¶ 12; *see also* Doc. 539 (Peterson Aff. Ex. G) ("I want Islamic 'Halal' meat instead of regular meat and poultry."). Accordingly, like their expert, defendants have long had fair notice that Mr. Charles sincerely believes Islam encourages him to consume *halal* meats.

are fundamental to [their] religion")); *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (holding "substantial burden" exists "if a regulation completely prevents the individual from engaging in religiously mandated activity").

No matter which test the Court adopts,[7] however, it should be clear that defendants' total refusal to provide Mr. Charles any *halal* meats whatsoever constitutes a "substantial burden" on the "religious exercise" of his sincere, religious belief that he should consume *halal* meats. Indeed, numerous courts, applying the proper RLUIPA standards, conclude a "substantial burden" results from the complete denial of a requested religious diet. *E.g.*, *Adams v. Burnett*, 2007 WL 329992, at *5 (W.D. Mich. Jan. 31, 2007) (holding the "fail[ure] to provide him a Kosher diet could qualify as a substantial burden"); *Fayson v. Earle*, 2006 WL 3220062, at *9 (D. Del. Nov. 7, 2006) ("The opportunity to adhere to dietary restrictions can be an important aspect of religious exercise, the denial of which may impose a 'substantial burden' on that exercise, in violation of RLUIPA."); *Caldwell v. Burnett*, 2006 WL 2583259, at *5 (W.D. Mich. Sept. 7, 2006) ("Clearly, if plaintiff has a sincere religious belief then failing to provide him a Kosher diet could qualify as a substantial burden on plaintiff's right to practice his religion."); *Figel v. Riley*, 2006 WL 2472208, at *6 (W.D. Mich. Aug. 24, 2006) (holding "if Plaintiff's beliefs are sincerely held, then denying him a Kosher diet could constitute a substantial burden"); *Buchanan v. Burbury*, 2006 WL 2010733, at *6 (N.D. Ohio July 17, 2006) (holding inmate who was denied Kosher meals could show "his religious exercise [had] been substantially burdened"); *Blount v. Fleming*, 2006 WL 1805853, at *14 (W.D. Va. June 29,

[7] Notably, Wisconsin state courts are "bound on the subject of federal law only by the pronouncements of the United States Supreme Court," not by any other federal courts' pronouncements regarding federal law. *State v. Webster*, 114 Wis. 2d 418, 426, 338 N.W.2d 474, 478 (1983) (holding Seventh Circuit decision did not "stand as a precedential bar"); *see also United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1075-76 (7th Cir. 1970) ("Until the Supreme Court of the United States has spoken, state courts are not precluded from exercising their own judgment upon questions of federal law. They are not concluded by, though they should give respectful consideration to, the decisions of the federal Circuit Courts of Appeals and District Courts.").

2006) (holding "it is clear that the complete denial of the common fare diet to an inmate belonging to a religion that mandates a particular diet [so] accommodated . . . constitutes a substantial burden"); *McManus v. Bass*, 2006 WL 753017, at *5 (E.D. Va. Mar. 22, 2006) (holding "Defendants' determination that Plaintiff was not entitled to the kosher diet imposed a substantial burden upon his religious freedom"); *Phipps v. Morgan*, 2006 WL 543896, at *6 (E.D. Wash. Mar. 6, 2006) (holding "Defendants have imposed a substantial burden on Plaintiff's sincerely held religious belief" that "Islam requires him to eat Halal meat" (citing *Williams v. Morton*, 343 F.3d 212, 217 (3d Cir. 2003)); *Blount v. Johnson*, 2006 WL 542600, at *7 (W.D. Va. Mar. 2, 2006) (holding prison substantially burdened inmate's religious exercise by denying him a religious diet); *Gordon v. Pepe*, 2004 WL 1895134, at *4 (D. Mass. Aug. 24, 2004) (rejecting argument that prison's "new vegetarian diet d[id] not 'substantially burden' plaintiffs religious exercise because he is not forced to eat anything and can observe other Rastafarian religious practices," because "the possibility that he might be able to trade for food or can simply choose not to eat is not a real alternative, nor do other avenues of Rastafarian expression diminish the importance of the religious diet").

Defendants' citation to other unpublished, nonbinding cases that reach different results, *see* Defs.' Br. 15-16, does nothing to change this analysis. The question whether the total denial of a religious diet constitutes a "substantial burden" should not hinge on measuring whose string citation is longer, *cf. Smith v. Wade*, 461 U.S. 30, 93 (1983) (O'Connor, J., dissenting) ("The battle of the string citations can have no winner."), but rather should turn on the quality of those decisions' reasoning. By this metric, defendants' cases are woefully deficient. Critically, defendants' cases all run afoul of RLUIPA's caution that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted

by the terms of this chapter and the Constitution." 42 U.S.C. § 2000cc-3(g) (emphases added). To wit, defendants' cases improperly permitted prisons to contend in the "substantial burden" box (on which plaintiffs bear the burden) that the presence of dietary alternatives (e.g., vegetarian, vegan, or ovo-lacto) alleviated the substantial burden, instead of correctly analyzing that question in the "least restrictive means" box (on which prisons bear the burden). This awkward and backward burden shifting of defendants' cases would eviscerate RLUIPA's "broad protection of religious exercise, to the maximum extent permitted." More to the point, defendants' cases conflict with common sense, which dictates that the total refusal to honor Mr. Charles's request for *halal* meats, leaving him no other way of eating *halal* meats, Charles Aff. ¶ 4; Althaus Dep. at 19:16-18, imposed a substantial burden on his ability to eat *halal* meats.

In sum, Mr. Charles sought to exercise a *sunnah* precept of his sincerely held religious faith by asking defendants if he could consume *halal* meats. Defendants refused, and left Mr. Charles no alternative way of consuming *halal* meats. This refusal, by totally preventing Mr. Charles from exercising this religious dietary aspect of his Islamic faith, was a "substantial burden" on his "religious exercise."

B. Defendants' Refusal To Provide *Halal* Meat Was Not The "Least Restrictive Means" Of Furthering Any "Compelling Governmental Interest."

Not only have defendants failed to show their refusal to provide *halal* meats did not substantially burden Mr. Charles's religious exercise, but more importantly, defendants did not satisfy their burden of showing their refusal to provide *halal* meat was the "least restrictive means" of furthering any "compelling governmental interest," for two overarching reasons.

1. Defendants' Imposition Furthered No "Compelling Governmental Interest."

First, defendants do not (as they wrongly contend) have any compelling governmental interests in "simplified food service" or "staying within an established budget."

Defs.' Br. 11; *see also* Defs.' 2d Discovery Response No. 6 (asserting "compelling governmental interest" in "avoiding the exorbitant financial burden that will ultimately be born[e] by the Wisconsin tax payer"). "Requiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997) (emphasis added). Accordingly, it is hornbook law that no compelling governmental interest exists in concerns of administrative efficiency or cost.[8] *E.g.*, *Craig v. Boren*, 429 U.S. 190, 198 (1976) (noting Supreme Court precedent has consistently "rejected administrative ease and convenience as sufficiently important objectives" to satisfy strict or intermediate scrutiny); *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250, 262-63 (1974) (holding State failed to identify a "compelling state interest," because the "conservation of the taxpayers' purse is simply not a sufficient interest"); *Frontiero v. Richardson*, 411 U.S. 677, 690-91 (1973) (plurality) (noting "although efficacious administration of governmental programs is not without some importance, 'the Constitution recognizes higher values than speed and efficiency,'" explaining "when we enter the realm of 'strict judicial scrutiny,' there can be no doubt that 'administrative convenience' is not a shibboleth, the mere recitation of which dictates constitutionality," and holding a government imposition with the "sole purpose of achieving administrative convenience" failed to satisfy strict or intermediate scrutiny); *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) (holding a State's imposition justified merely by "establishment of prompt efficacious procedures" did not satisfy strict scrutiny, because "the Constitution recognizes higher values than speed and

[8] Indeed, given that RLUIPA is Spending Clause legislation, *Cutter*, 544 U.S. at 715, it is entirely inappropriate for defendants to advance their minor administrative cost concerns as compelling. Having "voluntarily and knowingly accept[ed] the terms of the [RLUIPA] 'contract,'" *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981), in exchange for the federal government's largesse (i.e., almost $25 million in 2002, Doc. 498 (Peterson Aff. Ex. H), which is $5 million more than defendants' entire food budget, Althaus Aff. at 62:18-19), defendants cannot balk at their contractual obligation to accommodate religious dietary requests merely because it is marginally more expensive. In other words, defendants cannot have their cake and eat it too.

efficiency"); *Graham v. Richardson*, 403 U.S. 365, 374 (1971) (holding "a State's desire to preserve limited welfare benefits for its own citizens is inadequate" to satisfy strict scrutiny).

Instead, far from being compelling, defendants' administrative concerns are merely legitimate state interests. For that reason, defendants' cases citing a state's "legitimate" interests are inapposite. *See* Defs.' Br. 12 (citing *Hudson v. Maloney*, 326 F. Supp. 2d 206, 211 (D. Mass. 2004); *Williams v. Morton*, 343 F.3d 212, 218 (3d Cir. 2003); *Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993)). Even in defendants' view, those (constitutional, not RLUIPA) cases found prisons' interests in simplified food service and budgetary constraints to be merely "legitimate," not compelling. *Id.*

The difference between a compelling interest and a legitimate interest is as vast as the difference between strict scrutiny and rational basis review. Erwin Chemerinsky, *Constitutional Law: Principles and Policies* § 9.1, at 645-46 (2d ed. 2002) (explaining "[s]trict scrutiny is virtually always fatal to the challenged law," whereas "[r]ational basis review is the minimum level of scrutiny" and "is enormously deferential to the government"); *City of Boerne*, 521 U.S. at 534 (holding strict scrutiny "is the most demanding test known to constitutional law"). Accordingly, when Congress chose to require defendants to demonstrate any religious imposition "is in furtherance of a compelling governmental interest," 42 U.S.C. § 2000cc-1(a)(1), it surely understood this elementary distinction between strict scrutiny and rational basis review. *See Albernaz v. United States*, 450 U.S. 333, 341 (1981) ("Congress is 'predominantly a lawyer's body,' and it is appropriate for us 'to assume that our elected representatives . . . know the law.'" (citations omitted)). For that reason, defendants misplace their reliance on *Phipps*, 2006 WL 543896, and *Spruel v. Clarke*, 2006 WL 1328854, at *3-4 (W.D. Wash. May 12,

2006), because those cases make sense only if one improperly assumes Congress was oblivious to well-established, binding U.S. Supreme Court precedent.

Indeed, even if defendants' cases were correct that Congress intended prisons' interests in administrative efficiency and cost to be compelling, contrary to settled U.S. Supreme Court law, RLUIPA would be a dead letter. No prisoner could ever successfully challenge a prison's imposition, no matter how egregious, because accommodating religious freedoms will always cost somewhat more and will always require more complicated internal procedures.

It is difficult to understand why or how defendants believe their RLUIPA arguments could possibly be supported by *Benjamin v. Coughlin*, 708 F. Supp. 570, 575-76 (S.D.N.Y. 1989), *Kahey v. Jones*, 836 F.2d 948, 950 (5th Cir. 1988), *Udey v. Kastner*, 644 F. Supp. 1441, 1447 (E.D. Tex. 1986), or *Kahane v. Carlson*, 527 F.2d 492, 495-96 (2d Cir. 1975). *See* Defs.' Br. 12-13. Those cases were all decided more than a decade before RLUIPA was enacted in 2000. Indeed, no matter how concerned defendants are that religious accommodation presents a Hobson's choice between placing an "'undue burden on the prison system,'" or violating the Establishment Clause by becoming "'entangled with religion while drawing fine and searching distinctions among various free exercise claimants," Defs.' Br. 12-13 (quoting *Kahey*, 836 F.2d at 950), Congress and the U.S. Supreme Court subsequently decided otherwise. 42 U.S.C. § 2000cc-4 ("Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter."); *Cutter*, 544 U.S. at 720 ("On its face, the Act qualifies as a permissible legislative accommodation of religion that is not barred by the Establishment Clause.").

Finally, although defendants correctly note "RLUIPA does not require a State to pay for an inmate's devotional accessories," *Cutter*, 544 U.S. at 720 n.8, they do not explain why

that is relevant here. *See* Defs.' Br. 13-14, 20. *Halal* meat is not a devotional accessory, but rather an aspect of a religiously required diet. Indeed, even if defendants' concern that they would otherwise subsidize religious belief were well placed, they still could have offered *halal* meats for sale in the canteen or required a co-pay. *See infra* Part I.B.2.

Notably, defendants could have — but chose not to — contend that the accommodation of Mr. Charles's request for *halal* meats was so costly and so procedurally complicated that those otherwise legitimate administrative interests would have undermined defendants' compelling interest in maintaining prison security.[9] At any rate, even had defendants made this argument, it would strain credulity. There is just no basis for believing that accommodating Mr. Charles's dietary request would have any effect at all on security.

As an initial matter, defendants' cost claims are based wholly on the unfounded assumption that to accommodate Mr. Charles's dietary requests, they would have to find a supplier who could produce small numbers of *halal* servings in "single serving," "prepackaged" form. Defs.' 2d Discovery Response Nos. 3, 5. It is, of course, more expensive to buy single servings than it is to buy meat in bulk. Althaus Dep. at 53:10-11 (testifying "you get better economies of scale buying larger quantities"). But as defendants recognize, accommodating *halal* requests is much easier than complying with requests for *kosher* foods. Unlike the preparation of *kosher* food — which prohibits serving meat with milk products, or even preparing meat and milk products with the same utensils, pots, and pans — serving and preparing *halal* meats does not require prison cooks to keep meat and other foods separate.

[9] Whether simple oversight or a tactical decision, it would be unfair for defendants to sandbag Mr. Charles and cure their omission on reply. *See O. Smith Corp. v. Allstate Ins. Cos.*, 222 Wis. 2d 475, 492, 588 N.W.2d 285, 292 (Ct. App. 1998) (holding it is "inherently unfair" for a party to sandbag its opponent by "withhold[ing] an argument from its main brief and argu[ing] in its reply brief," because it "prevents the opposing party from having an adequate opportunity to respond").

Thus, all the prison would have to do is buy *halal* meat, and prepare it with the other food, the same as it does with meat for the prisoners without special religious dietary requests.

Defendants' estimate of potential cost — $6.60 per (10 ounce) serving of *halal* meat (or $10.56/pound) — thus is not in any sense an accurate estimate of the real cost of accommodating Mr. Charles's requests for *halal* meat. Defendants admit they tried to obtain *halal* meat only in "pre-packaged," "single serving" portions — not in bulk. Defs.' Br. 17, 18 n.2. When accommodating *kosher* diets, which forbid consuming or preparing dairy and meat together, it might make sense to save kitchen space by purchasing prepackaged, single-serving portions. But the parties agree there is no such requirement in *halal*. *See* Beyah Aff. ¶ 8; Beyah Dep. at 82:3-5. Had defendants bothered to find *halal* meat in bulk, rather than in single-serving portions, they could have purchased it far more cheaply. For example, they could have purchased it as nearby as *halal* meat vendors in Chicago. Carey Aff. ¶ 3. Alternatively, defendants could have asked their employee and expert witness, Mr. Beyah, about any of the "more than 30 [*halal* meat distributors] in the Midwest (Illinois, Indiana, Michigan, and Wisconsin)" that he was aware "distributed halal in 2001 or 2002."[10] Doc. 536. Instead, defendants' unjustifiably restricted search, even for single-serving-*halal*-meat distributors, was woefully deficient. By their own estimate, defendants spent less than seven hours trying to locate such *halal* meat distributors. Althaus Dep. 33:18-23. In reality, had defendants purchased bulk *halal* meats at roughly $3/pound, Carey Aff. ¶ 3, and served them four times per week, the marginal expense of accommodating Mr. Charles's religious diet would have cost less than $400/year ($3/pound = $1.88/10-ounce serving; $1.88 x 52 weeks x 4 meals = $390/year).

[10] Indeed, given Mr. Beyah's employment as defendants' religious chaplain, his knowledge on this point should be imputed to defendants. *E.g.*, *Ivers & Pond Piano Co. v. Peckham*, 29 Wis. 2d 364, 369, 139 N.W.2d 57, 59 (1966) ("The knowledge of an agent may be imputed to a principal irrespective of whether the agency is founded on express or implied authority.").

Defendants' claim that it was too costly to accommodate this religious request thus has no record support.[11]

Even assuming defendants' exorbitant estimate of the price of *halal* meats were correct — i.e., the General Menu costs $1.02/meal, the *Kosher* Menu costs $3.24/meal, the Vegan Menu costs $1.02/meal, and *halal* meats would cost $5.00/meal, *see* Defs' 2d Discovery Response Nos. 7, 14 — providing a Jew with a *kosher* diet would still cost nearly 33 percent more than providing a Muslim with *halal* meats four times per week. That is, 14 *kosher* meals at $3.24 costs $45.36/week, whereas 4 meals with *halal* meat at $5.00 (plus $1.02 for other parts of entrée) plus 10 General Menu or Vegan Menu entrees at $1.02 would cost $34.28/week — $11.08 cheaper per inmate per week, to be precise.

Ultimately, the only "compelling governmental interest" defendants correctly identify is prison security, i.e., the "need to maintain order and safety." *Cutter*, 544 U.S. at 722. Regrettably, despite repeatedly citing this interest, Defs.' Br. 11, 14, defendants never actually marshal any evidence or explain (as is their burden on summary judgment) how the provision of *halal* meat would make prisons less secure. That food preparation might be "problematic," *id.* 8, is a far cry from establishing it would undermine prison security. Likewise, although defendants note dietary accommodations "can lead to dissension among inmates," *id.* 13, they do not cite any record facts that show this would be the case here. Indeed, defendants already crossed the Rubicon on that point when they decided to accommodate Jewish inmates with *kosher* meats, but refused to accommodate Muslim inmates with *halal* meats. *See* Althaus Dep. at 66:14-69:11, 81:19-82:5 (explaining the security concerns for providing *kosher* and *halal* meals are practically

[11] Even in assessing the price of prepackaged, single-serving *halal* meals with meat, defendants deceptively included a $20/box "handling charge" that would not accrue if defendants purchased seven boxes or more. *See* Althaus Dep. at 59:21-61:14, 63:11-22; Doc. 523. Accordingly, had defendants not improperly inflated the price of *halal* meats by 32 percent, the proper figures would be $5.00/serving, and $1,040/year ($5.00 x 52 weeks x 4 meals).

identical). No amount of deference to prison administrators, *see Lovelace v. Lee*, 472 F.3d 174. 190 (4th Cir. 2006) (stating "a court should not rubber stamp or mechanically accept the judgment of prison administrators"), can overcome these blatant shortcomings in the evidence.

2. Even If Defendants' Imposition Furthered A "Compelling Governmental Interest," Defendants Did Not Use The "Least Restrictive Means."

Second, even if defendants had properly identified any compelling governmental interest furthered by their refusal to provide any *halal* meats, defendants still failed to establish their draconian response furthered those interests by the "least restrictive means." Given that this is one aspect of the "most demanding test known to constitutional law," *City of Boerne*, 521 U.S. at 534, government impositions fail strict scrutiny whenever a right can be accommodated by any "[l]ess discriminatory alternatives . . . available." *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334, 344-45 (1992) (holding statute failed strict scrutiny because "[l]ess discriminatory alternatives" would alleviate State's concern); *see also Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004) (holding statute failed strict scrutiny where there was a "less restrictive alternative"); *Turner v. Safley*, 482 U.S. 78, 90 (1987) (describing "least restrictive means" test, as requiring government to "set up and shoot down every conceivable alternative method" of accommodation). In other words, when Congress enacted RLUIPA, it truly meant "least restrictive means."

Indeed, defendants had many obvious and far less restrictive means available to them. For example, defendants failed to consider any of the following alternatives: (1) offering *halal* meat as a supplement to the vegetarian or regular fare diet only a few times per week, Althaus Dep. at 44:17-22; (2) offering *halal* meat for sale in the canteen, *id.* at 48:14-49:3; Carey Aff. ¶ 2 (stating vendors sell nonperishable *halal* meats); (3) requiring inmates to co-pay for *halal* meats, *id.* at 54:18-21; *see also Beerheide v. Suthers*, 82 F. Supp. 2d 1190, 1194 (D. Colo.

2000) (noting prison required inmates desiring *kosher* meals "to pay a co-pay of 25% of the cost of the diet up to a maximum of $90 per month"), *aff'd*, 286 F.3d 1179 (10th Cir. 2002); or (4) serving all inmates *halal* meat, Althaus Dep. at 69:3-11. Instead of steering any of these middle courses, defendants searched for only one solution — "pre-packaged," "single serving" *halal* meals — and abruptly concluded accommodation was not feasible. RLUIPA requires far more.

II. DEFENDANTS' REFUSAL TO PROVIDE ANY *HALAL* MEATS TO MR. CHARLES VIOLATED THE FREE EXERCISE CLAUSE.

Defendants cannot establish their total refusal to provide any *halal* meats accommodated Mr. Charles's rights under the Free Exercise Clause, because their refusal was an exaggerated response to prison concerns.

The Free Exercise Clause provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. "Inmates clearly retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) (citations omitted). As such, when a prison regulation impinges on inmates' constitutional rights, the regulation is invalid unless it is "'reasonably related to legitimate penological interests.'" *Id.* at 349 (quoting *Turner*, 482 U.S. at 89). To assess the reasonableness of prison regulations, the *Turner* Court fashioned a four-factor test:

1. "[T]here must be a 'valid, rational connection' between the prison regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89. Accordingly, "a regulation cannot be sustained where the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational," and "the governmental objective must be a legitimate and neutral one." *Id.* at 89-90.

2. Prison regulations are more likely to be unreasonable when there are no "alternative means of exercising the right that remain open to prison inmates." *Id.* at 90. When no alternative means remain open, prison officials are not entitled to any extra deference. *Id.*

3. Also relevant is "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* In considering this factor, the Court should recognize that "few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Id.* It is only when accommodation would have a "significant 'ripple effect' on fellow inmates or on prison staff," that courts should extend much deference to prison officials' discretion. *Id.*

4. "[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation." *Id.* Nevertheless, "[b]y the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* Accordingly, "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 91.

Indeed, the *Turner* holding itself is very instructive. There, a state prison regulation prohibited prisoners from marrying absent the prison superintendent finding "compelling reasons" to approve the request. *Id.* at 96. In practice, the only reasons considered compelling were pregnancy or childbirth. *Id.* at 96-97. In defense of its regulation, the prison asserted concerns in security and rehabilitation. *Id.* at 97. With respect to security, the prison pointed to evidence regarding the potential that "'love triangles' might lead to violent

confrontations between inmates." *Id.* Regarding rehabilitation, the prison marshaled evidence that "female prisoners often were subject to abuse at home or were overly dependent on male figures," and therefore "women prisoners needed to concentrate on developing skills of self-reliance." *Id.* The Court rejected both contentions as "not reasonably related" to security or rehabilitation. *Id.* Instead, the prison's asserted interest in security was "an exaggerated response," because there were "obvious, easy alternatives" that would "impos[e] a *de minimis* burden on the pursuit of security objectives." *Id.* at 97-98. For example, the state prison could have followed the federal example and allowed marriages, except when that warden finds a threat to prison order or security or public safety. *Id.* at 98. Likewise, the regulation "swe[pt] much more broadly" than could be explained by the prison's interest in rehabilitation. *Id.*

So too here, defendants come up short on all four *Turner* factors. *First,* defendants' regulations bear no "valid, rational connection" to their asserted goals of "preserving scarce prison resources" and "streamlining food preparation."[12] Defs.' Br. 21. To be sure, those are both legitimate governmental interests. The problem for defendants is that accommodation of Mr. Charles's rights would not have undermined either goal. As explained above, it would cost $11.08/week less to accommodate Mr. Charles's religious dietary request than it already costs defendants to accommodate a Jewish inmate's religious dietary request. *See supra* Part I.B.1. Moreover, because defendants already have an infrastructure and procedures in place to prepare and serve special meals to other inmates (be they *kosher*, vegetarian, or medically required), *see* IMP 6B, it would hardly burden defendants to prepare one more meal.

[12] In addressing Mr. Charles's claim under the Free Exercise Clause, defendants do not assert security as a legitimate governmental interest. *See* Defs.' Br. 20-22. Even if they had, their claim would ring hollow, because defendants' corporate-representative witness already conceded the security concerns for providing *kosher* and *halal* meals are practically identical. Althaus Dep. at 66:14-69:11; 81:19-82:5; *see also supra* Part I.B.1 (addressing defendants' factually unsupported security contentions).

Second, defendants made no factual showing on this record (as was their burden on summary judgment) that DOC's Muslim inmates have alternative means of exercising their religious faith. Without this showing, defendants' regulations are not entitled to extra deference.

Third, although defendants marshaled (misleading and factually inaccurate) evidence regarding the effect accommodation would have on prison resources generally, *see supra* Part I.B.1, defendants did not point to record evidence showing any negative impact accommodation would have on guards and other inmates, much less evidence of a "substantial 'ripple effect.'" Nor could they, because given that "few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order," accommodation here would only have a *de minimis* effect.

Fourth, as explained above, *see supra* Part I.B.2, there existed many "obvious, easy alternatives" to accommodate Mr. Charles's religious dietary request. As such, defendants' regulations were nothing more than an "'exaggerated response' to prison concerns."

Accordingly, because all the *Turner* factors point to the unreasonableness of defendants' regulations, defendants cannot establish their conduct was consistent with the Free Exercise Clause.

III. DEFENDANTS' REFUSAL TO PROVIDE ANY *HALAL* MEATS TO MR. CHARLES VIOLATED THE EQUAL PROTECTION CLAUSE.

Likewise, defendants failed to show their total refusal to provide *halal* meats to a Muslim inmate — when they provide *kosher* meats to Jewish inmates — was consistent with the Equal Protection Clause.

The Equal Protection Clause provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The *Turner* factors also apply to claims under the Equal Protection Clause. *Morrison v. Garraghty*,

239 F.3d 648, 655-56 (4th Cir. 2001). As the Court previously ruled, "[i]t is fundamental that one religion cannot be preferred over another in the prison context lacking a reasonable penological interest." Decision at 14.

Defendants wrongly contend Mr. Charles's equal protection claim falters because (they claim) he cannot show discriminatory intent or purpose, Defs.' Br. 23-24, 26-27, but they misconceive the basic constitutional analysis. It is true that claims under the Equal Protection Clause require a plaintiff to "demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison*, 239 F.3d at 654. But defendants fail to recognize that discriminatory intent or purpose is presumed whenever a statute or regulation discriminates on its face. *E.g.*, *Wayte v. United States*, 470 U.S. 598, 610 n.10 (1985) ("A showing of discriminatory intent is not necessary when the equal protection claim is based on an overtly discriminatory classification." (citing *Strauder v. West Virginia*, 100 U.S. 303, 304-10 (1880))); *Washington v. Davis*, 426 U.S. 229, 241 (1976); *Anderson ex rel. Dowd v. City of Boston*, 375 F.3d 71, 82 (1st Cir. 2004) (holding that "discriminatory intent is presumed" whenever a statute or regulation uses "explicit" classifications on its face (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979), and *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003))); *Fayson*, 2006 WL 3220062, at *10 (holding prisoner showed "'purposeful discrimination'" where she "submitted evidence that BWCI provides a Kosher menu for three Jewish inmates, but will not meet her request for a diet that conforms to her Islamic beliefs" (citations omitted)). In other words, defendants satisfied Mr. Charles's burden to show discriminatory intent when — instead

of promulgating a generally applicable, religiously neutral regulation — they promulgated a regulation that explicitly prefers Jews over Muslims.[13]

Next, defendants wrongly contend Mr. Charles was not similarly situated to Jewish inmates who received *kosher* meals with meat. Defs. Br. 25. But as shown above, defendants cannot rely on their artificially restricted search for *halal* meat vendors to claim no *halal* meat was available. *See supra* Part I.B.1; *see also Fayson*, 2006 WL 3220062, at *10 (holding Muslim inmate denied *halal* meals was "'similarly-situated'" to Jewish inmates who received *kosher* meals); Moreover, defendants' complaint that it would cost more to provide (cheaper) religious diets to Muslim inmates than (more expensive) religious diets to Jewish inmates, solely because there are more Muslim inmates, is ludicrous. It should require no citation to observe that defendants could not choose, for example, to confer a benefit on white inmates, but refuse to confer the same benefit on black inmates, on the sole ground that there are more black inmates than white inmates. And to suggest that RLUIPA allows the state to refuse to provide accommodations to a religious group because they are too large a segment of the population turns the statute on its head. Finally, the fact that *halal* does not prohibit mixing of meat and dairy makes it <u>easier</u> to provide than *kosher*, not more difficult (as defendants would apparently contend). Instead, common sense should guide here — defendants violated Mr. Charles's equal protection rights when they served religious diets with meat to Jewish inmates, but not to Muslim inmates.

Finally, defendants wrongly contend their regulation passes muster under the *Turner* factors. Defs.' Br. 27. Notably, even if defendants were to prevail on Mr. Charles's claim under the Free Exercise Clause, that does not mean defendants should prevail on his claim

[13] Indeed, aside from regulations that discriminate on their face, defendants even concede that "discriminatory intent can sometimes be inferred by [the] mere fact of different treatment." Defs.' Br. 26.

under the Equal Protection Clause. *See Morrison*, 239 F.3d at 656 (rejecting prison's argument that "because the district court granted summary judgment to them on Morrison's Free Exercise claim brought under the First Amendment, they should necessarily prevail on Morrison's Equal Protection claim brought under the Fourteenth Amendment"). For the same reasons described above, *see supra* Part II, defendants' regulations fall short on the *Turner* factors. Additionally, defendants fall even further short on the first *Turner* factor, because they did not act in a "legitimate and neutral" fashion. 482 U.S. at 89. Instead, their regulation is not a neutral law of general application, but rather singles out certain religious practices — specifically, Jewish *kosher* requirements — for special treatment, while refusing to accommodate analogous *halal* requirements for Muslims. *See Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 546 (1993) ("A law burdening religious practice that is not neutral or not of general application must undergo the most rigorous of scrutiny."). This observation throws into sharp relief the Court's ruling that "[i]t is fundamental that one religion cannot be preferred over another in the prison context" for an unreasonable reason. Decision at 14. As such, IMP 6B violated Mr. Charles's equal protection rights under the *Turner* factors.

Accordingly, because discriminatory intent is presumed in facially discriminatory regulations, Mr. Charles is similarly situated to Jewish inmates, and all the *Turner* factors point to the unreasonableness of defendants' regulations, defendants cannot establish their conduct was consistent with the Equal Protection Clause.

IV. THE COURT CORRECTLY RULED DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY.

Couching a procedurally improper reconsideration motion as a separate argument in support of summary judgment,[14] Defs.' Br. 28-32, defendants wrongly contend this Court erred when it denied defendants qualified immunity. Specifically, the Court previously ruled that (1) "'a constitutional right would have been violated on the facts alleged,'" and (2) it is "clearly established" and "fundamental" that "one religion cannot be preferred over another in the prison context" absent sufficient justification. Decision at 14. Contrary to defendants, even if the Court undertakes to decide the merits of defendants' procedurally improper argument, the Court's initial ruling correctly rejected defendants' qualified immunity.[15]

Qualified immunity depends on a two-step inquiry: (1) whether a right would have been violated on the facts alleged; and (2) if so, whether the right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 200 (2001). For the reasons stated above, *see supra* Parts I-III, the first step is satisfied, because defendants violated Mr. Charles's rights. Likewise, the second step is satisfied, because the legal frameworks for Mr. Charles's constitutional and RLUIPA claims were clearly established in 2001-2002.

Contrary to defendants' arguments, the U.S. Supreme Court has "expressly rejected" any requirement that plaintiffs show "previous cases be 'fundamentally similar'" or involve "'materially similar' facts." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Instead, the "salient question" is "whether the state of the law in [2001-2002] gave [defendants] fair

[14] Defendants' request that the Court reconsider its qualified immunity holding is procedurally improper in at least two respects: it is untimely, and it violates this Court's scheduling order. *See infra* Part VI. Moreover, having failed to take an interlocutory appeal within 14 days of the Court's initial qualified immunity decision, Wis. Stat. §§ 808.03(2), 809.50, defendants are transparently attempting to goad the Court into entering another qualified immunity decision, which could again be immediately appealable, *see Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985) (holding qualified immunity determinations are immediately appealable); *Behrens v. Pelletier*, 516 U.S. 299, 306-07 (1996) (holding qualified immunity determinations are subject to immediate appeal "at successive stages").

[15] Plaintiff incorporates by reference his prior qualified immunity arguments. *See* Plaintiffs' Brief In Response To Defendants' [First] Motion For Summary Judgment (May 12, 2006) (Dct. No. 85) at 5-12.

warning" that their conduct was unlawful. *Id.* (emphasis added). Accordingly, defendants misplace their reliance on qualified immunity decisions regarding constitutional claims that were decided well after they violated Mr. Charles's rights. *See* Defs.' Br. 30-32 (collecting cases decided after 2001-2002). Moreover, defendants cite no case (before or after 2001-2002) that holds prison officials are entitled to qualified immunity from *halal* meat claims. *See Lovelace*, 472 F.3d at 198 (holding prison could not rely, for qualified immunity purposes, on any opinion that "came after the November 2002 incident here"). Even if defendants had a crystal ball in 2001-2002, and could have predicted such cases, it would be improper for them to assume they were insulated by qualified immunity based on a scant few trial court decisions. *See Midlock v. Apple Vacations West, Inc.*, 406 F.3d 453, 457-58 (7th Cir. 2005) (Posner, J.) (holding attorney "was properly sanctioned" for relying on a federal district court opinion, because, "as we have noted repeatedly, a district court decision does not have stare decisis effect; it is not a precedent"; instead, the "fact of such a decision is not a reason for following it," because it is "no different from a persuasive article or treatise" (collecting cases)).

By *Hope*'s standard, defendants had "fair warning" in 2001-2002 that their conduct was unlawful. Notably, Mr. Charles's constitutional claims are governed by *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987). In *O'Lone*, the Supreme Court held that infringement of a prisoner's free exercise rights is unlawful unless it is "'reasonably related to legitimate penological interests.'" 482 U.S. at 349 (quoting *Turner*, 482 U.S. at 89). As such, the relevant standards for defendants' conduct under *O'Lone* were certainly "clearly established" in 2001-2002. Defendants do not (and could not) seriously dispute that the *O'Lone* rule was clearly established at the relevant times. And there is no question that requests for a religious diet fall within the rule of *Turner* and *O'Lone*. *See Simms v.*

Edmonds, 2000 WL 1648951, at *1 (4th Cir. Nov. 3, 2000) (holding "an inmate has the constitutional right to obtain adequate nourishment from prison foods permitted by his religious dietary rules, unless the prison's failure to provide such foods is reasonably related to a legitimate penological interest"); *Hawkins v. Mills*, 2005 WL 1806451, at *6-7 (W.D. Va. Aug. 1, 2005) (applying *Turner* and *O'Lone* to claims arising from denial of common fare requests); *Ephraim v. Angelone*, 313 F. Supp. 2d 569, 575 (E.D. Va.) (same), *aff'd*, 68 F. App'x 460 (4th Cir. 2003).

Likewise, in asserting qualified immunity from plaintiff's RLUIPA claims, defendants do not argue that the rule created by RLUIPA is (or was at the relevant time) unclear, ambiguous, or unfamiliar. And they could not make such an argument. As many courts have held, RLUIPA's substantive proscription and the strict scrutiny standard it applies to official action are clear and unambiguous. *See Madison v. Riter*, 411 F. Supp. 2d 645, 651-52 (W.D. Va. 2006) (citing cases), *aff'd in part, rev'd in part on other grounds*, 474 F.3d 118 (4th Cir. 2006). Accordingly, the Court correctly denied qualified immunity to defendants.

V. MR. CHARLES REMAINS ENTITLED TO RECOVER NOMINAL, COMPENSATORY, AND PUNITIVE DAMAGES.

Contrary to defendants, Defs.' Br. 32-34, the "Limitation on Recovery" of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(e), does not bar Mr. Charles from recovering compensatory damages. Instead, it merely provides that "No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." *Id.* (emphases added). As such, Mr. Charles can recover compensatory damages — in addition to

nominal and punitive damages[16] — for several overarching reasons. Specifically, the PLRA does not apply in the first instance, because Mr. Charles's state-court lawsuit is neither a "Federal civil action," nor (as Mr. Charles is currently on parole) is it "brought by a prisoner confined in a jail, prison, or other correctional facility." Additionally, even if the PLRA did apply, it would only bar recovery of compensatory damages that arise solely from "mental or emotional injury," not compensatory damages arising separately from Mr. Charles's spiritual injury or the intrinsic, intangible worth of his federal statutory rights.

First, Mr. Charles's lawsuit is not a "Federal civil action," because he chose not to file his complaint in federal district court, but instead filed in Wisconsin state court. By its plain language, Congress deliberately chose to limit § 1997e(e) only to "Federal civil action[s]." A "civil action" is a civil lawsuit, to be distinguished from a claim or cause of action. *Compare* Fed. R. Civ. P. 2 ("There shall be one form of action to be known as 'civil action.'"), *with id.* 8(a) (requiring "a short and plain statement of the claim showing that the pleader is entitled to relief" (emphasis added)). It follows that a "Federal civil action" is neither a civil lawsuit filed in state court, nor a claim arising under federal law, but rather nothing more than a civil lawsuit

[16] Defendants concede that § 1997e(e) "is inapplicable to awards of nominal or punitive damages for violations of the right itself," yet nevertheless contend punitive damages "are not available" to Mr. Charles, because "there is no record support for punitive damages, nor does plaintiff appear to seek them." Defs.' Br. at 33 (citations omitted). Discovery has not closed, so it remains to be seen the extent to which the record will provide further support for punitive damages. But what is clear now is that Wisconsin civil procedure did not require plaintiffs to plead punitive damages with particularity or to request punitive damages in a complaint's prayer for relief. *See* Wis. Stat. § 802.02(1)(a) (requiring notice pleading); *id.* § 802.03(2) (requiring particularity only for "fraud or mistake"); *id* § 895.043(3) (stating punitive damages depend on "evidence," not pleadings, that show defendants "acted maliciously toward the plaintiff or in an intentional disregard of [plaintiff's] rights"); *Hertz Corp. v. Red Rooster Cheese Co.*, 55 Wis. 2d 701, 706, 200 N.W.2d 603, 606-07 (1972) (holding prayer for relief is not a substantive part of the complaint); *Gorton v. Am. Cyanamid. Co.*, 194 Wis. 2d 203, 232-33, 533 N.W.2d 746, 758-59 (1995) (affirming grant of posttrial motion to amend plaintiffs' damage claims where uncontroverted evidence authorized relief not requested in pleadings); *see also Unified Catholic Schs. of Beaver Dam Educ. Ass'n v. Universal Card Serv. Corp.*, 34 F. Supp. 2d 714, 719 (E.D. Wis. 1999) ("Under Wisconsin law, plaintiff's right to punitive damages is not based on the plaintiff's theory of liability, but rather on the character of the defendant's conduct."). Moreover, drawing the inference most favorable to the nonmovant, a reasonable juror could interpret DOC's promulgation of IMPs 6A and 6B, when they previously failed to gather legislative support, as showing malice or intentional disregard of Muslim inmates' religious freedoms. *See* Docs. 411-412, 416-417. As such, Mr. Charles remains entitled to seek punitive damages.

filed in federal court. *See Mitchell v. Brown & Williamson Tobacco Corp.*, 294 F.3d 1309, 1315-16 (11th Cir. 2002) (rejecting argument "that the words '[n]o Federal civil action' include all civil actions pending in federal court, including those removed from state court," because prisoner's lawsuit "was clearly not a federal civil action," where, *inter alia*, "it was filed in state court"). Indeed, a civil lawsuit filed in state court never can become a "Federal civil action," even if it is removed to federal district court. *Id.*

Moreover, had Congress wanted § 1997e(e) to regulate all prison condition litigation that raised federal issues — whether filed in state or federal court — it certainly "knew how to do so," *Custis v. United States*, 511 U.S. 485, 492 (1994), and would have carefully used different language, such as "any Federal causes of action," "any Federal claims," or "any claims arising under substantive federal law." Thus, for example, when Congress wanted to require administrative exhaustion for all § 1983 claims in the PLRA, whether brought in federal or state court, it chose different language. *See* 42 U.S.C. § 1997e(a) ("No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." (emphasis added)). Here, however, Congress intentionally chose different language — "Federal civil action" — because Congress was most concerned about overburdened federal court dockets. *E.g.*, 141 Cong. Rec. S14408, S14413 (daily ed. Sept. 27, 1995) (Statements of Sens. Dole, Hatch, and Kyl) (complaining that federal courts' prison-condition-litigation docket had grown from 6,600 in 1975 to 39,000 in 1994, without mentioning state courts' dockets). Accordingly, because Mr. Charles did not file his lawsuit in federal district court, but instead filed it in Wisconsin state court, it is not a "Federal civil action."

Second, Mr. Charles's lawsuit is not "brought by a prisoner confined," because he was already released on parole when he filed his Second Amended Complaint. The PLRA defines "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h). "Just in case anyone might be tempted to equate 'prisoner' with 'ex-prisoner," this "statutory language does not leave wriggle room; a convict out on parole is not a 'person incarcerated or detained an any facility who is . . . adjudicated delinquent for, violations of . . . the terms and conditions of parole.'" *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998) (Easterbrook, J.) (omissions in original). In other words, a lawsuit brought by a parolee like Mr. Charles is not "brought by a prisoner confined."[17]

Third, even if the PLRA were somehow relevant to Mr. Charles's lawsuit, it would not bar <u>all</u> compensatory damages (as defendants contend without qualification). If that were Congress' far-reaching intention, it is certainly odd that it chose the circuitous route of narrowly circumscribing § 1997e(e)'s bar to "<u>mental or emotional</u> injury," instead of "<u>any</u> injury." *See, e.g.*, *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 7 (2000) ("Had that been Congress's intention, it could easily have used the formulation just suggested."); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 197 (1985) ("Congress could easily have [so provided] had that been its intention."); *United States v. Rodgers*, 461 U.S.

[17] It is of no moment that Mr. Charles was incarcerated when he initially filed suit. *See, e.g.*, *Stevens v. Goord*, 2003 WL 21396665, at *4 (S.D.N.Y. June 16, 2003) (holding "a prisoner who files a complaint while incarcerated, but who is no longer incarcerated at the time of judgment, does not have to satisfy the PLRA's exhaustion requirements" (citing *Morris v. Eversley*, 205 F. Supp. 2d 234, 241 (S.D.N.Y. 2002); *Liner v. Goord*, 115 F. Supp. 2d 432, 434 (S.D.N.Y. 2000); *Hallett v. N.Y. State Dep't of Corr. Servs.*, 109 F. Supp. 2d 190, 197 (S.D.N.Y. 2000))). If § 1997e(e) applied to Mr. Charles, the dismissal of his damages claims for "mental or emotional injury" would be "without prejudice to their being re-filed at a time when [he is] not confined." *Harris v. Garner*, 216 F.3d 970, 985 (11th Cir. 2000) (en banc). In other words, an adverse § 1997e(e) ruling would merely lead Mr. Charles to refile his complaint immediately and move to have his new action consolidated with the action at bar. This would (ironically, in light of the PLRA's stated goals), do nothing more than delay justice and waste precious judicial resources.

677, 707 (1983) (rejecting statutory interpretation where Congress "could have easily expressed that intention more clearly by [more direct] language"). Accordingly, it follows that, at most, the PLRA bars damages arising solely from "mental or emotional injury," but does not bar compensatory damages arising separately from Mr. Charles's spiritual injury or the intrinsic, intangible worth of his federal statutory rights.

Moreover, the amount of Mr. Charles's RLUIPA damages will be a question for the jury. Although "the abstract value of a constitutional right may not form the basis for § 1983 damages," *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 308 (1986) (emphases added), self-executing federal statutes like RLUIPA face no such limitation on compensatory damages. To wit, RLUIPA authorizes plaintiffs to "obtain appropriate relief." 42 U.S.C. § 2000cc-2(a). In similar statutory contexts, the U.S. Supreme Court has held "appropriate" relief includes money damages. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 76 (1992) (holding "appropriate relief" in Title IX includes money damages); *Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359, 369 (1985) (recognizing "appropriate" relief under the Education of the Handicapped Act includes compensatory damages). Likewise, expert testimony presented to both the House and Senate Committee that passed RLUIPA clarified that "appropriate relief includes declaratory judgments, injunctions and damages." *Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong. 219 (1999); *Religious Liberty: Hearing Before the Senate Comm. on the Judiciary*, 106th Cong. 91 (1999) (statements of Douglass Laycock, McKean Young Regents Chair in Law at the University of Texas at Austin) (emphasis added). Accordingly, case law recognizes that RLUIPA authorizes monetary damages. *Daker v. Ferrero*, 2006 WL 346440, at *9-10 (N.D. Ga. Feb. 13, 2006) (holding, after extensive analysis, that "appropriate relief" under RLUIPA includes monetary

damages). Like any other statutory violation, the issue of quantifying or calculating those RLUIPA damages will be a question solely for the jury. *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 353 (1998) (holding "[t]he right to a jury trial includes the right to have a jury determine the amount of statutory damages, if any" (emphasis in original)).

In sum, despite the PLRA, Mr. Charles remains entitled to recover nominal, compensatory, and punitive damages.[18]

VI. THE COURT CORRECTLY RULED MR. CHARLES'S CLAIM FOR DECLARATORY RELIEF IS NOT MOOT.

Again couching another procedurally improper reconsideration motion as a separate argument in support of summary judgment, Defs.' Br. 34-36, defendants wrongly contend this Court erred when it ruled Mr. Charles's claim for declaratory relief was not moot and could continue alongside his claim for monetary damages. *See* Decision at 11. To the contrary, even if the Court undertakes to decide the merits of defendants' procedurally improper argument, the Court's initial ruling correctly stated and applied Wisconsin mootness law.

As an initial matter, defendants' request that the Court reconsider its mootness holding is procedurally improper in at least two respects. *First*, it is untimely. Wisconsin civil procedure ordinarily requires that motions for reconsideration be filed within a "reasonable time" after an adverse ruling, *State v. Quackenbush*, 2005 WI App 2, ¶ 16, 278 Wis. 2d 611, 624, 692 N.W.2d 340, 346, which typically is 20 days, Wis. Stat. § 805.17(3). By raising this mootness

[18] Even if defendants were correct that the PLRA barred all compensatory damages, the PLRA would not bar Mr. Charles from recovering compensatory damages, because he in fact sustained physical injuries in the form of stomach aches, nausea, weakness, and losing weight. Charles Aff. ¶ 5. The PLRA does not require proof of a serious, permanent injury, but rather merely requires "a less-than-signficant-but-more-than-*de minimis* physical injury as a predicate to allegations of emotional injury." *Mitchell v. Horn*, 318 F.3d 523, 534-36 (3d Cir. 2003); *see also Jackson v. Carey*, 353 F.3d 750, 758 (9th Cir. 2003); *Geiger v. Jowers*, 404 F.3d 371, 374 & n.10 (5th Cir. 2005); *Boxer X v. Harris*, 437 F.3d 1107, 1111 (11th Cir. 2006), *cert. denied*, 75 U.S.L.W. 3529 (U.S. Apr. 2, 2007) (No. 06-7654). Moreover, even if these physical injuries were insufficient, § 1997e(e) cannot constitutionally be applied to First Amendment or Equal Protection claims. *Siggers-El v. Barlow*, 433 F. Supp. 2d 811, 816 (E.D. Mich. 2006).

argument for the first time five full months after the Court ruled against them, *see* Decision at 11, defendants have flouted this procedural requirement for reconsideration motions. *Second*, defendants' mootness argument is beyond the scope of the Court's most recent scheduling order, which (because the Court had conclusively determined procedural issues in the prior round of summary judgment) directed the parties to go beyond defendants' procedural defenses and address the substantive merits of Mr. Charles's *halal* claims. *See* Scheduling Order (Oct. 5, 2006) (Dct. No. 95) at 1 ("Defendants will file summary judgment on halal by December 15, 2006." (emphasis added)). In addition to wasting scarce judicial time and resources, it should go without saying that the untimeliness and procedural irregularities of defendants' improper argument has unfairly increased the cost to Mr. Charles and undersigned *pro bono* counsel — in both time and money — of litigating this case. Accordingly, given that Wisconsin law treats mootness as prudential, not constitutional or jurisdictional, the Court should decline to consider defendants' procedurally improper motion to reconsider the prior mootness ruling. *See Hottenroth v. Hetsko*, 2006 WI App 249, ¶ 26, 727 N.W.2d 38, 46-47 (holding circuit courts should not reconsider nonfinal rulings "absent some reason that, in the proper exercise of its discretion, justifies a change in its decision").

In any event, defendants' mootness argument is wrong. Defendants extensively brief federal mootness law, Defs.' Br. 34-35, but ignore that this case is being litigated in state court. Federal mootness law is not binding because, as the Wisconsin Supreme Court has long recognized, it applies "stricter standards" than Wisconsin "state standards of mootness." *Watkins v. Dep't of Indus., Labor & Human Relations*, 69 Wis. 2d 782, 796, 233 N.W.2d 360, 367 (1975). That is so because the Wisconsin Constitution has no analog to the Cases or Controversies Clause of the U.S. Constitution. *Compare* Wis. Const. art. VII, § 8 (granting

Wisconsin circuit courts jurisdiction "in all matters civil and criminal"), *with* U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases [arising under federal law]; [and] to Controversies [based on diversity jurisdiction]." (emphasis added)). Given this critical distinction in constitutional frameworks, the U.S. Supreme Court has long held mootness is a mandatory, constitutional requirement derived from Article III, *e.g.*, *SEC v. Med. Comm. for Human Rights*, 404 U.S. 403, 406 (1972); *Hall v. Beals*, 396 U.S. 45, 48 (1969), whereas the Wisconsin Supreme Court has held mootness is not "a jurisdictional prerequisite," but rather simply a prudential "matter of 'sound judicial policy.'" *State ex rel. First Nat'l Bank of Wis. Rapids v. M & I Peoples Bank of Coloma*, 95 Wis. 2d 303, 308 n.5, 290 N.W.2d 321, 325 n.5 (1980) (citations omitted); *see also Loy v. Bunderson*, 101 Wis. 2d 215, 223, 304 N.W.2d 140, 144 (1981) (holding "mootness does not generally deprive a court of subject matter jurisdiction"), *rev'd on other grounds*, 107 Wis. 2d 400, 320 N.W.2d 175 (1982); *Chenequa Land Conservancy, Inc. v. Vill. of Hartland*, 2004 WI App 144, ¶ 14 n.7, 275 Wis. 2d 533, 545 n.7, 685 N.W.2d 573, 579 n.7 (explaining that the "federal law derived from the Article III 'cases and controversies' limitation on federal court jurisdiction [does] not apply to Wisconsin courts" (citation omitted)).

Rather than consider the confusing and unhelpful morass of federal mootness jurisprudence, this Court would be better served by beginning its analysis at the starting point for declaratory relief: with Wisconsin mootness law and the Wisconsin Declaratory Judgment Act ("WDJA"), Wis. Stat. § 806.04. The WDJA provides that "Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed." *Id.* § 806.04(1) (emphasis added). Declaratory relief is discretionary, *id.* § 806.04(6), and "[f]urther relief based on a declaratory

judgment or decree may be granted whenever necessary or proper," *id.* § 806.04(8) (emphasis added). This supplemental relief "is not limited to declaratory relief, but includes any relief essential to carry out the declaratory judgment." 6 Jay A. Grenig & Nathan A. Fishbach, *Wisconsin Practice Series* § 86.6 (2d ed. 2007). Critically, the WDJA "is declared to be remedial," because "its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status and other legal relations." Wis. Stat. § 806.04(12). To this end, it "is to be liberally construed and administered." *Id.* (emphasis added).

In turn, Wisconsin courts have determined that "declaratory relief is appropriate wherever it will serve a useful purpose, and the fact that another remedy exists is only one factor to consider in determining whether to entertain the action." *Lister v. Bd. of Regents*, 72 Wis. 2d 282, 307, 240 N.W.2d 610, 625 (1976) (emphasis added); *see also* Grenig & Fishbach, *supra*, § 86.2. In other words, a claim for declaratory relief is not moot unless a judgment can have "no practical legal effect upon the existing controversy." *State ex rel. Badke v. Vill. Bd.*, 173 Wis. 2d 553, 568, 494 N.W.2d 408, 413 (1993) (emphasis added) (citing *Hahner v. Bd. of Educ.*, 89 Wis. 2d 180, 186, 278 N.W.2d 474, 476 (Ct. App. 1979)).

Consistent with the liberal construction and administration of these principles of Wisconsin mootness law, defendants have failed to demonstrate (as is their burden on summary judgment) that Mr. Charles's claim for declaratory relief will have "no practical legal effect." In fact, it will serve several "useful purpose[s]." For example, *State ex rel. Badke* is illustrative. There, plaintiffs challenged whether defendants' private meeting to issue a building permit complied with Wisconsin's open meeting law. *Id.* at 566, 494 N.W.2d at 412. On appeal, defendants contended plaintiffs' claim was moot, because after the allegedly improper meeting, defendants held a second, procedurally proper meeting, and issued the building permit. *Id.* at

568, 494 N.W.2d at 413. The Wisconsin Supreme Court disagreed, and permitted retrospective declaratory relief: "The controversy in this case is the legal status of the acts that preceded the revote, and a declaratory judgment will have a legal effect on that controversy: it will declare the legal status of the Village Board's acts." *Id.* So too here, the controversy in this case is the legal status of defendants' acts that preceded Mr. Charles's release from prison, and a declaratory judgment will have a legal effect on that controversy: it will declare the legal status of defendants' acts.

In light of defendants' flawed federal approach to mootness, it should come as no surprise that defendants' complaint that there is "nothing prospective" about Mr. Charles's claim for declaratory relief, Defs.' Br. 36 (citing federal cases),[19] is a red herring. Whether or not federal mootness law forbids retrospective declaratory relief, Wisconsin law does not. *E.g.*, *State ex rel. Badke*, 173 Wis. 2d at 568, 494 N.W.2d at 413. Indeed, defendants misstate the issue on which Mr. Charles seeks declaratory relief. To wit, Mr. Charles does not (as defendants contend) seek a prospective declaration that the prison must currently permit him to "engage in all of the religious practices complained of in this lawsuit, including eating a sufficient religious diet." Defs.' Br. 35. This argument addresses a poorly constructed straw man — such a declaration would clearly be moot. Instead, consistent with Wisconsin law, Mr. Charles seeks a

[19] Defendants' reliance, Defs.' Br. 35-36, on *Casteel v. McCaughtry*, 176 Wis. 2d 571, 585, 500 N.W.2d 277, 283-84 (1993), is misplaced. *Casteel* merely held that at inmate's "claims for declaratory relief and an injunction are not barred by his failure to file a notice of claim with the state." *Id.* at 585, 500 N.W.2d at 284 (emphasis added). Its abrupt dictum that declaratory and injunctive relief "are designed to prevent future harm," *id.*, did not silently overrule *State ex rel. Badke*, 173 Wis. 2d at 568, 494 N.W.2d at 413, which addressed the permissibility of retrospective declaratory relief in great detail and was decided barely four months earlier. Instead, the *Casteel* court merely stated the obvious proposition that injunctive relief (and declaratory relief based thereon) is prospective. *See Casteel*, 176 Wis. 2d at 585, 500 N.W.2d at 284.

retrospective declaration that defendants' past refusal (per DOC 309-IMP #6 and 6B) to provide *halal* meat was unconstitutional and unlawful.[20]

Moreover, as the Court previously ruled, the fact that Mr. Charles's retains a damages remedy does not counsel against declaratory relief. *See* Decision at 11 (citing *Rhodes v. Robinson*, 408 F.3d 559, 566 n.8 (9th Cir. 2005)). Under Wisconsin law, there is nothing remarkable about the proposition — adopted by this Court's initial mootness ruling — that to hold a party legally liable for monetary damages, it is permissible (if not necessary) to declare that it broke the law. *E.g.*, *City of Milwaukee v. Firemen's Relief Ass'n*, 34 Wis. 2d 350, 358, 149 N.W.2d 589, 592-93 (1967) (holding "'in a proper case for declaratory relief, where the court has entered a decree adjudicating the rights of parties and where the granting of relief in the form of damages may be predicated on that determination of rights, the court making the determination should also make that award of damages'"); *F. Rosenberg Elevator Co. v. Goll*, 18 Wis. 2d 355, 362, 118 N.W.2d 858, 862 (1963) ("Where declaratory relief is proper for determining the rights of parties in the controversy . . . the court should proceed to award any damages that may follow from and be incidental to its declaration of such rights." (emphasis omitted)); *see also Lister*, 72 Wis. 2d at 308, 240 N.W.2d at 625 (noting that a "declaration of rights may be appropriate in aid of a future action for damages"). To this end, the Ninth Circuit's holding in *Rhodes*, 408 F.3d at 566 n.8, is consistent with Wisconsin mootness law, and

[20] Even if Wisconsin standing law only permitted prospective declaratory relief, Mr. Charles's claim would satisfy that standard. As the *State ex rel. Badke* court noted, "[s]ucceeding on review will do more for [plaintiffs] than resolve a difference of opinion. Succeeding will, as [plaintiffs] suggest[], teach [defendants] what to do under the law to avoid future violations." *Id.* at 567, 494 N.W.2d at 413 (emphasis added). Likewise, the grant of declaratory relief would do more for Mr. Charles than resolve a difference of opinion; it would teach defendants how to avoid future violations.

the Court's reliance thereon was entirely correct and proper. The Court should reject defendants' mootness argument.[21]

CONCLUSION

For the reasons stated above, Mr. Charles should be allowed to proceed with his claims that defendants' refusal to accommodate his religious dietary request violated the Equal Protection Clause, the Free Exercise Clause, and RLUIPA. Accordingly, plaintiff respectfully asks this Court to deny Defendants' Second Motion For Summary Judgment.

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[21] Even if the Court were to reverse course and reconsider its sound mootness ruling, Mr. Charles's claim for declaratory relief would fall within all five of the well-established exceptions to the Wisconsin mootness doctrine:

> "[T]his court has carved out certain exceptions to this general [mootness] rule where: [1] the issues are of great public importance; [2] the constitutionality of a statute is involved; [3] the precise situation under consideration arises so frequently that a definitive decision is essential to guide the trial courts; [4] the issue is likely to arise again and should be resolved by the court to avoid uncertainty; or [5] a question is capable and likely of repetition yet evades review because the appellate process usually . . . cannot even be undertaken within a time that would result in a practical effect upon the parties."

State ex rel. Jones v. Gerhardstein, 141 Wis. 2d 719, 723-24, 416 N.W.2d 883, 888 (1987) (quoting *In re G.S.*, 118 Wis. 2d 803, 805, 348 N.W.2d 181, 182-83 (1984)), *superceded by statute on other grounds*, Wis. Stat. § 51.61(1)(g), *as recognized in State v. Anthony D.B.*, 237 Wis. 2d 1, 614 N.W.2d 435 (2000). *First*, the religious freedom of institutionalized persons — and their access to a religious diet — is of great public importance. *E.g.*, *Sasnett v. Sullivan*, 908 F. Supp. 1429, 1439 (W.D. Wis. 1995), *aff'd after Supreme Court remand on other grounds sub nom. Sasnett v. Litscher*, 197 F.3d 290 (7th Cir. 1999) ("Religious practice and faith can introduce an element of morality into inmates' thinking that leads them to behave lawfully. . . . Inmates who are involved in church activities and who are behaving in ways consistent with religion usually act in ways that are consistent with penological goals."); *Hamilton v. Schriro*, 863 F. Supp. 1019, 1022-23 (W.D. Mo. 1994), *rev'd on other grounds*, 74 F.3d 1545 (8th Cir. 1996) ("The practice of religion has the same beneficial effect on its adherents as do other religions for their adherents. Within the prison system, it has the benefit of promoting inner peace, has a calming effect and causes the practitioner to become a more cooperative, peaceful, self-controlled individual."). Indeed, defendants recognize as much. *See* Defs.' 2d Discovery Response No. 8 ("The DOC recognizes that religious beliefs in general can provide support to inmates which may aid in their institution[al] adjustment in turn enhancing overall security. Religious beliefs and practices can lead to development of community ties, which may aid in an inmate's rehabilitation and eventual successful reintegration into the community, reducing recidivism and the fiscal burden associated on the tax payer."); Response To Plaintiff Jerry Charles' First Set Of Requests For Admission (Peterson Aff. Ex. I) No. 22 ("Religious faith can be helpful in the rehabilitation of prisoners."). *Second*, the constitutionality of DOC regulations is involved. *Third and fourth*, because defendants admit that over 2,000 of DOC's 22,000 current inmates are Muslim, *see* Defs.' 2d Discovery Response Nos. 7, 16, this precise situation will undoubtedly arise frequently and should be resolved to avoid uncertainty. *Fifth*, this question is capable and likely of repetition yet evading review, because prisoners frequently serve their sentences (as here) before enough time has passed to exhaust administrative remedies, litigate through trial, and litigate through appeal (not to speak of potential remands, retrials, and second appeals).

Respectfully submitted,

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