

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
Miami Division

Case No.: 02-22760-CIV-Moore/O'Sullivan

ALAN J. COTTON,  
Plaintiff,  
v.  
FLORIDA DEPARTMENT OF CORRECTIONS;  
et al.,  
Defendants.

**PLAINTIFF'S OPPOSITION TO  
DEFENDANTS' MOTION TO  
DISMISS**

Plaintiff respectfully submits this memorandum in opposition to Defendants' Motion to Dismiss. Rather than answering the Complaint and allowing this case to proceed to discovery, Defendants have filed a motion to dismiss that seeks to paper over the deficiencies of their legal arguments by improperly attacking the credibility of Plaintiff's Jewish beliefs and by relying on unsupported and irrelevant factual assertions, none of which are found in the Complaint, designed to obscure their unlawful conduct. For the reasons set forth below, Defendants' motion should be denied in its entirety.

**FACTS**

Because Defendants have distorted the record by relying on several unsupported factual assertions, Plaintiff briefly sets forth here the operative facts actually alleged in the Complaint. Plaintiff Alan J. Cotton is a sincere adherent of Orthodox Judaism and, as part of the practice of his faith, sincerely believes he is required to keep a kosher diet in order to avoid tainting both his body and soul. Cmpl. ¶¶ 1, 4, 9-10. Keeping kosher is a fundamental tenet of the Orthodox Jewish faith. *Id.* ¶ 10. The three essential qualities of a kosher diet are that it must be derived from a religiously acceptable source; it must be prepared and served in a religiously acceptable manner; and meat and dairy may not be mixed. *Id.* ¶¶ 10-14.

Plaintiff is currently within the custody of Defendant Florida Department of Corrections and is housed at the Department's Everglades institution. *Id.* ¶ 8. None of the meal plans offered by the Defendants qualify as kosher under Jewish dietary laws. *Id.* ¶¶ 16-19. Defendants do accommodate the differing religious dietary needs of some prisoners, yet refuse to accommodate Plaintiff's. *Id.* ¶¶ 18, 20. Defendants also accommodate the medical dietary needs of some prisoners, but refuse to accommodate Plaintiff's religious dietary needs. *Id.* ¶ 16. Defendants refuse to provide Plaintiff a kosher diet as required by his religion despite their professed policy of supplying prisoners with a diet that meets their religious needs. *Id.* ¶ 21. Although federal prisons in Florida and a number of Florida county prisons accommodate the religious needs of Jewish prisoners by providing kosher meals, Defendants steadfastly refuse to provide kosher meals for Plaintiff and other Jewish prisoners. *Id.* ¶¶ 22-23. Defendants have never identified any compelling government interest for denying Plaintiff kosher meals nor explained how the failure to provide kosher meals is the least restrictive means of advancing any such compelling government interest. *Id.* ¶ 32. Plaintiff has exhausted all administrative remedies. *Id.* ¶¶ 24-31.

## **ARGUMENT**

### **A. Defendants Ignore the Standard of Review Applicable to Motions to Dismiss.**

In considering a motion to dismiss, "the complaint is construed in the light most favorable to the plaintiff, and all well-pleaded facts alleged by the plaintiff are accepted as true. It is well-settled that a 'complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.'" *McCulloch v. PNC Bank Inc.*, 298 F.3d 1217, 1220 (11<sup>th</sup> Cir. 2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)).

Defendants acknowledge this standard of review, but then proceed to flout that standard throughout their legal argument. Nowhere is this more apparent than in their attempt to discredit the sincerity of Plaintiff's Jewish beliefs that he must eat a kosher diet and their suggestion that he should have requested such a diet earlier. *See* Defs. Mem. at 15. An evaluation of Plaintiff's credibility is immaterial to this motion to dismiss because all of Plaintiff's allegations must be presumed true. *See McCulloch*, 298 F.3d at 1220.<sup>1</sup>

It is also well-established that for purposes of resolving a motion to dismiss, "the factual boundary of [the] case is marked by the metes and bounds of the complaint." *Lopez v. First Union Nat'l Bank*, 129 F.3d 1186, 1188 (11<sup>th</sup> Cir. 1997). Nevertheless, in blatant disregard of this fundamental principle, Defendants seek to conceal the weakness of their legal argument by relying on unsupported factual assertions found nowhere in the Complaint. Those unsupported factual assertions, all of which must be disregarded in resolving Defendants' motion, include the following:

- The assertion that an interest in "maintaining the smooth and efficient functioning of their institutions" motivated the decision to refuse to provide Plaintiff a kosher diet. Defs. Mem. at 6.
- The assertion that providing Plaintiff a kosher diet would entail unspecified "great expenditures." *Id.* at 7.
- The assertion that unspecified concerns of "product availability" and "equipment capabilities" influenced the decision not to provide Plaintiff a kosher diet. *Id.* at 6.
- The assertion that unspecified "logistical concerns" make it impossible to provide Plaintiff a kosher diet. *Id.* at 13.
- The assertion that refusing to provide Plaintiff a kosher diet was not made because of religion. *Id.* at 13
- The assertion that a pork-free diet would satisfy the requirements of a Jewish kosher diet. *Id.* at 7.
- The assertion that Defendants have taken kosher dietary laws into account in giving instruction for food preparation. *Id.* at 15.

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<sup>1</sup> Moreover, the timing of Plaintiff's request for a kosher diet and when he first formed his belief that he is required to consume a kosher diet is irrelevant. *See Hobbie v. Unemployment Appeals Comm'n of Florida*, 107 S. Ct. 1046, 1051 (1987) ("The timing of Hobbie's conversion is immaterial to our determination that her free exercise rights have been burdened; the salient inquiry under the Free Exercise Clause is the burden involved.").

- The assertion that the master menu committee considers “nutritional value, product availability, equipment capabilities, inmate preferences, and cost” in deciding what to serve prisoners. *Id.* at 10.
- The assertion that no other inmates receive special meals exclusively for religious purposes. *Id.* at 13.
- The assertion that the warden of Everglades Correctional Institution, in his official capacity, had no involvement in making decisions about what meals to serve there. *Id.* at 20.

Despite Defendants’ insistence that the Court take their word as the truth, it can hardly be said that Plaintiff’s Complaint admits these “facts.” Although Defendants may attempt to prove these assertions at a later stage in this litigation after discovery has occurred, for now these assertions must be disregarded and the inquiry must instead focus on the allegations actually found in the Complaint.

**B. Plaintiff’s RLUIPA Claim Should Not Be Dismissed.**

In response to its finding that “[w]hether from indifference, ignorance, bigotry, or lack of resources, some [penal] institutions restrict religious liberty in egregious and unnecessary ways,” *see* 146 CONG. REC. S7774-75 (July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy) (hereinafter “Joint Statement”), Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (“RLUIPA”) to protect and accommodate the religious free exercise rights of prisoners. Congress based that finding on substantial testimony concerning the problems faced by prisoners. In particular, Isaac Jaroslawicz of the Aleph Institute detailed the obstacles Jewish prisoners confront in seeking to exercise their faith, including the difficulty of obtaining a nutritionally sufficient kosher diet. *See Hearing Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 105th Cong. (Mar. 26, 1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute) *available at* <http://www.house.gov/judiciary/222356.htm> (noting that Florida is among the states that “den[y]

Jewish inmates the opportunity to obtain kosher food”). Indeed, the joint statement of RLUIPA’s Senate co-sponsors, Senators Edward Kennedy and Orrin Hatch, specifically referenced Mr. Jaroslawicz’s testimony in explaining the need for RLUIPA’s provisions protecting the religious exercise of prisoners. *See* Joint Statement at S7774-75. Plaintiff’s attempt to obtain relief for the substantial burden imposed on his religious exercise by Defendants’ failure to provide him a kosher diet is thus precisely the type of claim Congress had in mind in enacting RLUIPA.

RLUIPA provides for the protection and accommodation of inmates’ free exercise of religion as follows:

No government shall impose a substantial burden on the religious exercise<sup>[2]</sup> of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person . . . is in furtherance of a compelling government interest [] and . . . is the least restrictive means of furthering that compelling government interest.

42 U.S.C. § 2000cc-1(a). RLUIPA’s text makes clear that in order to plead a prima facie claim for relief, a Plaintiff must plead only that a prison has imposed a substantial burden on his religious exercise.

Once Plaintiff has made out that prima facie case, RLUIPA provides that the burden shifts to Defendants to marshal evidence “demonstrat[ing]” that the burden imposed on Plaintiff “is in furtherance of a compelling government interest and . . . is the least restrictive means of furthering that . . . interest.” *Id.* “The term ‘demonstrates’ means meets the burdens of going forward with the evidence and of persuasion.” 42 U.S.C. § 2000cc-5. Thus, Defendants have both the burden of producing evidence and the burden of persuasion to prove a compelling

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<sup>2</sup> RLUIPA defines the term “religious exercise” to “include[] any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C. § 2000cc-5(7)(A).

government interest and least restrictive means.<sup>3</sup> The burden of production is “a party’s obligation to come forward with evidence to support its claim.” *Director, Office of Workers’ Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). “The burden of persuasion includes the burden of establishing before a fact-finder that a given proposition is correct.” *United States v. Hollis*, 569 F.2d 199, 204 n.6 (3d Cir. 1977); *see also Greenwich Collieries*, 512 U.S. at 272 (where “the evidence is evenly balanced, the party that bears the burden of persuasion must lose”).

1. Plaintiff Has Pled a Prima Facie Claim for Relief Under RLUIPA.

Here, Plaintiff has clearly pled a prima facie claim for relief under RLUIPA.

Specifically, the allegations of the Complaint establish that Plaintiff is a sincere adherent of Orthodox Judaism, Cmpl. ¶ 9, that a fundamental tenet of Orthodox Judaism is that Plaintiff must consume a kosher diet, *id.* ¶¶ 9-10, that failure to keep a kosher diet would taint not only his “body, but the soul itself,” *id.* ¶ 10, and that Defendants have repeatedly refused to provide Plaintiff a kosher diet, *id.* ¶¶ 24-31. A substantial burden on religious exercise exists when a person is required to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning the precepts of her religion . . . on the other.”

*Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see also Thomas v. Review Board*, 450 U.S. 707, 718 (1981) (substantial burden exists where state “put[s] substantial pressure on an adherent to

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<sup>3</sup> RLUIPA’s assignment to the government of the burden of production and persuasion reflects the general rule of cases in which strict scrutiny applies. *See, e.g., Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 224 (1995) (government bears burden of “justify[ing]” classification subject to strict scrutiny); *Hobbie*, 480 U.S. at 141 (1987) (state laws burdening religions “must be subjected to strict scrutiny and could be justified only by proof by the State of a compelling interest”); *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (“To survive strict scrutiny ... a State must do more than assert a compelling state interest, it must demonstrate that its law is necessary to serve the asserted interest.”); *Fulani v. Krivanek*, 973 F.2d 1539, 1542-43 (11<sup>th</sup> Cir. 1992) (“Under strict- scrutiny analysis, once a plaintiff has demonstrated the burden . . . the state must show ‘that the law advances a compelling interest and is narrowly tailored to meet that interest.’”); *Stiles v. Blunt*, 912 F.2d 260, 263 (8<sup>th</sup> Cir. 1990) (“[T]he strict scrutiny test requires the government to prove that it has a compelling interest.”).

modify his behavior and to violate his beliefs”).<sup>4</sup> It is especially clear that a substantial burden exists when the religious exercise that is prevented is “central” or fundamental to the religious adherent’s faith. *See, e.g., Bryant v. Gomez*, 46 F.3d 948, 949 (9th Cir. 1995). Denying Plaintiff the kosher diet mandated by his religious beliefs plainly falls within the definition of a substantial burden on religious exercise. *See Love v. Evans*, No. 2:00-CV-0091 at 11 (E.D. Ark. Nov. 20, 2001) (attached as Appendix A), *aff’d*, 2002 WL 1453683 (8<sup>th</sup> Cir. July 8, 2002) (failure to provide inmate a kosher diet in accordance with his religious beliefs constituted a substantial burden on religious exercise and entitled Plaintiff to relief on his RLUIPA claim).<sup>5</sup> Moreover, Defendants do not even contest that refusing to provide Plaintiff a kosher diet substantially burdened his religious exercise.

In sum, Plaintiff has pled a prima facie claim for relief under RLUIPA. Accordingly, Plaintiff has done all that is necessary to survive a motion to dismiss on his RLUIPA claim.

2. Defendants Have Not Demonstrated the Existence of a Compelling Government Interest or Least Restrictive Means.

Inexplicably, Defendants nonetheless assert that Plaintiff’s RLUIPA claim should be dismissed based on their wholly unsupported factual assertions in their brief that denying Plaintiff a kosher diet was motivated by a compelling government interest and that complete refusal to provide him that diet is the least restrictive means of serving that interest. Defs. Mem.

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<sup>4</sup> RLUIPA’s legislative history makes clear that the term “substantial burden” is to “be interpreted by reference to existing Supreme Court jurisprudence.” Joint Statement at S7774-75.

<sup>5</sup> In addition, as discussed *infra* in § D, numerous courts have recognized that denying prisoners a diet (including a kosher diet) mandated by their religious beliefs may impermissibly infringe on their free exercise of religion. *See, e.g., Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10<sup>th</sup> Cir. 2002) (“prisoners have a constitutional right to a diet conforming to their religious beliefs”); *Love v. Reed*, 216 F.3d 682, 689 (8<sup>th</sup> Cir. 2000) (same); *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 2000) (same); *Turner v. Bolden*, No. 00-1884, 2001 WL 493415 (6<sup>th</sup> Cir. Apr. 30, 2001) (same); *Barnett v. Commissioner, NH Dep’t. of Corrections*, No. 98-2088, 1999 WL 529458 (1<sup>st</sup> Cir. June 17, 1999) (same); *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (same); *Doswell v. Smith*, No. 94-6780, 1998 WL 110161 (4<sup>th</sup> Cir. Mar. 13, 1998) (same); *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9<sup>th</sup> Cir. 1997) (same); *Hunafa v. Murphy*, 907 F.2d 46 (7<sup>th</sup> Cir. 1990) (same); *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 1995) (same).

at 6-7. Though the Court need not even address this argument given that Plaintiff has pled a prima facie case, Plaintiff will address Defendants' argument out of an abundance of caution.

As discussed above, once a Plaintiff has made out a prima facie case, the burden shifts to Defendants to "demonstrate" a compelling government interest and least restrictive means. 42 U.S.C. § 2000cc-1(a). In this case, Defendants have not come forward with *evidence* (and of course may *not* do so on a motion to dismiss where the record is limited to the allegations in the Complaint) to satisfy their burden of production or their burden of persuasion. Instead, they have offered nothing more than unsupported assertions in their brief.<sup>6</sup> Because such bald assertions do not suffice to carry their evidentiary burdens (and are irrelevant since they are not in the Complaint), Defendants' motion to dismiss Plaintiff's RLUIPA claim must be rejected.

Furthermore, even if this Court were to consider the assertions (as opposed to evidence) that Defendants offer in an attempt to dismiss Plaintiff's RLUIPA claim, those assertions fail to support the existence of a compelling government interest or least restrictive means. Specifically, Defendants assert that they "have a compelling government interest in maintaining the smooth and efficient functioning of their institutions by limiting the meals which it [sic] can offer on the basis of factors such as cost, product availability, and equipment capabilities." Defs. Mem. at 6 (emphasis added). It is well-established that:

[w]here government restricts only conduct protected by the First Amendment and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling. It is established in our strict scrutiny jurisprudence that a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.

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<sup>6</sup> In fact, the four corners of the Complaint do not disclose the existence of any interest (let alone a compelling one) that Defendants might have in refusing to provide Plaintiff a kosher diet. To the contrary, the Complaint alleges that Defendants themselves have affirmatively stated that it is their interest to provide inmates the diet mandated by their religious beliefs. Cmpl. ¶ 21.

*Church of Lukumi Babalu v. City of Hialeah*, 508 U.S. 520, 547 (1993). Here, Defendants provide special “therapeutic” diets for prisoners with medical needs, Cmplt. ¶ 16, and also provide special vegetarian diets, *id.* ¶ 18, and pork-free diets, *id.* ¶ 20, to meet the religious needs of some prisoners. Providing these various types of special diets, which also pose the potential of doing appreciable damage to the supposed interest of running a smooth and efficient institution, fatally undermines Defendants’ assertion that denying Plaintiff a kosher diet serves a compelling interest.

Moreover, Defendants have not demonstrated that their supposed interest in running a “smooth and efficient” institution would actually be threatened by providing Plaintiff a kosher diet. *See Burson v. Freeman*, 504 U.S. 191, 199 (1992) (“To survive strict scrutiny . . . a State must do more than assert a compelling state interest, it must demonstrate that its law is necessary to serve the asserted interest.”). Though Defendants make reference to unspecified “great expenditures,” Defs. Mem. at 7, and unspecified “logistical concerns,” *id.* at 13, that would occur if they provided Plaintiff a kosher diet, no evidence exists as to what those costs or concerns might be. Similarly, no evidence exists to support Defendants’ puzzling assertion that concerns of “product availability” and “equipment capabilities,” *id.* at 6, render it impossible to supply Plaintiff a kosher diet.<sup>7</sup> In fact, courts have rejected such a rationale. *See, e.g., Makin v. Colorado Dep’t of Corrections*, 183 F.3d 1205, 1213-14 (10<sup>th</sup> Cir. 1999) (bare assertion of budgetary impact of providing religious meal accommodation, without more than “minimal” supporting evidence, insufficient to constitute even a legitimate penological interest); *Beerheide v. Suthers*, 82 F. Supp. 2d 1190, 1197-98 (D. Colo. 2000) (unreliable and speculative evidence of

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<sup>7</sup> Defendants also mention in passing that providing Plaintiff a kosher diet “opens up the ability of other inmates to claim similar entitlements to special meals.” Defs. Mem. at 7. RLUIPA, however, like the First Amendment itself, does not generally open the field for any prisoner to request a special meal. Instead, it only allows requests by those whose sincerely held religious beliefs require them to consume a special diet.

budgetary impact of providing kosher meal insufficient to support denial of kosher food plan). This Court should also ignore Defendants' bare and speculative assertions.

Finally, no evidence exists to support Defendants' assertion that the least restrictive alternative that can achieve their interest of running a "smooth and efficient" institution is to completely reject Plaintiff's request for a kosher diet. At the very least, the Complaint's allegations provide a basis for finding that some set of facts exists under which both Plaintiff's need for a kosher diet and the interest in running a smooth and efficient institution could be accommodated. In particular, the fact that other prisons in Florida are able to provide a kosher diet, *see* Cmpl. ¶¶ 22-23, despite the fact that those prisons also presumably have an interest in a smooth and efficient operation, casts doubt on Defendants' assertion that complete denial of Plaintiff's request for a kosher diet is the least restrictive means to achieve its interest.<sup>8</sup>

**C. Plaintiff's Florida RFRA Claim Should Not Be Dismissed.**

Like RLUIPA, Florida's Religious Freedom Restoration Act ("RFRA") prohibits the government from "substantially burden[ing]" a person's religious exercise unless the government can "demonstrate . . . a compelling government interest" and that it employed "the least restrictive means" of furthering that interest. *See* § 761.03 Fla. Stat. Defendants' motion to dismiss the Florida RFRA claim rests on the same flawed reasoning as its arguments to dismiss the RLUIPA claim. For all of the reasons discussed above, this argument must be rejected also.

**D. Plaintiff's First Amendment Free Exercise Claim Should Not Be Dismissed.**

Though prisoners do not enjoy the same breadth of free exercise rights under the First Amendment as other citizens, it is well established that "prison walls do not form a barrier

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<sup>8</sup> As discussed *infra* at § D, even under the standard that the Supreme Court has applied under the First Amendment to prisoner free exercise claims, which is less demanding than RLUIPA's strict scrutiny standard, Plaintiffs have succeeded in showing that a kosher diet may be provided with minimal impact on prison interests. *See, e.g., Love*, slip. op. at 13-17; *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9<sup>th</sup> Cir. 1997). This further casts doubt on Defendants' assertion that they have employed the least restrictive means.

separating prison inmates from the protections of the Constitution.” *Turner v. Safley*, 482 U.S. 78, 84 (1987) (striking down regulation of inmate marriages based on regulation’s lack of reasonable relationship to asserted penological goal). The Supreme Court has directed that courts must balance four factors in considering whether to uphold a prison’s restriction on an inmate’s free exercise of religion: (1) whether there is a “‘valid, rational connection’ between the prison regulation and the legitimate governmental interest put forward to justify it,” and whether that connection is not “so remote as to render the policy arbitrary or irrational”;<sup>9</sup> (2) whether inmates retain alternative means of exercising the circumscribed right; (3) the impact of accommodating the right on other inmates, guards, and prison resources generally; and (4) whether there are alternatives to the regulation restricting religious liberty that “fully accommodate[ ] the prisoner's rights at de minimis cost to valid penological interests”; the “existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an ‘exaggerated response’ to prison concerns.” *Turner*, 482 U.S. at 89-91.

By its very nature, the *Turner* test is fact-intensive and requires development of a factual record in discovery, thereby rendering religious accommodation claims unsuitable for resolution on a motion to dismiss. *See, e.g., Fortner v. Thomas*, 983 F.2d 1024, 1029 (11<sup>th</sup> Cir. 1993)

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<sup>9</sup> Significantly, where the government objective is discriminatory, and thus arbitrary, the *Turner* inquiry is at an end and the Plaintiff is entitled to relief. *See Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001) (“If the connection between the regulation and the asserted goal is ‘arbitrary or irrational,’ then the regulation fails, irrespective of whether the other [*Turner*] factors tilt in [the state’s] favor”); *Crawford v. Indiana Dep’t of Corrections*, 115 F.3d 481, 486 (7<sup>th</sup> Cir. 1997), *abrogated on other grounds by Erickson v. Board of Governors*, 207 F.3d 495 (7<sup>th</sup> Cir. 2000), (“there is no general right of prison officials to discriminate against prisoners on grounds of . . . religion.”). Here, the Complaint alleges such a discriminatory objective. Other prisoners who have religious dietary needs are afforded a religious diet, but Orthodox Jewish prisoners, like Plaintiff, are not. The Complaint further alleges that this disparate treatment was discriminatory. *Id.* at ¶ 40. Drawing all inferences in the Complaint in the light most favorable to Plaintiff, Defendants’ differential treatment of Plaintiff in the provision of religious diets was implemented for the purpose of “discriminating” against Orthodox Jewish prisoners like Plaintiff. Accordingly, for this reason alone, Plaintiff has pled sufficient facts to state a First Amendment free exercise clause violation, *see Lukumi*, 508 U.S. at 532 (“the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs”), and Defendants’ motion to dismiss Plaintiff’s free exercise claim must be denied. But even aside from the allegations of discriminatory motive, Plaintiff, as demonstrated *infra*, has pled sufficient facts to establish a free exercise violation.

(declining to resolve free exercise claim under *Turner* on a motion to dismiss and noting that although *Turner* balancing test is more deferential than strict scrutiny that “does not mean that courts have abdicated their duty to protect those constitutional rights that a prisoner retains”); *Love*, slip op. at 16 (“[a]pplication of the *Turner* factors is, of course, fact specific”); *Ward v. Walsh*, 1 F.3d 873, 878-79 (9<sup>th</sup> Cir. 1993) (noting factual questions on application of *Turner* test remained and remanding for further inquiry); *Turner v. Bolden*, No. 00-1884, 2001 WL 493415, at \*2 (6<sup>th</sup> Cir. Apr. 30, 2001) (same); *DeHart v. Horn*, 227 F.3d 47, 58-60 (3d Cir. 2000) (same); *Barnett v. Commissioner, NH Dep’t. of Corrections*, No. 98-2088, 1999 WL 529458 (1<sup>st</sup> Cir. June 17, 1999) (same); *Ali v. Dixon*, 912 F.2d 86, 91 (4<sup>th</sup> Cir. 1990) (same); *Hunafa v. Murphy*, 907 F.2d 46, 47-48 (7<sup>th</sup> Cir. 1990) (same). *See also* *Widmer v. Moore*, 776 So. 2d 324, 325 (Fla. Dist. Ct. App. 2001) (reversing dismissal of inmate’s First Amendment suit against Florida prison requesting a Hare Krishna religious diet because Plaintiff “must be given an opportunity to prove” that “prison’s refusal is not reasonably related to valid penological interests”).<sup>10</sup>

Subject only to the limitations set forth by the Supreme Court in *Turner*, inmates continue to possess the right to a diet conforming to their religious beliefs. *See, e.g., Beerheide v. Suthers*, 286 F.3d 1179, 1185 (10<sup>th</sup> Cir. 2002) (“prisoners have a constitutional right to a diet conforming to their religious beliefs”); *Love v. Reed*, 216 F.3d 682, 689 (8<sup>th</sup> Cir. 2000) (same); *DeHart v. Horn*, 227 F.3d 47 (3d Cir. 2000) (same); *Turner v. Bolden*, 2001 WL 493415 (6<sup>th</sup> Cir. Apr. 30, 2001) (same); *Barnett v. Commissioner, NH Dep’t. of Corrections*, 1999 WL 529458 (1<sup>st</sup> Cir. June 17, 1999) (same); *Jackson v. Mann*, 196 F.3d 316, 320 (2d Cir. 1999) (same);

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<sup>10</sup> Although the *Turner* test is less demanding than the strict scrutiny test that applies under RLUIPA and Florida’s RFRA, it is far from toothless. *See Williams v. Pryor*, 240 F.3d 944, 950 (11<sup>th</sup> Cir. 2001) (holding that *Turner* test requires a “more searching” inquiry than mere rational basis review). Moreover, although the *Turner* balancing test does weigh prison interests, it does not grant prisons the right to “set constitutional standards by fiat.” *Whitney v. Brown*, 882 F.2d 1068, 1074 (6<sup>th</sup> Cir. 1989) (rejecting notion that *Turner* provides that any restriction on religious liberty that “prison officials can justify is valid because they have somehow justified it”).

*Doswell v. Smith*, No. 94-6780, 1998 WL 110161 (4<sup>th</sup> Cir. Mar. 13, 1998) (same); *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9<sup>th</sup> Cir. 1997) (same); *Hunafa v. Murphy*, 907 F.2d 46 (7<sup>th</sup> Cir. 1990) (same); *Kahane v. Carlson*, 527 F.2d 492 (2d Cir. 495) (same). See also *Rinaldo v. Corbett*, 256 F.3d 1276 (11<sup>th</sup> Cir. 2001) (prisoner prevailed in religious diet claim against county prison). In this case, application of the *Turner* test to the Complaint's allegations demonstrates that Plaintiff has adequately pled a claim that Defendants violated his First Amendment rights by failing to provide a kosher diet in accordance with his sincerely held religious beliefs.

With regard to the first factor, despite Defendants' bald assertion of interests not found in the Complaint, the four corners of the Complaint do not reveal any legitimate interests that would justify failing to provide Plaintiff with the kosher diet in accordance with his religious convictions. To the contrary, the Complaint reveals that Defendants in fact have a stated interest in providing a diet that does meet an inmate's religious needs in all but the most unusual circumstances. Cmplt. ¶ 21.

The second factor requires considering whether Plaintiff has any alternative means to "observ[e] the essential tenet of Judaism of eating a kosher diet." *Beerheide*, 286 F.3d at 1186. The kosher dietary laws are "an important, integral part of the covenant between the Jewish people and the God of Israel." *Kahane*, 527 F.2d at 495 (directing prison to provide inmate a nutritionally sufficient kosher diet in accordance with Jewish dietary laws). Here, the facts alleged in the Complaint do not disclose any alternative means by which Plaintiff could obtain a nutritionally sufficient kosher diet. Defendants offer no dietary alternative to Plaintiff other than the food they already serve. Although it is true that Defendants offer more than one meal option, none are kosher, and thus all of those options would require Plaintiff to defile himself by doing

something that is completely forbidden by his religion. Cmpl. ¶ 10. Accordingly, this factor weighs in Plaintiff's favor.

As for the third *Turner* factor, none of the allegations in the Complaint suggest that providing Plaintiff kosher meals will have *any* negative impact, let alone a constitutionally significant one, on other inmates or guards or prison resources generally. As a result, even if this Court were to credit the interests asserted by Defendants in their motion to dismiss, it is impossible to measure at this stage the degree of impact that providing Plaintiff a kosher diet would have on those interests. *Beerheide*, 286 F.3d at 1190 (third *Turner* factor weighs in favor of inmates where prison failed to produce sufficient, reliable evidence to weigh the impact of providing kosher meals to three prisoners on prison resources). This factor also weighs in favor of Plaintiff.

Finally, the fourth *Turner* factor also helps the Plaintiff. Defendants' current policy is to provide no kosher diet whatsoever to Plaintiff. Based on the allegations in the Complaint, read in the light most favorable to Plaintiff, there is no basis for concluding that there is no easy alternative to Defendants' "no accommodation" position. Indeed, in at least three prisoner cases involving requests for kosher meals, the weight of the evidence showed that the request could be accommodated with minimal cost to penological interests. *See Love*, slip op. at 11-13, 14-16 (evidence showed that reasonable alternatives existed to prison's policy of refusing to accommodate request for kosher diet) (attached as Appendix A); *Beerheide*, 286 F.3d at 1185-91; *Ashelman*, 111 F.3d at 678. *See also Salaam v. Lockhart*, 905 F.2d 1168, 1171 (8<sup>th</sup> Cir. 1990) ("Nor do alternatives have to be entirely cost-free; costs that are insubstantial in light of the overall maintenance of the prison are acceptable."). The fact that various county and federal prisons in Florida provide kosher diets, *see* Cmpl. ¶¶ 22-23, also casts doubt on Defendants'

position that no reasonable alternatives exist to their blanket refusal to accommodate kosher diet requests. *See also Bolden*, 2001 WL 493415 at \*2 (noting prison accommodated Orthodox Jewish inmates by providing separate kosher kitchen). Moreover, the fact that prisoners have routinely prevailed (or at the very least survived a motion for summary judgment) on claims for accommodation of a religious diet in general, and for a kosher diet in particular, further highlights the frivolousness of Defendants' assertion that Plaintiff can prove no set of facts that would entitle him to relief. *See, e.g., Love*, slip op. at 14-16; *Beerheide*, 286 F.3d at 1185-91; *Ashelman*, 111 F.3d at 678. At the very least, evidence must be presented and weighed before this court can conclude that no reasonable alternatives exist to the prison's policy of not accommodating Plaintiff's need for a kosher diet.<sup>11</sup>

Thus, because the balance of *Turner* factors favor Plaintiff, taking the allegations of the Complaint as true, he has adequately alleged a free exercise claim under *Turner*, and Defendants' motion to dismiss the free exercise claim must be denied.

Surprisingly, Defendants cite *Martinelli v. Dugger*, 817 F.2d 1499, 1507 n.29 (11<sup>th</sup> Cir. 1987) (upholding prison's denial of Greek Orthodox inmate's request for diet conforming to his belief that he should not "eat pork"), for the proposition that Plaintiff's First Amendment claim must fail as a matter of law. *Martinelli* does not control the resolution of this case for two reasons. First, *Martinelli* did not apply the relevant four-factor balancing test set forth in *Turner*. Second, the case *at most* stands for the proposition that on the particular record in that

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<sup>11</sup> Moreover, although Defendant has gone outside of the Complaint and asserted that providing a kosher diet would require unspecified "great expenditures," it is impossible to determine at this stage what that budgetary impact is and thus also impossible to measure whether a kosher diet could be accommodated with minimal impact on the Defendants' budget. *See also Makin*, 183 F.3d at 1213-14 (bare assertion of budgetary impact of providing religious meal accommodation, without more than "minimal" supporting evidence, insufficient to constitute even a legitimate penological interest); *Beerheide*, 82 F. Supp. 2d at 1197-98 (unreliable and speculative evidence of budgetary impact of providing kosher meal insufficient to support denial of kosher food plan under *Turner* balancing test); *Beerheide v. Zavaras*, 997 F. Supp. 1405, 1412 (D. Colo. 1998) (finding that providing kosher meals to three prisoners had only a de minimis impact on prison's multi-million dollar budget).

case, the plaintiff failed to show he was entitled to accommodation of his religious exercise. Indeed, the opinion specifically notes that the plaintiff made no effort to controvert the prison administrator's testimony concerning the expense of providing him a diet conforming to his religious beliefs. *Id.* Nor does the opinion disclose that the plaintiff made any effort to show that providing him a diet consistent with his religious beliefs would minimally impact the state's interest, as many plaintiffs have successfully done in other cases requesting a religious diet. *See, e.g., Beerheide*, 286 F.3d at 1185-91. Nothing in *Martinelli* deprives Jewish prisoners seeking a kosher diet, like Plaintiff, of the mere opportunity to develop a factual record demonstrating entitlement to relief under *Turner's* test for a free exercise claim.

**E. Plaintiff's Free Exercise Claim Under the Florida Constitution Should Not Be Dismissed.**

In asserting that Plaintiff fails to state a claim under Article I, Section 3 of the Florida Constitution, Defs. Mem. 10, Defendants cite only that provision's establishment clause, and ignore that Florida's Constitution, like the federal Constitution, also contains a "free exercise clause." Plaintiff's claim arises under Florida's free exercise clause, which forbids in pertinent part "prohibiting or penalizing the free exercise [of religion.]" FLA. CONST. art. I, § 3. Defendants' failure to address the merits of the claim actually pled by Plaintiff under Article I, Section 3 of the Florida Constitution, is itself cause for denying their motion.

Moreover, Plaintiff has adequately pled a claim for relief under Florida's free exercise clause. As discussed *supra* at § B, Defendants' denial of Plaintiff's request for a kosher diet substantially burdened his religious exercise. Under the Florida Constitution, strict scrutiny<sup>12</sup> applies to interference with the right to free exercise of religion, as Florida seeks to "protect the rights of the individual from intrusion by the state unless the state has a compelling interest great

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<sup>12</sup> The *Turner* standard, described *supra*, thus has no relevance to Plaintiff's claim under the Florida Constitution's free exercise clause.

enough to override this constitutional right. The means to carry out any such compelling state interest must be narrowly tailored in the least intrusive manner possible to safeguard the rights of the individual.” *Matter of Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993) (quoting *In re Guardianship of Browning*, 568 So. 2d 4, 13-14 (Fla. 1990); see also *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96 (Fla.1989). *But see Yasir v. Singletary*, 766 So. 2d 1197 (Fla. Dist. Ct. App. 2000) (applying reasonableness standard to prison officials’ limitations on institutional uses of prisoner’s new religious name). For the reasons expressed above, Defendants have not shown that they satisfy this strict scrutiny standard.<sup>13</sup>

**F. Plaintiff’s Equal Protection Claims Should Not Be Dismissed.**

The Fourteenth Amendment’s “Equal Protection Clause requires that the government treat similarly situated persons in a similar manner.” *Gary v. City of Warner Robins*, No. 02-11230, 2002 WL 31513316, at \*2 (11<sup>th</sup> Cir. Nov. 13, 2002). Florida’s Constitution similarly guarantees equal treatment of similarly situated persons. See FLA. CONST. art. I, § 2 (“All natural persons, female and male alike, are equal before the law and have inalienable rights.... No person shall be deprived of any right because of race, religion, national origin, or physical disability.”). Here, the Complaint’s allegations demonstrate that Defendants provide a special diet to meet the religious needs of some prisoners, but do not similarly provide a diet to meet the religious needs of Orthodox Jewish prisoners like the Plaintiff. Cmplt. ¶¶ 18, 20. Moreover, Plaintiff suffers this disparate treatment despite the fact that Defendants profess to adhere to a policy of accommodating the religious dietary needs of their prisoners. *Id.* ¶ 21. Drawing all inferences in the Complaint in the light most favorable to Plaintiff, Defendants’ differential treatment of Plaintiff in the provision of religious diets was implemented for the purpose of

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<sup>13</sup> Even if this Court were to apply the lower standard of the *Turner* balancing test to the Florida free exercise claim, the motion to dismiss would fail for the same reasons as the request to dismiss the federal free exercise claim.

discriminating against Orthodox Jewish prisoners like Plaintiff. *Id.* ¶¶ 44, 46. These allegations are sufficient to state an Equal Protection Claim under the United States and Florida constitutions. *See Patel v. United States*, No. 97-1083, 1997 WL 764570, at \*3 (10<sup>th</sup> Cir. Dec. 4, 1997) (holding that Hindu prisoner had presented sufficient evidence to avoid summary judgment on equal protection claim where record showed that prison allowed Muslims to receive a diet accommodating their religious beliefs but did not afford Hindu prisoners a similar accommodation); *Street v. Maloney*, No. 92-1822, 1993 WL 125396, at \*4 (1<sup>st</sup> Cir. 1993) (denying prison officials summary judgment on equal protection claim because it was a factual question whether prison could justify differential treatment of Hare Krishna inmate from Catholic inmates where Hare Krishna prisoner was denied prayer beads but Catholic prisoners were allowed rosary beads); *LaFavers v. Saffle*, 936 F.2d 1117 (10<sup>th</sup> Cir. 1991) (reversing grant of summary judgment to defendant on inmate’s claim that prison policy of denying him a vegetarian diet as required by his religious beliefs denied him equal protection of laws because special religious diets were permitted for members of other religions).<sup>14</sup>

Where disparate treatment is visited upon those asserting “a fundamental right or a suspect class is involved,” the Fourteenth Amendment requires that this disparate treatment satisfy “strict scrutiny.” *Gary*, 2002 WL 31513316, at \*2. The same is true under Florida’s equal protection clause. *See, e.g., Duncan v. Moore*, 754 So. 2d 708, 712 (2000). Free exercise of religion is a fundamental right under both the federal and Florida constitutions; similarly religion is a suspect class under both federal and Florida constitutional jurisprudence. *See City of*

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<sup>14</sup> Defendants’ self-serving, unsupported assertion that the refusal to provide kosher diet to Plaintiff was not because of his religion, Defs. Mem. at 13, must be disregarded as an attempt to insert facts outside of the Complaint. This Court should also reject Defendants’ curious assertion, *id.* at 12, that providing Plaintiff a kosher diet would violate the rights of all non-Jewish inmates. In addition to the fact that Defendants cite no precedent to support this claim, their assertion turns Equal Protection analysis on its head by attempting to transform Plaintiff’s attempt to remedy unequal treatment into an equal protection violation. Moreover, this assertion fails because Plaintiff is not similarly situated to all non-Jewish inmates; instead, he is similarly situated to prisoners who desire a special diet based on sincerely held religious conviction.

*New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (identifying religion as suspect classification triggering strict scrutiny under federal Constitution); *Schreiner v. McKenzie Tank Lines*, 408 So. 2d 711, 716-17 (Fla. Dist. Ct. App. 1982) (Florida’s Constitution “specifically identifies three ‘suspect classes,’ including ... religion”). Accordingly, strict scrutiny applies to Defendants’ disparate treatment of Plaintiff’s request for a kosher diet. For the reasons expressed *supra* at § B, Defendants have not shown that they satisfy this standard.

**G. Defendant DOC Is Not Entitled to Eleventh Amendment Immunity.**

“[I]n the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.” *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 100 (1984). But “[u]nder the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), there is a long and well-recognized exception to this rule ....” *Florida Ass’n of Rehabilitation Facilities, Inc. v. State of Fla.*, 225 F.3d 1208, 1219 (11th Cir. 2000). Because Plaintiff only seeks prospective injunctive relief and not damages, Defendant DOC is not entitled to Eleventh Amendment immunity.<sup>15</sup>

**H. Defendant Mingo Is Not Entitled to Dismissal.**

Defendants seek dismissal of Warden Mingo (in his official capacity) based on their unsupported factual assertion that he “has no involvement in meal or meal plan decisions,” so that his conduct has no “causal connection” to Plaintiff’s injury. Defs. Mem. at 20. Plaintiff simply denies this factual allegation, and Plaintiff’s version of the facts controls on a motion to dismiss. The extent of Defendant Mingo’s involvement in meal decisions *in this case* will be explored further through discovery. Accordingly, the claims against him should remain in play at least until that discovery occurs.

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<sup>15</sup> In any event, Plaintiff has also named as a Defendant Michael W. Moore, Secretary of the DOC, in his official capacity, which is the functional equivalent of suing the DOC itself and preserves all of his rights against the DOC. *See Will v. Michigan Dept. of State Police*, 491 U.S. 58, 71 & n.10 (1989).

**I. Whether Plaintiff Is Entitled to Preliminary or Permanent Injunctive Relief Is a Factual Issue That May Not Be Decided on a Motion to Dismiss.**

Defendants ask this Court to preempt any motion for preliminary injunction even before it is made, apparently on the grounds that: (1) Plaintiff has impermissibly delayed his request for judicial relief; and (2) any injunction would impose excessive costs on the State.

These fact-intensive arguments are wildly premature on a motion to dismiss. Defendants suggest that Plaintiff's religious belief is not sincerely held because he did not resort to legal process immediately. But Plaintiff alleges otherwise, and the Complaint – and all reasonable inferences that may be drawn from it – are the operative facts on this motion. Cmplt. ¶¶ 9-10.<sup>16</sup>

Similarly, Defendants bemoan the allegedly crushing costs of *any* injunction based on unspecified costs of the particular type of injunction that, Defendants speculate, is the one Plaintiff will seek. Defs. Mem. at 18. In fact, the range of available equitable remedies is vast and, in any event, Plaintiff has not demanded any particular form of equitable remedy.<sup>17</sup> Thus, the Court should reject Defendants' motion to dismiss all possible forms of injunctive relief.

**CONCLUSION**

For the foregoing reasons, Defendants' motion to dismiss should be denied.

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<sup>16</sup> Moreover, proof of delay is insufficient to defeat a claim of irreparable harm. "Irreparable" does not mean "immediate," but instead incapable of remedy by monetary damages, such as the ongoing deprivation of First Amendment rights. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Taylor v. City of Fort Lauderdale*, 810 F.2d 1551, 1554 (11th Cir 1987) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quotations omitted). In any event, Plaintiff moved with reasonable dispatch once he had adequate legal assistance. *See also National Customs Brokers v. United States*, 723 F. Supp. 1511, 1517 (CIT 1989) ("[P]laintiff cannot be faulted for first attempting an administrative solution"); *Warner Lambert Co. v. McCrory's Corp.*, 718 F. Supp. 389, 395 (D.N.J. 1989) ("[G]ood faith preparation for litigation should not be used to subsequently bar plaintiff from obtaining injunctive relief."). If Defendants want to know why Plaintiff did not complain "upon being served his first DOC meal," Defs. Mem. 17 – if that assertion is even true – they may inquire in discovery, but may not wholly preempt his claim for preliminary injunctive relief before then.

<sup>17</sup> *See* Cmplt. ¶ 15 (nonexhaustive list of possible accommodations); *see, e.g., Love v. McCown*, 2002 WL 1453683 (8<sup>th</sup> Cir. July 8, 2002) (upholding preliminary injunction ordering deposit of funds into prisoner account for purchasing kosher food); *Ashelman*, 111 F.3d at 678 (remanding to fashion order requiring provision of kosher food); *Berheide*, 997 F. Supp. at 1412-13 (granting preliminary injunction ordering provision of kosher food).

Respectfully submitted this 22<sup>nd</sup> day of November 2002.

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