No. 09-40400

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MAX MOUSSAZADEH,
Plaintiff-Appellant,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE;
BRAD LIVINGSTON, SOLELY IN HIS OFFICIAL CAPACITY
AS EXECUTIVE DIRECTOR OF TDCJ-CID;
DAVID SWEETEN, SOLELY IN HIS OFFICIAL CAPACITY
AS WARDEN OF THE EASTHAM UNIT OF THE TDCJ-CID,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Texas, Galveston Division
No. 3:07-CV-00574, Hon. Melinda Harmon

OPENING BRIEF OF PLAINTIFF-APPELLANT MAX MOUSSAZADEH

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June 15, 2009

CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5TH CIR. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this appeal. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Max Moussazadeh, Plaintiff-Appellant;
2. Latham & Watkins LLP, Counsel for Plaintiff-Appellant (Anne W. Robinson, Michael J. Songer);
3. The Becket Fund for Religious Liberty, Counsel for Plaintiff-Appellant (Eric C. Rassbach, Luke W. Goodrich);
4. Texas Department of Criminal Justice, Defendant-Appellee;
5. Brad Livingston, Executive Director of TDCJ-CID, Defendant-Appellee;
6. David Sweeten, Warden of Eastham Unit, Defendant-Appellee;
7. Office of the Attorney General of the State of Texas, Counsel for Defendants-Appellees (Greg Abbott, Kent Sullivan, David Morales, David Talbot, Jr., Celamaine Cunniff);
8. James Mossbarger, Warden of Stringfellow Unit.

Respectfully submitted,

Anne W. Robinson

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STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Max Moussazadeh respectfully requests oral argument. This case presents important questions regarding (1) the application of the doctrine of mootness to prisoner litigation, (2) the interpretation of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.*, and (3) the religious liberty of all inmates incarcerated within the Fifth Circuit. Moussazadeh respectfully submits that oral argument is necessary for a full exposition of the legal issues and relevant facts inherent in the case.

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STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. The district court's order of March 26, 2009, granted Defendants-Appellees' motion to dismiss, denied Plaintiff-Appellant's motion for summary judgment, and disposed of all of Plaintiff-Appellant's remaining claims. This Court has jurisdiction over that decision under 28 U.S.C. § 1291. Plaintiff-Appellant timely filed a notice of appeal on April 10, 2009. *See* FED. R. APP. P. 4(a).

STATEMENT OF ISSUES

At least 32 states and the federal government provide kosher food to observant Jewish prison inmates. Plaintiff Max Moussazadeh, an observant Jewish inmate incarcerated with the Texas Department of Criminal Justice ("TDCJ"), filed this lawsuit seeking to compel TDCJ to provide him with kosher food. In response the lawsuit, TDCJ began providing kosher food, but reserved the right to deny kosher food in the future, and refused to enter any settlement agreement that would guarantee Moussazadeh kosher food for the duration of his term. The district court then dismissed the case as moot and denied Moussazadeh's motion for summary judgment. The questions presented in this appeal are:

1. Whether TDCJ's voluntary cessation of its unlawful prison meal policy moots Moussazadeh's claim, where TDCJ reserves an absolute right to deny kosher food at any time, and claims that it has compelling budgetary and security interests in *not* providing kosher food.

2. Whether TDCJ can establish that the denial of kosher food is the least restrictive means of furthering a compelling governmental interest, where it has been providing kosher food for two years without a problem, and where at least 32 states and the federal government already provide kosher food.

INTRODUCTION

This lawsuit is about whether TDCJ must provide observant Jewish prison inmates with kosher food. At least 32 states and the federal government currently provide kosher food to their Jewish inmates. Because Texas was not part of this group, Plaintiff Max Moussazadeh filed suit under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.* ("RLUIPA"), seeking to compel TDCJ to provide kosher food.

RLUIPA claims have two parts. First, the plaintiff must show that the government has imposed a "substantial burden" on his exercise of religion. 42 U.S.C. § 2000cc-1(a). TDCJ does not dispute that the denial of kosher food, an essential element of the Jewish faith, burdens Moussazadeh's exercise of religion. Thus, this case centers on the second part of the RLUIPA claim, which requires TDCJ to satisfy strict scrutiny. Specifically, TDCJ must demonstrate that the burden it placed on Moussazadeh "(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest," *id.*—a demanding test.

The district court did not analyze the question of strict scrutiny because it concluded that the case was moot. Specifically, after a year and a half of litigation, TDCJ transferred Moussazadeh to a new prison unit and began providing him with

kosher food. The district court concluded that this voluntary cessation of unlawful conduct mooted Moussazadeh's case. USCA5 1292 (RE Tab 4).[1]

It is well established, however, that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Gates* v. *Cook*, 376 F.3d 323, 337 (5th Cir. 2004). Indeed, a defendant seeking to moot a case by its voluntary conduct bears a "heavy burden": It must prove that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (emphasis added).

For several reasons, the district court erred by concluding that TDCJ carried that heavy burden here. First, the district court ignored the fact that TDCJ has reserved an absolute right to deny Moussazadeh kosher food for any reason and at any time, either by transferring him to a non-kosher unit, or by shutting down its kosher food service. Second, the district court gave no weight to the fact that TDCJ refused to settle this case *precisely* because it wanted to preserve its right to deny kosher food in the future. As Magistrate Judge Guthrie explained, "[t]he source of the breakdown in [settlement] negotiations [wa]s *the prison system's insistence that they be allowed to deny the Plaintiff any access to nutritionally suffi-*

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[1] Citations to "USCA5" refer to the Record on Appeal. Citations to "RE" refer to the Record Excerpts, and are included where relevant for the Court's convenience.

cient kosher meal[s] by transferring him to a different facility without a kosher diet program." USCA5 365 (emphasis added).

Third, the district court failed to address the fact that TDCJ has taken flatly contradictory positions on mootness and the merits. On mootness, TDCJ claims that it is clear the denial of kosher food will never happen again. But on the merits, TDCJ argues that continuing to provide kosher food compromises its interests in controlling costs and maintaining security, and is therefore impossible. Both propositions cannot be true. Finally, the district court gave no regard to the fact that TDCJ has resisted requests for kosher food for many years, and has taken only the most minimal (and easily reversible) steps toward providing kosher food. Under controlling Fifth Circuit precedent, these facts prevent TDCJ from showing that it is "absolutely clear" that its conduct cannot be expected to recur.

The district court also erred by denying Moussazadeh's motion for summary judgment. Several undisputed facts prevent TDCJ as a matter of law from satisfying strict scrutiny. Most importantly, it is undisputed that, for the past two years, TDCJ has provided kosher food without undermining its alleged interests in controlling costs and maintaining security. This fact alone compels summary judgment in favor of Moussazadeh. *See Spratt* v. *R.I. Dep't of Corr.*, 482 F.3d 33, 40 (1st Cir. 2007) (ban on inmate preaching did not further a compelling interest in security where the government allowed the inmate to preach for several years

without incident); *Warsoldier* v. *Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) (ban on long hair for male inmates did not further a compelling interest in security where the government allowed female inmates to have long hair).

Moreover, the undisputed evidence shows that 32 state prison systems and the Federal Bureau of Prisons provide kosher food to observant Jewish inmates who request it. These prison systems "[s]urely . . . have the same compelling interest[s]" in cost and security as TDCJ. *Warsoldier*, 418 F.3d at 1000. Yet TDCJ has offered no evidence demonstrating an interest in denying kosher food that nearly two-thirds of the states and the federal government somehow lack. *See Spratt*, 482 F.3d at 42 (rejecting a compelling interest claim under RLUIPA "in the absence of any explanation by [the government] of significant differences between [its prison] and a federal prison that would render the federal policy unworkable").

Finally, according to TDCJ's own evidence, providing kosher food would increase its annual food budget, at most, by only eight hundredths of one percent (0.08%). *See infra* at 51 & n.13. TDCJ has cited no authority for the claim that such a tiny cost increase is a compelling governmental interest.

This Court should, accordingly, reverse the district court's dismissal for lack of jurisdiction, and remand with instructions to enter summary judgment in favor of Moussazadeh.

STATEMENT OF THE CASE

On October 11, 2005, Plaintiff Max Moussazadeh filed this lawsuit under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq.* ("RLUIPA"), seeking injunctive and declaratory relief requiring TDCJ to provide him with kosher food. USCA5 22 ¶ 28 (RE Tab 11). Shortly after the suit was filed (April 2006), the court granted the first of two stays of discovery in order to facilitate settlement. USCA5 235 (RE Tab 13). Ultimately, discovery was stayed for 33 of the 41 months that this case remained on the district court's docket. Because of the lengthy stays, Moussazadeh has had very little discovery and has conducted no depositions. USCA5 536 ¶ 17.

After about a year of settlement negotiations (April 27, 2007), TDCJ transferred Moussazadeh to the Stringfellow Unit, where it later began providing him with kosher food (May 25, 2007). USCA5 433 (RE Tab 19). Although the parties very nearly reached a settlement agreement, negotiations broke down because TDCJ refused to sign any agreement that would obligate it to provide Moussazadeh with kosher food in the future. USCA5 365 (RE Tab 16). When settlement negotiations broke down, Moussazadeh moved to lift the stay and commence discovery (November 19, 2007). USCA5 360-62. The district court granted that request on July 17, 2008. USCA5 427 (RE Tab 18).

One month later, however—on the same day that TDCJ belatedly began complying with discovery requests (August 22, 2008)—TDCJ filed a motion to dismiss the case as moot or, in the alternative, a motion for summary judgment. USCA5 431 (Defs.' Mot. to Dismiss). It also sought and received another stay of discovery (September 10, 2008). USCA5 489 (RE Tab 10). Moussazadeh opposed TDCJ's motion to dismiss and filed his own motion for summary judgment.

On March 26, 2009, the district court granted TDCJ's motion to dismiss the case as moot, denied Moussazadeh's motion for summary judgment, and dismissed all remaining claims. Moussazadeh timely filed a notice of appeal on April 10, 2009. USCA5 1265 (RE Tab 2).

STATEMENT OF FACTS

A. TDCJ denies Moussazadeh kosher food.

Plaintiff-Appellant Max Moussazadeh is an observant Jewish inmate serving a 75-year sentence with the Texas Department of Criminal Justice. USCA5 1071 (RE Tab 25). Moussazadeh is of Iranian Jewish heritage; he was born to Jewish parents and has always considered himself to be Jewish. USCA5 1071 (RE Tab 25). In accordance with established Jewish tradition and practice, Moussazadeh believes that keeping a kosher diet is fundamental to the Jewish faith and is necessary to conform to the divine will of God as expressed in the Torah.[2] USCA5 1071 (RE Tab 25). Moussazadeh subscribes to the Torah's teaching that consuming even small amounts of forbidden food defiles both his body and soul. USCA5 19 ¶ 10 (RE Tab 11).

Defendant TDCJ administers the Texas state prison system, which includes over 150,000 inmates and has an annual food budget exceeding $140 million. USCA5 1106, 1187 (RE Tabs 27, 30). Observant Jews constitute a very small per-

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[2] *See also Shaliehsabou* v. *Hebrew Home of Greater Wash., Inc.*, 363 F.3d 299, 302 (4th Cir. 2004) ("'The faithful Jew observes the laws of kashruth not because he has become endeared of its specific details nor because it provides him with pleasure nor because he considers them good for his health nor because the Bible offers him clear-cut reasons, but because he regards them as Divine commandments and yields his will before the will of the Divine and to the disciplines imposed by his faith.'" (quoting Rabbi Hayim Halevy Donin, *To Be a Jew: A Guide to Jewish Observance in Contemporary Life* 98 (1972))).

centage of this prison population: TDCJ recognizes only 70 to 75 active practitioners of Judaism, or less than 0.05% of all inmates. USCA5 1106 (RE Tab 27).

According to data supplied by TDCJ, if TDCJ provided kosher food to every observant Jewish inmate in its custody, its annual food budget would increase by approximately eight hundredths of one percent (0.08%). *See infra* at 51 & n.13. Nevertheless, as of 2005, TDCJ was one of the few prison systems in the country that refused to provide kosher food to Jewish inmates. At that time, at least 32 states and the Federal Bureau of Prisons provided kosher food to Jewish prisoners. USCA5 1116 (RE Tab 28); *see also* 28 C.F.R. § 548.20 (federal policy).

During his incarceration with TDCJ, Moussazadeh has repeatedly been forced to violate his sincerely held religious beliefs by consuming non-kosher food. While housed in the Eastham Unit in Lovelady, Texas, Moussazadeh faced a choice among three dietary options: meat-free, pork-free, or "regular." USCA5 19-20 ¶¶ 8, 16-17 (RE Tab 11); USCA5 39-40 ¶¶ 9, 12-13 (RE Tab 12). It is undisputed that none of these options qualified as kosher. USCA5 39-40 ¶¶ 9, 12-13 (RE Tab 12). Faced with a choice between following his religious beliefs and receiving a nutritionally sufficient diet, Moussazadeh filed two administrative grievances requesting kosher food. USCA5 1071-72 ¶¶ 7-8 (RE Tab 25). After TDCJ denied both grievances, Moussazadeh filed suit on October 11, 2005. USCA5 22 ¶

28 (RE Tab 11). He sought an injunction requiring TDCJ to provide him with kosher food for the duration of his imprisonment. USCA5 22 ¶ 28 (RE Tab 11).

B. TDCJ decides to provide kosher food in response to Moussazadeh's suit.

Shortly after the parties exchanged preliminary discovery (April 2006), TDCJ informed Moussazadeh of its desire to settle the case. USCA5 533 ¶ 3 (RE Tab 12). The parties then requested, and the court granted, a stay of the litigation to facilitate settlement. USCA5 235 (RE Tab 13). After a year of fruitless settlement negotiations, Moussazadeh told TDCJ he intended to ask the court to lift the stay because TDCJ had yet to provide him with kosher food. USCA5 317-18 (Transcript of April 25, 2007 Status Conf. 3-4) (RE Tab 9). About five minutes before the parties began their April 25, 2007 status conference, however, TDCJ informed Moussazadeh that it would transfer him from the Eastham Unit to the Stringfellow Unit, where he would begin receiving kosher food. USCA5 317 (RE Tab 9). Two days later, TDCJ transferred Moussazadeh to Stringfellow, where he began receiving kosher food on May 25, 2007—over a year after the court issued its stay and 19 months after Moussazadeh filed his Complaint. USCA5 433 (RE Tab 19).

To provide kosher food at Stringfellow, TDCJ purchased a refrigerator, microwave, stove burner, and various kitchen supplies, at a total cost of $8,066. USCA5 823-24 (RE Tab 24). TDCJ did not construct any new facilities, as it made

use of existing space in the kitchen at Stringfellow, USCA5 772 (Aff. of Rabbi David Goldstein), establishing a sort of "kosher corner." And because TDCJ already had a rabbi under contract for its chaplaincy program, it did not need to hire any additional personnel; it simply tasked the contract rabbi with overseeing the kitchen. USCA5 797 (TDCJ Contract for Services with Rabbi David Goldstein).

TDCJ also issued a Jewish dietary policy and revised its Chaplaincy Manual. Notably, the Jewish dietary policy does not provide kosher food to all Jewish prisoners statewide. Instead, the policy explains that "[k]osher meals shall only be provided on the Enhanced Jewish Designated Unit [*i.e.*, Stringfellow]," and makes clear that not every Jewish inmate will be entitled to transfer to or remain at Stringfellow. USCA5 463 (RE Tab 20). The revised Chaplaincy Manual, dated April 2007, provides that an inmate who has otherwise "qualified for the Enhanced Jewish Designated Unit" might still be transferred away for a variety of reasons: "because of custody level, required treatment or educational program, housing restriction, medical condition, nature of the offense, length of sentence, *or other reason.*" USCA5 785 (RE Tab 23) (emphasis added). TDCJ also warned Moussazadeh that he "is serving a lengthy sentence" and "could be moved to a number of units" for "any number of reasons." USCA5 304 (RE Tab 14).

C. Settlement fails because TDCJ refuses to agree to provide kosher food in the future.

After Moussazadeh's transfer to Stringfellow, the parties continued settlement negotiations; negotiations ultimately broke down, however, over the issue of whether TDCJ would be bound to provide kosher food to Moussazadeh for the duration of his imprisonment. Throughout negotiations, Moussazadeh made clear that he could not sign any agreement that left TDCJ free to deny him kosher food in the future. USCA5 349 (RE Tab 15). Thus, in September 2007, TDCJ proposed an agreement that would have provided Moussazadeh with kosher food "so long as Plaintiff is housed in a facility operated by TDCJ." USCA5 348 (RE Tab 15). But after conferring with TDCJ's administration, TDCJ's counsel removed this language from the next settlement proposal. USCA5 368 (RE Tab 17); USCA5 349 (RE Tab 15). As Magistrate Judge Guthrie explained, this issue proved to be the sticking point in the parties' negotiations: "The source of the breakdown in negotiations is *the prison system's insistence that they be allowed to deny the Plaintiff any access to nutritionally sufficient kosher meal[s] by transferring him to a different facility without a kosher diet program.*" USCA5 365 (RE Tab 16) (emphasis added).

On November 20, 2007, Magistrate Judge Guthrie, on her own motion, transferred Moussazadeh's case to the Southern District of Texas, Galveston Division, based on Moussazadeh's transfer to the Stringfellow Unit. USCA5 365-66

(RE Tab 16). Notably, the court observed that even though Moussazadeh had been transferred to Stringfellow and provided with kosher food, "issues . . . are still in dispute" and a live controversy continued to exist between the parties. USCA5 365, 366 (RE Tab 16).

D. TDCJ moves to dismiss the case as moot.

On July 17, 2008, the district court lifted the stay of litigation and allowed discovery to commence. USCA5 427 (RE Tab 18). One month later—on the same day that TDCJ belatedly began complying with discovery requests (August 22, 2008)—TDCJ filed a motion to dismiss the case as moot or, in the alternative, a motion for summary judgment. USCA5 431. In its motion to dismiss, TDCJ argued that the case was moot because it had begun to provide Moussazadeh with kosher food. USCA5 436. In its motion for summary judgment, TDCJ claimed that it was entitled to judgment because the denial of kosher food was the least restrictive means of furthering compelling governmental interests in controlling costs and maintaining prison security. USCA5 682 (RE Tab 22).

In response, Moussazadeh argued that that TDCJ's voluntary cessation of unlawful conduct did not render the case moot. Specifically, as the Supreme Court has explained, a defendant seeking to moot a case by its voluntary conduct bears a "heavy burden": It must demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the*

Earth, Inc. v. *Laidlaw Environmental Services, Inc.*, 528 U.S. 167, 189 (2000) (emphasis added). TDCJ could not meet that burden, Moussazadeh argued, because (1) TDCJ asserted an absolute right to deny him kosher food at any time in the future, (2) TDCJ refused to settle the case precisely to preserve that right, and (3) TDCJ claimed that continuing to provide kosher food in the future was inconsistent with its compelling governmental interests in controlling costs and maintaining security.

Moussazadeh also cross-moved for summary judgment, arguing that undisputed evidence precluded TDCJ from showing that the denial of kosher food was the least restrictive means of furthering compelling governmental interests in controlling costs and maintaining security. Specifically, Moussazadeh argued that TDCJ could not carry its burden where (1) TDCJ has been providing kosher food, without any cost or security problems, for almost two years; (2) at least 32 states and the federal government provide kosher food without compromising their interests in controlling costs and maintaining security; and (3) TDCJ's own evidence shows that providing kosher food would increase TDCJ's annual food budget, at most, by only eight hundredths of one percent (0.08%). In the alternative, Moussazadeh filed a Rule 56(f) declaration requesting additional opportunity for discovery on several disputed factual issues relevant to mootness and the merits. USCA5 532-36.

E. The district court's ruling.

On March 26, 2009, Judge Harmon granted TDCJ's motion to dismiss and denied Moussazadeh's motion for summary judgment. According to the court, TDCJ's claim of voluntary cessation was entitled to "'some solicitude,'" since governmental actors "'are accorded a presumption of good faith.'" USCA5 1292 (quoting *Sossamon* v. *Lone Star State of Texas*, 560 F.3d 316, 325 (5th Cir. 2009)) (RE Tab 4). The court dismissed the case as moot, reasoning that Moussazadeh was "no longer incarcerated on a TDCJ Unit that is incapable of providing him with a kosher diet," and that "any claim that [Moussazadeh] might be transferred to another unit, where kosher food is unavailable, is too speculative." USCA5 1293-94 (RE Tab 4). The court further explained that, if TDCJ denied Moussazadeh kosher food again, he could always "exhaust[] his administrative remedies and fil[e] another suit in federal court." USCA5 1293 (RE Tab 4). Moussazadeh timely filed a notice of appeal. USCA5 1265 (RE Tab 2).

SUMMARY OF THE ARGUMENT

I. TDCJ's voluntary provision of kosher food does not render Moussazadeh's case moot. To establish that its voluntary conduct has mooted this case, TDCJ bears a "heavy burden" of proving that it is "'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Gates* v. *Cook*, 376 F.3d 323, 337 (5th Cir. 2004) (citation omitted). For a variety of reasons, TDCJ has failed to make that showing here.

First, TDCJ has steadfastly maintained an absolute right to deny Moussazadeh kosher food for any reason and at any time. Second, TDCJ refused to settle this case precisely because it wanted to remain free to deny Moussazadeh kosher food in the future. Third, TDCJ claims that continuing to provide kosher food is incompatible with its compelling governmental interests in controlling costs and maintaining security, and is therefore impossible. Finally, TDCJ resisted requests for kosher food for many years, and has taken only the most minimal (and easily reversible) steps toward providing kosher food. These facts are more than sufficient to defeat TDCJ's claim of mootness.

The district court's decision to the contrary contravenes settled precedent from this Court and the Supreme Court. If left undisturbed, that decision would encourage government defendants to manipulate the doctrine of mootness, litigat-

ing to judgment against *pro se* plaintiffs while avoiding difficult cases against plaintiffs represented by sophisticated counsel.

II. The district court likewise erred in denying Moussazadeh's motion for summary judgment on the merits. TDCJ does not dispute that the denial of kosher food substantially burdens Moussazadeh's exercise of religion. Under RLUIPA, then, the only question is whether TDCJ can demonstrate that the denial of kosher food is the least restrictive means of furthering a compelling governmental interest.

Based on the undisputed factual record, TDCJ cannot, as a matter of law, make that showing here. Most importantly, TDCJ has already been providing kosher food for the last two years without compromising its alleged interests in controlling costs and maintaining security. Moreover, 32 state prison systems and the Federal Bureau of Prisons have long provided kosher food without compromising the same interests in controlling costs and maintaining security. Finally, according to TDCJ's own evidence, providing kosher food would increase its annual food budget, at most, by only eight hundredths of one percent (0.08%).

In short, the undisputed evidence forecloses TDCJ from satisfying strict scrutiny as a matter of law. Accordingly, this Court should reverse the district court's decision and remand with instructions to enter summary judgment in favor of Moussazadeh.

STANDARD OF REVIEW

This Court reviews the question of mootness and the denial of summary judgment *de novo*, applying the same legal standards as the district court. *Knowles* v. *City of Waco*, 462 F.3d 430, 433 (5th Cir. 2006). It reviews the district court's factual findings for clear error. *U.S. ex rel. Branch Consultants* v. *Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009).

Summary judgment is appropriate when the pleadings, affidavits, and other summary judgment evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Boudreaux* v. *Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005). Although a court must draw all reasonable inferences in favor of the non-moving party, conclusory allegations and unsubstantiated assertions are not sufficient to defeat summary judgment. *Little* v. *Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

Special rules of review apply to RLUIPA cases. RLUIPA must be "construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g). As this Court has explained, RLUIPA provides more protection for religious exercise than does the First Amendment because "the statute requires prison regulators to put forth a stronger justification for regulations that impinge on the religious practices of prison inmates." *Mayfield* v. *Tex. Dept. of Criminal Justice*, 529 F.3d 599, 612 (5th Cir. 2008).

ARGUMENT

I. Moussazadeh's claim is not moot.

Moussazadeh's claim is not moot because it falls within two "long-recognized exceptions" to the doctrine of mootness: the rule that a defendant's "voluntary cessation" of unlawful conduct does not render a case moot (Section I.A, *infra*), and the exception for activity that is "capable of repetition, yet evading review" (Section I.B, *infra*). *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189-90 (2000). Moreover, even assuming this case presents a serious question of mootness, the district court erred by refusing to allow Moussazadeh to conduct discovery on the key jurisdictional facts relevant to mootness (Section I.C, *infra*).

A. TDCJ's voluntary cessation of its illegal conduct does not moot Moussazadeh's claim.

It is well established that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." *Gates* v. *Cook*, 376 F.3d 323, 337 (5th Cir. 2004) (citing *Friends of the Earth*, 528 U.S. at 189). As this Court recently explained, "[i]f defendants could eject plaintiffs from court on the eve of judgment, then resume the complained-of activity without fear of flouting the mandate of a court, plaintiffs would face the hassle, expense and injustice of constantly relitigating their claims without the possibility of obtaining lasting relief." *Sossamon* v. *Lone Star State of Texas*,

560 F.3d 316, 324 (5th Cir. 2009). Recognizing that "practices may be reinstated as swiftly as they were suspended," this court has held that "[c]hanges made by defendants after a suit is filed do not remove the necessity for injunctive relief." *Jones* v. *Diamond*, 636 F.2d 1364, 1375 (5th Cir. 1981) (en banc), *overruled on other grounds*, *Int'l Woodworkers of Am.* v. *Champion Int'l Corp.*, 790 F.2d 1174, 1175 (5th Cir. 1986) (en banc).

Thus, the standard for determining whether a case has been mooted by the defendant's voluntary conduct "is stringent." *Gates*, 376 F.3d at 337. Specifically, the defendant bears the "'heavy burden'" of proving that it is "'*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (emphasis added) (quoting *Friends of the Earth, Inc.*, 528 U.S. at 190).

1. TDCJ has not met its "heavy burden" of demonstrating that its conduct will not recur.

The district court erred by concluding that TDCJ carried that "heavy burden" here. Indeed, five key facts thoroughly undermine TDCJ's attempt to prove that the denial of kosher food cannot be expected to recur.

First, TDCJ has steadfastly maintained an absolute right to deny Moussazadeh kosher food for any reason and at any time. According to TDCJ, the denial of kosher food "is not a violation of RLUIPA"; thus, TDCJ is within its legal rights to deny kosher food at any time. USCA5 682 (RE Tab 22). Indeed, TDCJ's revised Chaplaincy Manual makes clear that Jewish inmates can be denied access

to kosher food at Stringfellow for any number of reasons: "because of custody level, required treatment or educational program, housing restriction, medical condition, nature of the offense, length of sentence, *or other reason*." USCA5 785 (emphasis added) (RE Tab 23). TDCJ has also expressly warned Moussazadeh that he "is serving a lengthy sentence" and "could be moved to a number of units" for "any number of reasons." USCA5 304 (RE Tab 14). These claims alone defeat TDCJ's assertion of mootness. *See* 13C Charles Alan Wright, Arthur R. Miller et al., *Federal Practice and Procedure* § 3533.7 (3d ed. 2008) ("It is equally easy to deny mootness if officials who have changed their practices warn that former practices may be resumed at any time.") (collecting cases).

Second, TDCJ refused to settle this case precisely because it refused to agree to provide Moussazadeh with kosher food in the future. In Section II.1(c) of TDCJ's September 7, 2007 settlement proposal, TDCJ's counsel offered to provide Moussazadeh with kosher food "so long as Plaintiff is housed in a facility operated by TDCJ." USCA5 348 (RE Tab 15). After conferring with TDCJ's administration, however, TDCJ's counsel removed this language from the next settlement offer. USCA5 368 (RE Tab 17); USCA5 349 (RE Tab 15). As Magistrate Judge Guthrie explained, this issue proved to be the sticking point in the parties' negotiations: "The source of the breakdown in negotiations is *the prison system's insistence that they be allowed to deny the Plaintiff any access to nutritionally sufficient*

kosher meal[s] by transferring him to a different facility without a kosher diet program." USCA5 365 (emphasis added) (RE Tab 16). In short, TDCJ refused to settle precisely so that it could protect its freedom "to return to [its] old ways." *Friends of the Earth*, 528 U.S. at 189. Such a refusal is powerful evidence that the conduct may recur. *Cf. Pederson* v. *La. State Univ.*, 213 F.3d 858, 874-75 (5th Cir. 2000) (finding live controversy where the defendants "have given no assurance" that they would continue new programs).

Third, TDCJ has consistently maintained that continuing to provide kosher food will jeopardize compelling governmental interests in controlling costs and maintaining security, and is therefore impossible. Indeed, other than the issue of mootness (which TDCJ raised for the first time 33 months after filing its answer, and 15 months after starting to provide kosher food), TDCJ's only defense to this litigation has been that denying kosher food is justified under RLUIPA because it is the only way TDCJ can further compelling governmental interests in controlling costs and maintaining security. *See* USCA5 682 (RE Tab 22). Even after asking for a dismissal on grounds of mootness, TDCJ has staunchly maintained that "it would be far too costly and would far exceed the allotted budget to provide kosher food," USCA5 1107 (RE Tab 27), and that providing kosher food would imperil security by "breed[ing] resentment among other inmates." USCA5 682 (RE Tab 22). TDCJ cannot, on the one hand, claim that the denial of kosher food will not

recur, while on the other hand claim that the denial of kosher food is essential to maintain its budget and security.

Fourth, TDCJ has staunchly resisted requests for kosher food for many years. Even before Moussazadeh's lawsuit, TDCJ denied multiple requests for kosher food beginning, at the latest, in 2003. *See Baranowski* v. *Hart*, 486 F.3d 112, 117 (5th Cir. 2007). It then continued to deny kosher food to Moussazadeh after he filed two grievances, and for 19 months after he filed suit. Only in May 2007—with the prospect of discovery looming—did TDCJ began preparing kosher meals for a handful of prisoners out of a corner of the Stringfellow kitchen. These years of resistance cut strongly against a finding of mootness. *See Gates*, 376 F.3d at 337 (rejecting a claim of mootness by the Mississippi Department of Corrections because the illegal conditions persisted for "several years" prior to the defendant's voluntary cessation); *Jones*, 636 F.2d at 1375 (rejecting mootness claim because "improvement in [prison] conditions . . . , after five and a half years of litigation, does not eliminate the need for an injunction").

Fifth, TDCJ has incurred only minimal costs to provide kosher food. It purchased a refrigerator, microwave, stove burner, pots, pans, and other kitchen supplies; and it gave oversight of the kitchen to a rabbi who was already under contract. USCA5 823-24 (RE Tab 24); USCA5 797 (TDCJ Contract for Services with Rabbi David Goldstein). The total cost of all new materials for the kosher corner

was $8,066—less than six thousandths of one percent (0.006%) of TDCJ's $140 million annual food budget. Moreover, should TDCJ decide to deny kosher food again in the future, these materials can easily be used in TDCJ's regular food service. As this Court has observed, "practices may be reinstated as swiftly as they were suspended," *Jones*, 636 F.2d at 1375—particularly when the costs of suspending a practice are negligible and can easily be recouped when the practice is reinstated. *See id.* (construction of entire new jail building did not moot a case challenging unsanitary jail conditions).

2. Controlling precedent confirms that TDCJ has not carried its "heavy burden" of demonstrating mootness.

Controlling precedent from this Court and the Supreme Court confirms that TDCJ has not carried its "heavy burden" of demonstrating mootness. In *Jones*, for example, prisoners confined in a county jail brought a class action, alleging that conditions in the jail—such as overcrowding, filth, and lack of exercise—violated their constitutional rights. 636 F.2d at 1367. Even before the suit was filed, however, the county approved a bond issue to build "an entirely new jail at an entirely new location." *Id.* at 1385 (Coleman, C.J., dissenting). After the new jail was completed, the county board formally declared that it would "never again use the old jail unless necessitated by some unforeseen emergency." *Id.* It then argued that the case was moot.

Rejecting the county's mootness argument, *id.* at 1375 (majority opinion), this Court explained that the construction of a new building, along with the improvement in conditions after years of litigation, did not provide sufficient assurance that the conduct would never recur:

> The provision of a new and sanitary building does not assure that it will be operated in a constitutional way. Filth can accumulate in new buildings . . . ; new buildings can be made intolerably overcrowded . . . . Because nothing in the record provides any comfort to the plaintiff class or any assurance to this court that the results of the almost seven-year litigation will not be lost and the wrongs of the past will not be recommitted, we deem the issuance of an injunction necessary.

Id.

This case is much stronger than *Jones*. In *Jones*, the county issued a formal declaration that it would never again use the old jail; here, TDCJ claims that compelling governmental interests *require* it to deny kosher food, and it maintains an absolute right to deny kosher food at any time. In *Jones*, the county approved a bond for a new jail before litigation even began; here, TDCJ rejected pre-litigation requests for kosher food for years, contested one kosher food case all the way to the Fifth Circuit, *see Baranowski*, 486 F.3d 112, and began providing kosher food only 19 months after Moussazadeh filed suit. In *Jones*, the county built an entirely new jail facility at a cost of nearly two million dollars, 636 F.2d at 1386 (nearly six million when adjusted for inflation); here, TDCJ equipped a corner of an existing kitchen for just over $8,000. In spite of these contrasts, and in spite of the fact that

Moussazadeh relied on *Jones* extensively below,[3] the district court ***did not even cite*** *Jones*, much less attempt to distinguish it.

Similarly, in *Gates*, a death row inmate sued the Mississippi Department of Corrections (MDOC), alleging that the conditions of confinement on death row—including lack of exercise, high temperatures, filth, and insect infestations—violated the Eighth Amendment's ban on cruel and unusual punishment. 376 F.3d at 327. After MDOC began voluntarily complying with the district court's injunction, it argued that the case was moot. *Id.* at 337. But this Court concluded that MDOC's voluntary cessation did not moot the case, particularly where "many of the[] [challenged] conditions have persisted for years." *Id.* The same is true here: TDCJ not only resisted providing kosher food for years, but claims an absolute right to deny kosher food again at any time in the future. Again, despite Moussazadeh's reliance on *Gates*, the district court did not even mention it. *See* USCA5 519, 521, 522 (Pl.'s Opp. to Mot. to Dismiss at 7, 9, 10); USCA5 1007-07 (Pl.'s Surreply on Mot. to Dismiss at 5-6) (criticizing TDCJ's failure to cite or distinguish *Gates*).

The district court's decision is also inconsistent with decisions of the Supreme Court. In *City of Los Angeles* v. *Lyons*, 461 U.S. 95 (1983), the plaintiff

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[3] *See, e.g.*, USCA5 519, 522 (Pl.'s Opp. to Mot. to Dismiss at 7, 10) (criticizing TDCJ's "inexcusabl[e] fail[ure]" to cite or distinguish *Jones*); USCA5 1007-08 (Pl.'s Surreply on Mot. to Dismiss at 5-6) (same).

sought an injunction barring city police officers from using choke holds. In response to the suit, the board of police commissioners imposed a six-month moratorium on the use of chokeholds. *Id.* at 100. After extending the moratorium to allow the police department to conduct a study of chokeholds, the board argued that the moratorium rendered the case moot. *Id.* at 100-01 & n.3. The Supreme Court disagreed, holding that the city's action had not "'irrevocably eradicated the effects of the alleged violation'" because "the moratorium by its terms *is not permanent*." *Id.* at 101 (citation omitted) (emphasis added).

Here, too, TDCJ's provision of kosher food "by its terms is not permanent": (1) TDCJ has refused to settle this case precisely because it will not agree to make the provision of kosher food permanent; (2) TDCJ reserves an absolute right to deny kosher food in the future; and (3) TDCJ has warned that Moussazadeh "is serving a lengthy sentence" and can be transferred to a non-kosher unit for "any number of reasons." USCA5 304 (RE Tab 14). Under *Lyons*, that is more than enough to defeat TDCJ's claim of mootness. *See also Friends of the Earth*, 528 U.S. at 179, 193-94 (suit against polluting wastewater treatment plant was not moot, even though the plant was "permanently closed, dismantled, and put up for sale," and all pollution from the facility had "permanently ceased").

By contrast, in *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974), the Supreme Court held that a challenge to the constitutionality of a law school admissions pol-

icy was mooted when the school admitted the plaintiff and, pursuant to school policy, permitted him to finish his final term. The fact that he was able to complete his studies meant that he would "never again be required to run the gauntlet of the Law School's admission process." *Id.* at 319. Here, by contrast, TDCJ has expressly declined to take the step that the Supreme Court found dispositive in *Odegaard*—namely, guaranteeing that Moussazadeh will never again be subjected to the challenged conduct.

The district court's ruling is irreconcilable with these cases. TDCJ cannot moot Moussazadeh's claims by setting up a kosher corner in a single facility—after years of intransigence—while maintaining a ***right to deny*** Moussazadeh kosher food or transfer him to a non-kosher facility the day after this lawsuit concludes.

3. *Sossamon* grants government officials "some solicitude" in narrow circumstances, not a free pass.

Rather than addressing any of these cases, the district court relied almost exclusively on *Sossamon* v. *Lone Star State of Texas*, 560 F.3d 316, 324 (5th Cir. 2009), *petition for cert. filed* (May 18, 2009) (No. 08-1438), concluding that, because TDCJ was a government entity entitled to "solicitude," its temporary provision of kosher food mooted Moussazadeh's claim. USCA5 1292. This holding, however, dramatically expands the scope of *Sossamon* and guts the doctrine of voluntary cessation.

In *Sossamon*, a *pro se* inmate alleged that TDCJ violated RLUIPA by, among other things, forbidding him to attend worship services while on cell restriction. In response to the lawsuit, TDCJ formally amended its policies, promulgating a state-wide regulation allowing inmates to attend worship services while on cell restriction; it then argued that the inmate's claims were moot.

Noting that courts may be "justified" in treating voluntary cessation of illegal conduct by government defendants "with some solicitude," the *Sossamon* court concluded that TDCJ's formal, state-wide policy change mooted the plaintiff's claims. *Sossamon*, 560 F.3d at 325-26. According to the court, the government was entitled to a presumption of good faith because the policy change (1) was applied "state-wide," and (2) was accompanied by no evidence of "litigation posturing." *See id.* at 325 (noting that "the change in policy is now *state-wide*," and that, "[w]ithout evidence to the contrary, we assume that formally announced changes to official governmental policy are *not mere litigation posturing*" (emphases added)).

Neither of those conditions exists here. *First*, TDCJ does not provide kosher food on a state-wide basis. In *Sossamon*, the Court emphasized that a state-wide policy change "obviate[d] any concern that local prison officials might change their minds on a whim or that Sossamon might be transferred to a facility with dif-

ferent rules." 560 F.3d at 325. In other words, no matter where Sossamon was transferred, he would never again be subjected to the challenged practice.

Here, by contrast, TDCJ has limited its provision of kosher food to the Stringfellow Unit, and has made clear that Jewish inmates (including Moussazadeh) can be removed from Stringfellow for any number of reasons: "because of custody level, required treatment or educational program, housing restriction, medical condition, nature of the offense, length of sentence, *or other reason.*" USCA5 785 (RE Tab 23) (emphasis added). For example, Moussazadeh is a maximum security prisoner, and Stringfellow is *not* a maximum security unit; TDCJ has said that this "made [Moussazadeh's] transfer to the Stringfellow Unit difficult." USCA5 304 (RE Tab 14). Moreover, if Moussazadeh needs medical treatment or requests an educational program available at another unit, he will again be denied kosher food. USCA5 304 (RE Tab 14). Finally, TDCJ has specifically warned that "Plaintiff is serving a lengthy sentence," and "for any number of reasons . . . Plaintiff could be moved to a number of units." USCA5 304 (RE Tab 14). In short, the threat of transfer is concrete; the likelihood of transfer is significant; and in the event of a transfer, the denial of kosher food is certain.[4]

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[4] TDCJ may argue, as it suggested below, that if it transfers Moussazadeh away from Stringfellow, it will send him to a "Basic Jewish Designated Unit," where kosher products are available "through the unit commissary for purchase *at the offender's expense.*" USCA5 785 (TDCJ Chaplaincy Manual) (RE Tab 23) (emphasis added); *see also* USCA5 690 (Defs.' Supp. Mot. to Dismiss) (RE Tab 22).

Second, unlike the record in *Sossamon*, the record in this case is replete with evidence of "litigation posturing." Most vividly, TDCJ adopted a flatly contrary litigating position on the issue of mootness in another kosher food case—*Baranowski*, 486 F.3d 112. Seven months before this Court issued a decision in *Baranowski*, the plaintiff formally changed his religious preference from "Jewish" to "none," and no longer actively sought kosher food or Jewish services. And two months before the decision in *Baranowski*, TDCJ began providing some (if not all) of the relief that Baranowski sought, including preparations for kosher food at Stringfellow and regular Jewish services at Basic Jewish Designated Units. If Moussazadeh's case is moot, these facts made *Baranowski* doubly moot—not only had TDCJ begun providing some of Baranowski's requested relief, but Baranowski himself no longer sought that relief. And although TDCJ had a duty to "'to bring to [the Court's] attention, "*without delay*," facts that may raise a question of mootness,'" *Staley* v. *Harris County*, 485 F.3d 305, 313 (5th Cir. 2007) (en banc) (emphasis added) (citation omitted), it mentioned *neither* of these critical facts until *after* this Court had issued a decision, and *after* outside parties attempted to inter-

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Such a transfer, however, would do nothing to ameliorate Moussazadeh's injury. Because Moussazadeh could not purchase 1,095 meals per year for the next 59 years of his sentence, transfer to a Basic Jewish Designated Unit would have the same effect as an outright denial of kosher food. Moreover, the Chaplaincy Manual makes clear that Jewish inmates can be transferred away from Basic Jewish Designated Units for all the same reasons they can be transferred away from Stringfellow. USCA5 785 (RE Tab 23).

vene in the appeal and have the Court's decision vacated on grounds of mootness. *See* Defendants-Appellees Hart, Sanders, Pierce, Hodges and Quarterman's Response in Opposition to Motion to Intervene and Intervenor-Appellants' Petition for Rehearing and Suggestion of Mootness at 9-15, *Baranowski*, 486 F.3d 112 (No. 05-20646).

When confronted with an argument that *Baranowski* was moot, TDCJ took precisely the *opposite* position it has taken here. Specifically, TDCJ argued that its voluntary conduct did not moot the case because "[t]here is a reasonable expectation that the alleged violation will recur"; and it argued that "this case falls into the 'capable of repetition yet evading review' exception to the mootness doctrine." *Id.* at 11-12 (Response in Opposition). In short, TDCJ claims that its conduct does *not* moot a claim for kosher food where the plaintiff has abandoned the Jewish religion (*Baranowski*), but *does* moot a claim for kosher food where the plaintiff is, and has always been, Jewish (*Moussazadeh*).

Moreover, TDCJ continues to assert contradictory litigating positions on mootness and the merits. On mootness, it claims that it is absolutely clear that the denial of kosher food will not recur; on the merits, it claims that it *must* deny kosher food in order to meet its compelling interests in controlling costs and maintaining security. At least one of these positions is necessarily "litigation posturing." *Sossamon*, 560 F.3d at 325.

Finally, Sossamon is further distinguishable in light of the facts outlined in Section I.A.1 above—namely, the fact that TDCJ reserves an absolute right to deny kosher food at any time; the fact that settlement negotiations broke down precisely because TDCJ refused to be bound to provide kosher food in the future; and the fact that TDCJ rejected multiple requests for kosher food over the course of many years. None of these facts was present in *Sossamon*; all are powerful evidence that the denial of kosher food is likely to recur; and the district court here did not even attempt to address them.[5]

4. The district court's ruling eviscerates the doctrine of voluntary cessation and will allow governments to pick and choose their opponents.

The district court's sweeping interpretation of *Sossamon* also undermines the policies animating mootness and voluntary cessation. The doctrine of mootness facilitates considered decision-making by ensuring that courts focus on "sharply presented issues in a concrete factual setting" with "self-interested parties vigorously advocating opposing positions." *Grant* v. *Gilbert*, 324 F.3d 383, 390 (5th

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[5] TDCJ's actions also contrast sharply with the conduct of other defendants to whom solicitude has been afforded. In *Ragsdale* v. *Turnock*, 841 F.2d 1358, 1365 (7th Cir. 1988)—the principal authority cited by *Sossamon* to support the idea of "solicitude"—physicians brought a facial constitutional challenge to a law restricting abortion. The Seventh Circuit found that the case was moot because the state had a policy of not enforcing the statute and "ha[d] conceded, [for] at least [five years], that this requirement is unconstitutional." 841 F.2d at 1365. Here, by contrast, TDCJ continues to assert a right to deny kosher food at any time.

Cir. 2003) (citing *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 403-404 (1980)). The doctrine of voluntary cessation prevents defendants from "eject[ing] plaintiffs from court on the eve of judgment, then resum[ing] the complained-of activity without fear of flouting the mandate of a court," thus putting plaintiffs to "the hassle, expense, and injustice of constantly relitigating their claims." *Sossamon*, 560 F.3d at 324; *see also Friends of the Earth*, 528 U.S. at 192 (when a case has been "brought and litigated . . . for years," dismissal wastes "sunk costs to the judicial system").

The district court's interpretation of *Sossamon* thwarts both of these policies by allowing government officials nearly limitless discretion to pursue judgments against *pro se* plaintiffs while avoiding litigation against represented parties. Here, for example, TDCJ litigated to judgment against a *pro se* prisoner who no longer even claimed to be Jewish (*Baranowski*)—thus denying the courts the benefit of "sharply presented issues" with "self-interested parties vigorously advocating opposing positions." *Grant*, 324 F.3d at 390. Then, three weeks after obtaining a favorable decision in *Baranowski*, TDCJ began serving kosher food to Moussazadeh and sought to dismiss his claim as moot—thus attempting to avoid litigation against a truly interested plaintiff who retained counsel, sought discovery, and presented substantial evidence undermining TDCJ's position. The district court's dismissal thus enables TDCJ to gain the benefit of a favorable judgment in a

poorly litigated case, while reserving the right to "resume the complained-of activity without fear of flouting the mandate of a court." *Sossamon*, 560 F.3d at 324. In short, it allows TDCJ to pick and choose its opponents.

No doubt governments will welcome the opportunity to litigate against *pro se* plaintiffs and eject plaintiffs represented by counsel; but *Sossamon* was never intended to encourage this sort of manipulation. While courts are not compelled to adjudicate disputes "in which one or both of the parties plainly lacks a continuing interest, as when the parties have settled," *Friends of the Earth*, 528 U.S. at 192, here TDCJ refused to settle solely to preserve a right to deny kosher food in the future—the foundation of the controversy Moussazadeh seeks to litigate. The claim is not moot.

B. TDCJ's denial of kosher food is capable of repetition yet evading review.

For similar reasons, this dispute falls within a separate exception to mootness, namely, the exception for conduct that is "capable of repetition yet evading review." *Ctr. for Individual Freedom* v. *Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) (citing *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1995)), *cert. denied*, 549 U.S. 112 (2007). A violation is capable of repetition yet evading review if "(1) [t]he challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there was a reasonable expectation that the same complaining party would be subjected to the same action again." *Id.*

Here, it is undisputed that the denial of kosher food has not been "fully litigated," *id.*, during the three years this lawsuit has been pending. Future denials of kosher food may be of even shorter duration. For example, TDCJ has said it can transfer Moussazadeh for any number of reasons, including "custody level, required treatment or educational program, housing restriction, medical condition, . . . *or other reason.*" USCA5 785 (RE Tab 23) (emphasis added). Many of these reasons could produce relatively short transfers—for example, a medical condition that required only a few weeks or months of treatment, or an educational program that lasted only one or two years. Similarly, TDCJ could stop operating the kosher corner for a year or two in an alleged effort to cut costs. Or, through carelessness or inadvertence, TDCJ could simply fail to operate the kosher corner in a kosher manner. The district court offered no reasoning to support its bare assertion that such deprivations of kosher food would be "capable of review." USCA5 1293 (RE Tab 4). Indeed, merely exhausting the administrative grievance process can sometimes last longer than a prisoner's residency after a temporary transfer.

As explained in detail above, there is also more than "a reasonable expectation" that Moussazadeh will be denied kosher food again in the remaining 59 years of his sentence. TDCJ reserves an absolute right to deny kosher food at any time, rejected settlement precisely to preserve its ability to *deny* kosher food, and claims that it has compelling interests in doing so.

Moreover, as this Court has explained, even if it were doubtful that Moussazadeh would be subjected to the challenged conduct again, the "capable of repetition" doctrine applies where "other individuals certainly will be affected by the continuing existence of the [policy]." *Carmouche*, 449 F.3d at 662. Here, TDCJ's policy affects every observant Jewish inmate in TDCJ's custody. If Moussazadeh's case is dismissed, the issue will simply have to be litigated again. According to the district court's flawed analysis, that is not a problem: "The disposition of the pending suit does not preclude [Moussazadeh] from exhausting his administrative remedies and filing another suit in federal court." USCA5 1293 (RE Tab 4). But that is just the sort of duplicative litigation and waste of judicial resources that the exceptions to mootness are designed to prevent.

C. If the issue of mootness is in doubt, this Court should remand for further discovery on the relevant jurisdictional facts.

Finally, even assuming *arguendo* that there is some doubt about whether this case is moot, this Court should, at the very least, remand to the district court for further discovery on the jurisdictional facts relevant to mootness. As this Court has explained, "[w]hen a district court makes factual determinations decisive of a motion to dismiss for lack of jurisdiction, it must give plaintiffs an opportunity for discovery and a hearing that is appropriate to the nature of the motion to dismiss." *McAllister* v. *FDIC*, 87 F.3d 762, 766 (5th Cir. 1996). Such additional discovery is "broadly favored and should be liberally granted." *Culwell* v. *City of Fort Worth*,

468 F.3d 868, 871 (5th Cir. 2006). A refusal to allow further discovery is reviewed for abuse of discretion. *McAllister*, 87 F.3d at 766.

Here, in response to TDCJ's motion to dismiss, Moussazadeh requested additional discovery, under Rule 56(f), on disputed factual issues relevant to TDCJ's motion to dismiss. USCA5 532-36. Specifically, Moussazadeh requested discovery on "the likelihood that TDCJ will close the kosher kitchen in the future or transfer Moussazadeh to another unit," including an opportunity to depose TDCJ's 30(b)(6) witness on TDCJ's "intent to keep the kitchen open" and "policy and practice of transferring inmates among TDCJ's various units." USCA5 533 (RE Tab 21), USCA5 534. Both of these factual issues are highly relevant to the issue of mootness.

The district court, however, apparently overlooked this request and thus failed to address it. Moreover, despite the fact that TDCJ expressly warned that Moussazadeh "is serving a lengthy sentence" and "could be moved to a number of units" for "any number of reasons," USCA5 304 (RE Tab 14), and the fact that TDCJ's Chaplaincy Manual provides that Moussazadeh can be transferred for any number of reasons, USCA5 785 (RE Tab 23), the district court found as a factual matter that "any claim that plaintiff might be transferred to another unit, where kosher food is unavailable, is too speculative to avoid mooting the case." USCA5

1293-94 (RE Tab 4). The court offered no basis for this factual finding and no reason for denying Moussazadeh's request for additional discovery on this point.

The failure to explain the denial of additional discovery is a *per se* abuse of discretion. As this Court has explained, "when a district court provides absolutely no explanation for its purely implicit denial of what facially appears to be a reasonable request for additional discovery time, we must assume that the district court either failed to exercise its discretion or abused it." *Wilkinson* v. *Star Enters.*, No. 96-20878, 1997 WL 73857, at *3 (5th Cir. Feb. 14, 1997). Here, the district court offered no reason for denying additional discovery on the facts relevant to mootness; at a minimum, then, a remand for additional discovery is required. *See also McAllister*, 87 F.3d at 766 ("[T]he district court abused its discretion in refusing to grant a Rule 56(f) continuance to allow plaintiffs to conduct discovery [on jurisdictional facts].").[6]

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[6] The district court also denied Moussazadeh's request for discovery on the question of whether the food from the kosher corner is in fact kosher. USCA5 1283-84 (RE Tab 4); *see also* USCA5 533 (RE Tab 21). Instead, the court relied on TDCJ's statement (through its contract rabbi) that the food served is kosher. USCA5 1281-82 (RE Tab 4). Without discovery, Moussazadeh was unable to controvert that statement. If this Court remands for additional discovery, it should also allow Moussazadeh to conduct discovery on whether the food he is receiving is in fact kosher.

II. Moussazadeh is entitled to summary judgment because TDCJ's refusal to provide kosher food cannot survive strict scrutiny.

Moussazadeh's RLUIPA claim is not just live. Based on the undisputed factual record, he is also entitled to summary judgment.[7]

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[7] If this Court reverses on the question of mootness, it can and should rule on the merits of Moussazadeh's summary judgment motion. Several aspects of the district court's opinion indicate that the district court denied Moussazadeh's motion on the merits. First, the district court directly opined on the merits, stating that, "[u]nder Fifth Circuit precedent, RLUIPA is not violated by TDCJ's failure to provide a kosher diet . . . because of [TDCJ's] compelling administrative and budgetary constrains." USCA5 1292 (RE Tab 4); *see Rollins Envtl. Servs. (FS), Inc.* v. *St. James Parish*, 775 F.2d 627, 632 (5th Cir. 1985) (court of appeals should address the merits when "it is clear that the district court based its jurisdictional ruling on the merits of [the] federal claims"). Second, although the district court denied several pending motions "as moot," it lumped Moussazadeh's motion for summary judgment in with all of the motions addressed on the merits in its opinion, stating that those motions were "denied." USCA5 1294 (RE Tab 4). Finally, the district court dismissed plaintiff's complaint "with prejudice," which is not appropriate unless the court denied Moussazadeh's claim on the merits. *See Hix* v. *U.S. Army Corps. of Engineers*, 155 Fed. Appx. 121, 2005 WL 3067906 (5th Cir. 2005) (incorrect to dismiss claims with prejudice if the court did not reach the merits); *Davis* v. *United States*, 961 F.2d 53, 57 (5th Cir. 1991) (same).

Moreover, even assuming that the district court did *not* reach the merits, this Court has discretion as a matter of judicial economy to decide the merits where, as here, (1) the merits present a purely legal issue that has been fully briefed and is reviewable *de novo* on appeal, (2) this Court has the same record as the district court, and (3) a remand would serve no useful purpose. *See, e.g.*, *Tex. Extrusion Corp.*, 844 F.2d 1142, 1154, 1156-57 (5th Cir. 1988) ("Although the district court did not reach the merits of appellants' challenge [because it concluded that it lacked jurisdiction] . . . , considerations of judicial economy convince us to address [the merits] in this appeal."); *Mangual* v. *Rotger-Sabat*, 317 F.3d 45, 64 (1st Cir. 2003) ("[W]hen a district court dismisses a matter on jurisdictional grounds and this court reverses," an appeals court should reach the merits when the merits "comprise a purely legal issue" and are "reviewable *de novo* on appeal . . . without additional factfinding" because a remand would "serve no useful purpose.")

RLUIPA claims proceed in two parts. First, Moussazadeh must prove that TDCJ has imposed a "substantial burden" on his exercise of religion. 42 U.S.C. § 2000cc-1(a). The burden then shifts to TDCJ to prove that the imposition of the burden on Moussazadeh "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id.*; *see also Odneal* v. *Pierce*, No. 06-41165, 2009 WL 901511, at *2 (5th Cir. Apr. 3, 2009) (explaining RLUIPA's burden-shifting framework).

Here, TDCJ does not dispute that Moussazadeh has shown a substantial burden on his religious exercise. *See Baranowski*, 486 F.3d at 125 (denial of kosher food "work[s] a substantial burden upon [a Jewish inmate's] practice of his faith"); *see also* USCA5 1290 (RE Tab 4). Thus, the only question is whether TDCJ can carry its burden of satisfying strict scrutiny.

Based on the undisputed evidence in the summary judgment record, TDCJ has failed as a matter of law to carry that burden. Specifically, TDCJ cannot demonstrate that denying kosher food furthers compelling interests in controlling costs and maintaining security when: (1) TDCJ has been providing kosher food, without any cost or security problems, for the past two years; (2) at least 32 state prison systems and the Federal Bureau of Prisons provide kosher food without compromising the same interests in controlling costs and maintaining security; and (3) TDCJ's own evidence shows that providing kosher food would increase TDCJ's

annual food budget, at most, by only *eight hundredths of one percent* (0.08%). Moussazadeh is therefore entitled to summary judgment.

A. *Baranowski* does not relieve TDCJ of the burden of satisfying strict scrutiny.

In the district court, TDCJ resisted summary judgment exclusively on the basis of this Court's decision in *Baranowski* v. *Hart*, 486 F.3d 112. There, the Court rejected a *pro se* prisoner's request for kosher food under RLUIPA, finding that the denial of kosher food served TDCJ's compelling interests in "maintaining good order and controlling costs." *Id.* at 125. According to TDCJ, *Baranowski* obviates the need to review the factual record on its strict scrutiny defense because "no amount of additional discovery can overcome [*Baranowski*'s] effect in this case." USCA5 697 (RE Tab 22). The district agreed, stating that "[u]nder Fifth Circuit precedent, RLUIPA is not violated by TDCJ's failure to provide a kosher diet to a Jewish inmate . . . because of compelling administrative and budgetary constraints." USCA5 1292 (citing *Baranowski*, 486 F.3d at 125-26) (RE Tab 4).

But *Baranowski* does not purport to establish a once-and-for-all rule that the denial of kosher food can never violate RLUIPA. *See Mayfield*, 529 F.3d at 614 ("Because [RLUIPA requires] a fact-specific, case-by-case review, we do not believe that [our prior decision] laid down a *per se* rule that the TDCJ's [policy] could never [violate RLUIPA]."). As noted above, *Baranowski* involved a claim by a *pro se* prisoner, who adduced *no evidence* on the cost or security implications

of kosher food. Mindful that the plaintiff was proceeding *pro se*, this Court emphasized that its decision was based on the "*uncontroverted* summary judgment evidence" and was limited to "the record before us." 486 F.3d at 125 (emphasis added).

The record here is dramatically different. For one thing, TDCJ has now been providing kosher food for over two years—something it claimed was impossible in *Baranowski*. For another, unlike the *pro se* prisoner in *Baranowski*, Moussazadeh has adduced substantial evidence on the cost and security implications of providing kosher food—including the fact that 32 states and the federal government provide kosher food to their prisoners, and the fact that providing kosher food will increase TDCJ's food budget, at most, by eight hundredths of one percent (0.08%). As explained below, the undisputed facts in this record not only distinguish this case from *Baranowski*, but require summary judgment in favor of Moussazadeh.[8]

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[8] This Court has distinguished *Baranowski* in similar circumstances before. In *Mayfield*, a prisoner challenged the same religious volunteer policy the Court upheld in *Adkins* v. *Kaspar*, 393 F.3d 559 (5th Cir. 2004), and in *Baranowski*. *See* 529 F.3d 599, 613-14 (5th Cir. 2008). Nevertheless, the Court explained, "[b]ecause [RLUIPA requires] a fact-specific, case-by-case review, we do not believe that [our prior cases] laid down a per se rule that the TDCJ's volunteer requirement could never [violate RLUIPA]." *Id.* at 614. "Looking to the summary judgment in [the present] case," the Court concluded that the district court improperly dismissed the plaintiff's claims. *Id.* Under *Mayfield*, this Court should undertake the same record-specific analysis of the record here.

B. TDCJ cannot demonstrate a compelling governmental interest in denying kosher food when it has been providing kosher food without difficulty for the past two years.

By its own admission, TDCJ has been providing kosher food for over two years. USCA5 433 (RE Tab 19). And far from claiming that this service is breaking the budget, TDCJ says that it intends to continue offering kosher meals for the foreseeable future (at least when the question of mootness arises). USCA5 689-90 (RE Tab 22).

This fact alone not only distinguishes this case from *Baranowski*, but also prevents TDCJ as a matter of law from demonstrating a compelling governmental interest. As the Supreme Court has explained, "a law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 547 (1993) (citation omitted). In other words, if a government allows "appreciable damage" to a supposedly compelling interest, the interest cannot, as a matter of law, be constitutionally compelling. Here, however, not only has TDCJ allowed "appreciable damage" to its allegedly compelling interests, *it has engaged in the very conduct that it claims it has a compelling interest to avoid.* Under *Lukumi*, TDCJ simply cannot have a constitutionally compelling interest in "not doing" what it has already been doing for over two years, and what it claims it intends to do for the foreseeable future.

Cases from other circuits confirm this common-sense conclusion. In *Spratt*, for example, the government claimed that a ban on inmate preaching furthered a compelling governmental interest in institutional security. 482 F.3d at 40. The First Circuit, however, rejected this argument, emphasizing that the government had already allowed the conduct in question for the past seven years. *Id.* As the Court explained:

> Spratt's seven-year track record as a preacher, which is apparently unblemished by any hint of unsavory activity, at the very least casts doubt on the strength of the link between his activities and institutional security. While we recognize that prison officials are to be accorded substantial deference in the way they run their prisons, this does not mean that we will "rubber stamp or mechanically accept the judgments of prison administrators."

Id. (quoting *Lovelace* v. *Lee*, 472 F.3d 174, 190 (4th Cir. 2006)). Here, too, the fact that TDCJ has been providing kosher food for over two years, without compromising its budget or security, prevents TDCJ from satisfying strict scrutiny.

Similarly, in *Warsoldier* v. *Woodford*, 418 F.3d 989 (9th Cir. 2005), the court rejected the government's claim that a ban on long hair for *males* furthered a compelling governmental interest in prison security because same prison system allowed long hair for *females*. *Id.* at 1000. As the Court explained, because the same allegedly compelling interests "apply equally to male and female inmates," the prison system's exception for females "suggests that there is no particular health or security concern justifying the policy, and, more importantly, that the hair

length restriction is not the least restrictive means to achieve the same compelling interests." *Id.*

TDCJ's claim here is far weaker. TDCJ cannot, as a matter of law, claim a compelling governmental interest in denying accommodation to the very group that is *already* receiving it. *See also F.O.P.* v. *City of Newark*, 170 F.3d 359 (3d Cir. 1999) (Alito, J.) (police department had no compelling reason to prohibit beards requested for religious reasons when it allowed beards requested for medical reasons).

C. TDCJ's interests cannot be compelling when the same interests of 32 states and the federal government are not.

TDCJ also cannot demonstrate a compelling interest in denying kosher food when at least 32 state prison systems and the Federal Bureau of Prisons, which have the same interests, already provide kosher food. USCA5 1116 (RE Tab 28) (finding that 32 state prisons provided kosher food in 2005); *see also* 28 C.F.R. § 548.20 (federal policy); U.S. Department of Justice, Federal Bureau of Prisons, Program Statement 4700.05, ch. 4 (June 12, 2006), *available at* http://www.bop.gov/DataSource/execute/dsPolicyLoc. According to a study authored by the Michigan Department of Corrections, three states (Michigan, Arkansas, and New York) operate kosher kitchens; twenty-nine states either purchase prepared kosher meals from outside kosher food vendors or, like the Federal Bureau of Prisons, accommodate religious diets on a generic common fare program.

USCA5 1116 (RE Tab 28).[9] Fourteen states instituted a kosher meal program as a result of a court order; eighteen did so voluntarily. USCA5 1117 (RE Tab 28). And these prison systems accommodate anywhere from "an average of two (2), to an average of one thousand-five hundred (1500)" Jewish prisoners every day. USCA5 1117 (RE Tab 28).

TDCJ does not dispute that these prison systems have the same interests as TDCJ in controlling costs and maintaining security. Yet many of these systems—some with far larger Jewish prisoner populations and smaller food budgets than TDCJ—have successfully provided kosher food for years. On summary judgment, TDCJ offered no evidentiary basis for concluding that its situation is in some way unique, or that it has a compelling governmental interest other prison systems lack. Summary judgment is therefore required.

In *Spratt*, for example, where the state prison system banned inmate preaching, the First Circuit found it "problematic . . . that other prison systems, including the Federal Bureau of Prisons, do not have such . . . policies." 482 F.3d at 42

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[9] The Federal Bureau of Prisons permits inmates to apply to the prison chaplain for authorization to receive a kosher diet. Approved inmates are provided kosher food using a "common fare" religious diet program, consisting of foods that require little preparation, contain no pork or pork derivatives, do not mix meat or dairy products in the service of food items, and are served with utensils that have not come in contact with pork or pork derivatives. The federal common fare kosher program provides three hot entrees per week and meets or exceeds the Recommended Dietary Allowances for nutrition. *See* Arlene Spark, *Nutrition in Public Health* 228-29 (2007).

(quoting *Warsoldier*, 418 F.3d at 999). As the court explained, "in the absence of any explanation by [the government] of significant differences between [its prison] and a federal prison that would render the federal policy unworkable, the Federal Bureau of Prisons policy suggests that some form of inmate preaching could be permissible without disturbing prison security." *Id.*

Similarly, when considering the hair-length policy in *Warsoldier*, the court relied on the fact that "[p]risons run by the federal government, Oregon, Colorado, and Nevada all meet the same penological goals without such a policy." 418 F.3d at 999. As the court explained, the practice of other prison systems was powerful evidence that the Department of Corrections could not satisfy strict scrutiny:

> Surely these other state and federal prison systems have the same compelling interest in maintaining prison security, ensuring public safety, and protecting inmate health as [the Department of Corrections here]. Nevertheless, [the Department] offers no explanation why these prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs. . . . Instead, [the Department] insists that this court must completely defer to [the Department's] judgment. [The Department's] insistence, however, is insufficient to meet its burden of proof under [RLUIPA].

Id. at 1000.[10]

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[10] *See also Procunier* v. *Martinez*, 416 U.S. 396, 414 n.14 (1974) ("[T]he policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."); *Turner* v. *Safley*, 482 U.S. 78, 97–98 (1987) (fact that Federal Bureau of Prisons generally allowed marriages suggested that state prison had alternatives to prohibition on inmate marriage).

Here, the record is even more clear-cut. It is not merely the federal government and three states that have adopted a contrary policy, but the federal government and 32 states. TDCJ offered *no* evidence on summary judgment to support the conclusion that it has compelling interests that distinguish it from nearly two-thirds of all other states.

D. TDCJ's summary judgment evidence is insufficient to generate a material issue of fact regarding its interests.

TDCJ has also failed to offer specific summary judgment evidence showing that providing kosher food would compromise its interests in controlling costs or maintaining prison security.[11]

As for cost, TDCJ's data actually *undermines* its claim that the provision of kosher food would compromise its budget. TDCJ estimates that it would cost ap-

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[11] Apparently believing that "no amount of additional discovery can overcome [*Baranowski*'s] effect in this case," USCA5 697 (RE Tab 22), TDCJ's summary judgment evidence consisted largely of conclusory, outdated assertions based on the 2004 affidavit submitted in *Baranowski*. In fact, TDCJ's interrogatory responses cut and pasted (verbatim and without attribution) large portions of the *Baranowski* affidavit. *See* USCA5 1086-88, where the entirety of TDCJ's interrogatory response is lifted verbatim from the *Baranowski* affidavit at USCA5 1179-81. The only problem was that, by time TDCJ submitted these interrogatory responses (2008), much of the information in the *Baranowski* affidavit was badly out of date and, because of changed circumstances, demonstrably false. For example, one interrogatory response (copied from the affidavit) stated that "*[n]o TDCJ unit is currently set up to accommodate a kosher diet.*" USCA5 1087 (copying USCA5 1180) (emphasis added). But TDCJ submitted this response ***over a year*** after it established the kosher corner and began serving kosher food at Stringfellow. USCA5 433 (RE Tab 19).

proximately $6.54 per day to provide an individual inmate with kosher food, compared with the regular food cost per day of $2.62.[12] USCA5 1089 (RE Tab 26). Even assuming that all 75 practicing Jewish inmate were to request a kosher diet—a generous assumption given the fact that TDCJ moved only 18 Jewish inmates to Stringfellow, USCA5 325—the cost of providing kosher food would increase TDCJ's annual food budget by only *eight hundredths of one percent* (0.08%).[13]

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[12] Although Moussazadeh accepts this number for purposes of summary judgment, it is worth pointing out two problems with it. First, it is unaccompanied by any factual support—just a general assertion that TDCJ staff "stud[ied] sample weekly kosher menus from Arkansas, Colorado, California and the US Bureau of Prisons." USCA5 1089. Second, by TDCJ's own admission, the estimated cost *includes* the $2.62 per day that TDCJ already spends for all other inmates under the regular food plan. *Id.* Thus, TDCJ assumes that it would receive no cost savings by removing Jewish inmates from the regular food program—an obvious form of double-counting.

[13] TDCJ's total annual food budget is $140.6 million, USCA5 1187 (RE Tab 30), and TDCJ recognizes 75 prisoners as Jewish. USCA5 1106 (RE Tab 27). Kosher food costs an extra $3.92 per Jewish inmate per day ($6.54 per day for kosher food – $2.62 per day for regular food = $3.92 per day increase). 75 Jewish prisoners x $3.92 per day x 365 days = $107,310 increased cost per year. $107,310 increase / $140,600,000 annual budget = 0.0008, or eight hundredths of one percent (0.08%).

The *total* annual cost of providing kosher food (as opposed to the *increased* cost) would be one tenth of one percent (0.1%) of TDCJ's annual budget. 75 Jewish prisoners x $6.54 per day for kosher food x 365 days = $179,032.50 for a year of kosher food. $179,032.50 per year / $140,600,000 annual budget = .001, or one tenth of one percent (0.1%).

TDCJ has not even attempted to explain how such a minimal budget increase constitutes a compelling governmental interest.[14]

As for security, TDCJ has provided no specific evidence demonstrating that providing kosher food would compromise prison security. TDCJ's own interrogatory responses state that "the main obstacle" to providing kosher food is *not* security concerns but "scarce resources." USCA5 1087 (RE Tab 26) (copying *Baranowski* affidavit at USCA5 1179). The same response mentions security only in passing, stating generally that TDCJ's policies "extend to offenders of all faiths reasonable and equitable opportunities to pursue religious beliefs and participate in religious activities and programs that do not endanger the safe, secure, and orderly operation of the agency." USCA5 1088 (copying USCA5 1181). This sort of "conclusional assertion" is a far cry from the specific evidence required to satisfy

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[14] Cost concerns, standing alone, typically are not a compelling governmental interest under RLUIPA. RLUIPA specifically provides that it "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3(c). Moreover, when applying strict scrutiny in analogous contexts, the Supreme Court has largely rejected cost, standing alone, as a compelling governmental interest. *See Memorial Hosp.* v. *Maricopa County*, 415 U.S. 250, 262-63 (1974) ("The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a [law] which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State.") *Udey* v. *Kastner*, 805 F.2d 1218, 1220 (5th Cir. 1986) ("[A]lthough we recognize that costs are a valid consideration for First Amendment purposes, we have stated in other prison suits that 'inadequate resources can never be an adequate justification for depriving any person of his constitutional rights.'")

strict scrutiny. *Sossamon*, 560 F.3d at 335 (rejecting "conclusional assertion" of security concerns under RLUIPA).[15]

And, as discussed above, TDCJ offered no summary judgment evidence that (1) its provision of kosher food during the past two years has caused any cost or security problems; or (2) its cost or security interests differ from the many other prison systems that offer kosher food accommodations. TDCJ therefore has failed to create a genuine issue of material fact on the issue of strict scrutiny.

E. TDCJ's denial of kosher food is not the least restrictive means of furthering its interests.

Finally, even assuming *arguendo* that TDCJ's denial of kosher food somehow advances a compelling governmental interest in controlling cost or maintaining security, the undisputed evidence demonstrates that the outright denial of kosher food to Moussazadeh is not the least restrictive means of furthering those interests.

Federal courts narrowly construe the "least restrictive means" requirement when applying strict scrutiny. A governmental restriction "cannot survive strict

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[15] *See also Greene* v. *Solano County Jail*, 513 F.3d 982, 989-90 (9th Cir. 2007) ("In light of RLUIPA, no longer can prison officials justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison. RLUIPA requires more."); *Spratt*, 482 F.3d at 40 ("While we recognize that prison officials are to be accorded substantial deference in the way they run their prisons, this does not mean that we will 'rubber stamp or mechanically accept the judgments of prison administrators.'" (citing *Lovelace,* 472 F.3d at 190)).

scrutiny" if "a less restrictive alternative is available." *World Wide Street Preachers Fellowship* v. *Columbia*, 245 Fed. Appx. 336, 343 (5th Cir. 2007) (citing *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000)). Moreover, TDCJ must demonstrate that it "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier*, 418 F.3d at 999.

Here, the fact that TDCJ is already providing kosher food forecloses any argument that the outright denial of kosher food is (or was) the least restrictive means of furthering the government's compelling interests. In *Mayfield*, for example, this Court reversed summary judgment for TDCJ in an RLUIPA challenge to a prison rule proscribing the possession of runestones. (Runestones are small tiles made of wood or stone and used in the practice of the Odinist faith.) After Mayfield filed suit, TDCJ proposed a pilot program allowing prisoners to keep runestones in a central depository and access them for religious use during prescribed times. *Mayfield*, 529 F.3d at 616. Based on this change of policy, this Court held that the pilot program "would seemingly represent a less restrictive means for carrying out the TDCJ's penological interests" than the previous policy of prohibiting runestones altogether. *Id.* at 617.

Moussazadeh's claim is even stronger. TDCJ has not merely proposed a pilot program for kosher food, but has been providing kosher food at Stringfellow for

the last two years. Moreover, it has done so without any apparent or alleged harm to prison security or undue drain on prison resources. Under *Mayfield*, then, the kosher corner "represent[s] a less restrictive means for carrying out the TDCJ's penological interests" than a complete denial of kosher food, and TDCJ cannot satisfy strict scrutiny. *Id.*

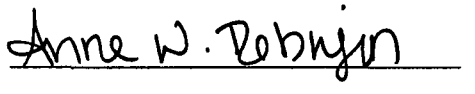
That 32 states and the federal government provide kosher food is further evidence that TDCJ's denial of kosher food is not the least restrictive means of furthering its alleged interests. As the Michigan Department of Corrections study shows, three states—Michigan, Arkansas and New York—have separate kosher kitchens similar to TDCJ's kitchen at Stringfellow. USCA5 1116 (RE Tab 28). The remaining 29 states order pre-packaged kosher meals. *Id.* Even assuming the kosher corner has compromised TDCJ's compelling governmental interests, TDCJ has offered no explanation for why a pre-packaged kosher-meal program (used by 29 other states) is not a viable alternative in Texas. And as the Ninth Circuit has explained, "[t]he failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restriction means." *Shakur* v. *Schriro*, 514 F.3d 878, 890-91 (9th Cir. 2008); *see also Sossamon*, 560 F.3d at 335 (instructing TDCJ to consider "less restrictive means" of furthering security interests while taking into account cost, such as allowing

prisoners to worship in the chapel by shifts). In short, TDCJ failed to use least restrictive means, and therefore fails to satisfy strict scrutiny.

CONCLUSION

Moussazadeh requests that this Court reverse the district court's grant of TDCJ's motion to dismiss, reverse the district court's denial of Moussazadeh's motion for summary judgment, and render judgment in Moussazadeh's favor. In the alternative, Moussazadeh requests that this Court reverse the district court's grant of TDCJ's motion to dismiss and remand the case for discovery and further proceedings.

Respectfully submitted,



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June 15, 2009

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this the 15th day of June, 2009, two (2) true and correct paper copies and an electronic copy of the foregoing Opening Brief of Plaintiff-Appellant Max Moussazadeh were served on the following:

VIA OVERNIGHT SERVICE

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Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Anne W. Robinson
Counsel for Plaintiff-Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to FED. R. APP. P. 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7)(B).

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 13,530 words, excluding the parts of the brief exempted by FED. R. APP. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirement of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word 2003 using 14-point Times New Roman font in the text and in the footnotes.

Executed June 15, 2009.

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