No. 20-1363

in the
UNITED STATE COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GERALD ACKERMAN and MARK SHAYKIN,

Plaintiffs-Appellees,

v.

HEIDI WASHINGTON,

Defendant-Appellant.

Appeal from the United States District Court
Eastern District of Michigan, Southern Division
Honorable Linda V. Parker

BRIEF FOR PLAINTIFF-APPELLEES GERALD ACKERMAN AND MARK SHAYKIN

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs/Appellees Gerald Ackerman and Mark Shaykin request oral argument. Ackerman and Shaykin prevailed in proving at a bench trial that they, and the class they represent, are entitled to injunctive relief under Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-1. Claims such as these are necessarily fact-intensive. Oral argument would allow both sides to clarify points in the record should the Court have questions. Oral argument may likewise facilitate useful discussion on the proper application of the Supreme Court's decision in *Cutter v. Wilkinson*, 544 U.S. 709 (2005) and this Court's decision in *Haight v. Thompson*, 763 F.3d 554 (6th Cir. 2014).

STATEMENT OF ISSUES PRESENTED

1. Did the district court clearly err when it held that RLUIPA protects Ackerman and Shaykin's right to consume meals that contain Kosher meat and dairy as a religious exercise, where they presented evidence that they sincerely believed that on the Sabbath, Rosh Hashanah, Yom Kippur, Shavuot, and Sukkot, Jewish teachings instruct adherents to eat joyful meals with meat and dairy?

   Appellant answers: Yes.

   Appellee answers: No.

2. Did the district court clearly err when it held that Ackerman and Shaykin proved that their religious exercise is substantially burdened by MDOC's refusal to either provide Kosher meat and dairy or allow outside organizations to provide such meals, where some foods mandated by Jewish teachings are not available at all, prisoners cannot afford to buy others, and none can be consumed at mealtime?

   Appellant answers: Yes.

   Appellee answers: No.

3. Was the district court correct in holding that MDOC's policy did not constitute a compelling government interest where MDOC failed to show there was any real cost burden on the prison administration and failed to show that the policy was the least restrictive means of achieving cost savings?

   Appellant answers: No.

   Appellee answers: Yes.

STATEMENT OF THE CASE

Plaintiffs/Appellees Gerald Ackerman and Mark Shaykin are Jewish individuals incarcerated in Defendant/Appellant Heidi Washington's, as Director of Michigan Department of Corrections ("MDOC"), facilities. (Bench Op., R. 243, Page ID # 2509.) Ackerman and Shaykin represent a class consisting of all Jewish prisoners in MDOC custody who request a religious diet, as well as a sub-class of those prisoners who meet the main class definition and also have a "sincere religious belief, which is seriously held, that they are to consume Certified Kosher meat and dairy on each of the Sabbaths" and four identified Jewish holidays. (Settlement Agreement, R. 213, Page ID # 2177; Stip. Order re Sub-Class Definition, R. 201, Page ID # 2078.)

A. In 2013, MDOC implemented a policy under which all prisoners approved to receive a religious meal would receive a universal, vegan meal, regardless of the specific mandates of their religious beliefs.

Beginning in 2013, MDOC, which had previously provided Kosher meals including meat and dairy to prisoners with approved religious meals, implemented a universal vegan meal for religious meals. (Compl., R. 1, Page ID # 9.) This policy was embodied in MDOC's Policy Directive 05.03.150, "Religious Beliefs and Practices of Prisoners," which sets policy regarding the manner in which prisoners were to be "permitted to exercise their religious beliefs within the constraints necessary for the safety, security, and good order of the facility."

(MDOC PD 05.03.150, R. 65-2, Page ID # 1010.) Previously, MDOC intermittently offered Kosher meals to its inmates, which included Kosher meats and dairy. (Trial Tr., R. 233, Page ID # 2317–19.) Under the new policy, though, all prisoners who were approved for religious meals would consume vegan meals. (MDOC PD 05.03.150, R. 65-2, Page ID # 1015.) This new policy forced Ackerman and Shaykin to choose between eating a diet that is Kosher, and a diet that permits them to fulfill the mizvah, or commandment, of eating meat and dairy (the "meat-and-dairy claim"). (Compl., R. 1, Page ID # 12.) Moreover, the kitchen in which the vegan meals were prepared was not in fact a Kosher kitchen (the "cross-contamination claim"). (Compl., R. 1, Page ID # 10, 13.) Previously, the Kosher meals had been "self sealed meals . . . and they were double wrapped, and therefore, they hadn't been contaminated." (Trial Tr., R. 233, Page ID # 2319.) When MDOC went to the vegan meal, Kosher was no longer kept. (*Id*.) Pans and other cross-contaminated items from the main kitchen were utilized so that the materials used to prepare the food were not kosher, and food was inappropriately passed in and out the doors. (*Id*.) Additionally, in the past, charitable Jewish organizations had been permitted to bring in supplemental Kosher foods for prisoners, to ensure they were able to properly celebrate religious holidays. (*Id*. at 2321, 2356–57.) However, MDOC has since disallowed this practice. (*Id*.)

Under this new policy, Ackerman and Shaykin were unable to fulfill the mandates of their religion to eat meals prepared in a Kosher manner, and to eat certain foods, including meat and dairy, on The Sabbath and four additional holidays. (*See id*. at 2319–21.) Ackerman and Shaykin[1] filed their initial complaint on September 27, 2013, alleging that the MDOC Policy Directive 05.03.150 violated RLUIPA and their First and Fourteenth Amendment rights. (Compl., R. 1, Page ID # 9–15.) After some discovery, Ackerman and Shaykin, with the help of newly-retained counsel, sought to amend their complaint to clarify the allegations made and to add class action allegations. (Mot. to Am. Compl., R. 90.) The amended complaint clarified that Ackerman and Shaykin are, pursuant to their religious beliefs, to consume meat and dairy. (First Am. Compl., R. 90-1, Page ID # 1201, 1206.)[2] To this end, they must receive religious meals that include Kosher meat and dairy, and the religious meals must be prepared in a Kosher manner. *Id*. Further, Ackerman and Shaykin sought approval of a class of all past, present, and future Jewish prisoners approved to receive religious meals and have not received

[1] The complaint was initially filed *pro se* by Michael Arnold, another Jewish prisoner. (Compl., R. 1, Page ID # 1.) After Arnold was paroled, the parties stipulated to the substitution of Ackerman and Shaykin as Plaintiffs and putative class representatives. (Stip., R. 155, Page ID # 1828.) For ease of reference and in conformity with the approach taken in Appellant's brief, the Plaintiff/Appellees are referred to as "Ackerman and Shaykin" throughout this brief, whether before or after this substitution.

[2] As MDOC notes in its briefing, there is no separate docket entry for the amended complaint.

Kosher meat and dairy prepared in a Kosher manner. *Id*. at 1204. Leave to amend was granted in 2017. (Reconsideration Order, R. 106, Page ID # 1300.) Shortly after the order granting leave to amend the complaint, Ackerman and Shaykin moved for class certification for the cross-contamination claims, which the court granted on August 21, 2018. (Order re Class Cert., R. 157, Page ID # 1833). In the interim, the magistrate judge ruled on a motion for summary judgment that Ackerman and Shaykin needed to present biblical evidence supporting a requirement to eat meat to demonstrate the sincerity of the belief presented. (Order re Mot. Summ. J., R. 96, Page ID # 1262–64.) Absent such evidence, the magistrate judge dismissed the meat-and-dairy claim. (*Id*.)

Once Ackerman and Shaykin had successfully amended the complaint to add class allegations and moved for certification of the class, they also sought to have the meat-and-dairy claims reinstated pursuant to Federal Rule of Civil Procedure 54(b). (54(b) Mot., R. 125.) In support, they provided an affidavit from Rabbi Doniel Neustadt, the Chairman of the Council of Orthodox Rabbis of Greater Detroit, who affirmed that, pursuant to "accepted Jewish ritual and custom, each Sabbath meal consists of fish, chicken, or meat . . . ." (Affidavit of Rabbi Neustadt, R. 125-2, Page ID # 1441.) Moreover, on Shavuot, it is customary to eat dairy food. (*Id*.) Rabbi Neustadt pointed the court to several provisions from the Code of Jewish Law in support of this custom. *Id*. (citing Code of Jewish Law ch.

72 § 7, ch. 103 § 7).) Ackerman and Shaykin also drew the court's attention to a new decision out of the Western District of Michigan, wherein a court relied on the Code of Jewish Law to find that the plaintiff had shown a sincere religious belief mandating consumption of meat, fish, and dairy on given Jewish holidays. (54(b) Mot., R. 125, Page ID # 1430, 1434–35.)[3]

The district court held that a court may, under RLUIPA, inquire into the sincerity of a religious belief, but not its reasonableness. (Order re 54(b) Mot., R. 159, Page ID # 1861.) An MDOC affidavit evaluating how Kosher dietary restrictions function was therefore irrelevant, in light of Ackerman and Shaykin's evidence that they sincerely believed they were required "to consume kosher meat on the Sabbath and other Jewish holidays and dairy products on Shavuot." (*Id*. at 1862.) The court therefore reinstated the meat-and-dairy claims. (*Id*. at 1867.) Following this decision, the parties stipulated to a defined sub-class for these clams. (Stip. Order re Sub-Class Definition, R. 201, Page ID # 2077–78.) While the Rule 54(b) motion was pending, MDOC moved yet again for summary judgment. (Mot. Summ. J., R. 127, Page ID # 1487–88.) Ackerman and Shaykin

[3] *Report and Recommendation*, Greeley, MJ, in *Horacek v. Heyns*, Case No. 2:13-cv-280; 2:15-cv-38, R.114, PageID.628–32, and *Opinion and Order Adopting Report and Recommendation* in *Horacek v. Heyns*, Case No. 2:13-cv-280; 2:15-cv-38, 2017 WL 1190551 (W.D. Mich. Mar. 3, 2017).

successfully defended this motion, and following the favorable decision, the parties agreed to settle the cross-contamination claim. (Settlement, R. 213.)

B. Following settlement of the cross-contamination claims, the parties proceeded to a bench trial on the meat-and-dairy claims, where the district court ordered MDOC to provide Kosher meat and dairy meal options.

At trial, Ackerman and Shaykin offered testimony about their experience attempting to keep Kosher while incarcerated. (Trial Tr., R. 233.) MDOC's Food Service Management and Support Unit Director, Kevin Weissenborn, and the Macomb Correctional Facility's Assistant Residential Unit Supervisor, Lisa Walsh, also testified. *Id*.

1. Ackerman and Shaykin testified about their long-held Jewish beliefs, and the necessity of consuming meat and dairy on various holidays.

At trial, Ackerman and Shaykin both explained that they were raised Jewish, and grew up eating a traditional Kosher diet throughout their lives. (Trial Tr., R. 233, Page ID #2315, 2350.) They practiced Jewish traditions, including attending religious services, and Ackerman was bar mitzvahed as a young adult. (*Id*. at 2315–16; 2350.) Ackerman spoke about the meals he traditionally consumed on The Sabbath and the four holidays at issue, testifying that he would "eat a meal called Cholent, easily translated as beef stew" on the Sabbath. (*Id*. at 2320.) Meanwhile, on Yom Kippur, a day of fasting and atonement following Rosh Hashanah, he would break his "fast with fish; traditionally, lox or smoked fish."

(*Id*. at 2321.) He testified that Yom Kippur follows ten days after Rosh Hashanah, the Jewish new year, and together, the two holidays are the highest of holy days:

> It's the thing that keeps us going from year to year. So any refraction from that, any taking away from that reduces the heartfelt meaning of it to us. It's like we're trying to do everything we can to tell God that we're sorry for the things we've done over the last year, and these are the things he's asked us to do to show that, and when we can't do those things, it diminishes from the fullness of the holiday.

(*Id*. at 2322.)

Meanwhile, Shavuot, the celebration of the receiving of the Torah, is traditionally recognized with the consumption of cheesecake. (*Id*. at 2377; 2353.) Ackerman explained that cheesecake should not be replaced by other dairy, like a glass of milk, because "[t]hese ritual practices we have mean a great deal to us, so when we have the ability to fulfill it properly, we feel obligated to do so." (*Id*. at 2380.) Shaykin agreed that cheesecake is not interchangeable with other dairy products, testifying that "[g]rowing up, traditionally, we always had cheesecake, and it was a big thing, making the homemade cheesecake, and the preparation with the pans, helping out. I even helped out, you know, making it." (*Id*. at 2358.) Shaykin confirmed that he keeps Kosher by eating meat and dairy, such as fish and poultry, on The Sabbath, Shavuot, Rosh Hashanah, Yom Kippur and Sukkot. (*Id*. at 2350–52.) He explained that "the Shulchan Aruch [the Code of Jewish Law], it states that we must consume meats and dairy products, and with not eating it, I'm not fulfilling what I'm supposed to do . . . ." (*Id*. at 2351.) Shaykin, on cross-

examination, firmly denied that this was merely a family tradition or personal preference—his "religious beliefs would be better satisfied by cheesecake than by another dairy product . . . ." (*Id*. at 2369, 2371.)

Ackerman also explained that the requirement to eat meat and dairy is about having celebratory meals, rather than a few bites of meat or a sip of milk here and there to meet *pro forma* requirements. He testified that the "Sabbath is a celebration. . . . It's celebrating and thanking God for creating us. . . . [God] didn't say we need you to eat a side of beef, but we need you to eat a meal, we expect you to eat a joyful meal, and code of Jewish law here says delicacy." (*Id*. at 2393.)

2. Ackerman also explained that there are no options for him to supplement the vegan meal in order to fulfill the mandates of his religion.

Ackerman and Shaykin have tried to maintain a Kosher diet while in prison, though it has at times "been difficult." (*Id*. at 2317.) Ackerman was able to procure Kosher meals in prison for five years, at which point he was transferred to a different facility in order to be closer to his dying mother. (*Id*. at 2317–18.) He consulted with a rabbi about his decision to forego Kosher meals to say goodbye to his mother before being transferred. (*Id*.) Afterward, Ackerman worked with the rabbi to be transferred back to a facility with Kosher options. (*Id*.) Shaykin testified that, with the exception of a Passover meal, he has been unable to keep Kosher since 2013. *Id*. at 2351. When Ackerman and Shaykin were first incarcerated, a

Jewish charitable institution sent cheesecake to inmates on Shavuot, as well as providing pastrami and salmon on holidays, but this practice was discontinued by the prison warden. (*Id*. at 2378–79; 2356–57.) MDOC never provided cheesecake itself. (*Id*.)

Ackerman explained that, based on his interpretation of the Shulchan Aruch, the Jewish code of law, the new vegan-only religious meals did not fulfill the requirements of his religion. (*Id*. at 2320–21.) Shaykin agreed that, by being deprived of meat and dairy on the specified holidays, he was not able to "fulfill [his] obligation of being sincere in [his] religion." Ackerman and Shaykin were able to buy some Kosher products through the commissary, but most options were "snack foods. There [was] very little of anything." (*Id*. at 2322.) Tuna was available, but quite expensive; other options, like a small beef stick, was not enough to make up the type of celebratory meal his beliefs mandate. (*Id*. at 2393; 2353.) Moreover, buying snack food through the commissary would mean that Shaykin and Ackerman would have to eat the snack separately from the main meal, because MDOC policy forbade prisoners from bringing additional food, such as the beef stick, into the chow hall. (*Id*. at 2396.) But Jewish "law requires us to have a Shavuot meal, not to have a meal and then supplement it later at some other time." (*Id*.) Even if adequate options were available in the commissary and they could bring them into the chow hall, Ackerman and Shaykin would struggle to

fund their Kosher meals. Ackerman made only $2.62 per day, working as a horticulture tutor, while Shaykin made $1.14 a day working in segregation. (*Id*. at 2324–26; 2353.) A Kosher meal option, like tuna, cost around $7 per meal, so Ackerman would need to spend around half his paycheck on Kosher fish for just four meals, every month, while Shaykin would be unable to buy Kosher fish for all The Sabbath meals. *Id*. Meanwhile, powdered milk, the only Kosher dairy product available, is $3.57, making their paychecks stretch even farther. (*Id*. at 2347.) Other prisoners, who might make as little as $0.84 per day, would not be able to manage it at all. (*Id*. at 2326.)

Moreover, purchasing their own Kosher meals would restrict the prisoners' ability to buy other necessities. Ackerman, who has long hair and a beard, buys "a lot of shampoo and conditioner . . . ." (*Id*. at 2326.) He also testified that he buys: "[d]eodorant, soap, typical toiletries, sometimes have to buy allergy pills, any over-the-counter medicines. I have to buy envelopes . . . JPay stamps, periodically put money on the phone so I can make phone calls." (*Id*.) Ackerman testified that he does buy coffee, which he both drinks himself and uses for barter—Ackerman explained that "no monetary system in prison other than store goods, and coffee is the most tradeable commodity that we have, so sometimes I use that as my bank account." (*Id*.) Shaykin testified that he mostly buys envelopes for letters and puts money on his account to make phone calls, along with coffee, which he uses to

barter for other goods like deodorant at a "cheaper rate." (*Id*. at 2354–55.) Shaykin also testified that he suffers from health issues and needs to cover his co-pay. (*Id*.) One of his health concerns is a vitamin B12 deficiency. (*Id*.) His doctors recommended he go on a meat diet to help address this, but in order to do so, Shaykin would not be able to maintain a Kosher diet since no Kosher meat is available from the prison kitchen. (*Id*. at 2356.)

3. MDOC's witnesses provided rough estimates about the claimed "burden" of providing Kosher meat and dairy to Jewish inmates.

Mr. Kevin Weissenborn, who at the time of trial was "the director of the Food Service Management and Support Unit[,]" testified on behalf of MDOC. (Trial Tr., R. 233, Page ID #2401). His duties include arranging "for all contractual services related to food service." (*Id*.) He testified about a list of Kosher food items available in the commissary, for which the most expensive product was the tuna, and the cheapest was fish steaks. (*Id*. at 2403–04.)

Weissenborn testified that the total MDOC food service budget is approximately $39 million annually, and it would cost about $10,000 annually to provide Kosher meat and dairy to Jewish prisoners on the Sabbath and the four additional holidays. (*Id*. at 2405–10, 2429.) He testified that there were other, cheaper options, but testified that the other options would "probably" not have met nutritional requirements. (*Id*.) He did not explain how a supplement to an existing

meal could fail to meet nutritional requirements if the existing meal met those requirements.

Meanwhile, Ms. Lisa Walsh, an assistant residential unit supervisor at one of MDOC's facilities, explained that inmates can buy commissary items twice a month using money from their jobs, or money provided by family and friends. (*Id*. at 2436–38.) MDOC will loan an inmate up to $11 if their account is under $11. (*Id*.) Presumably, this loan would need to be paid back. Getting the loan could take a month or more. (*Id*. at 2442.) Walsh stated that, for indigent inmates, she can sometimes provide a toothbrush or toothpaste if she knows they cannot provide one for themselves. (*See id*. at 2443–44.) She agreed that, while bartering is prohibited behavior, (*id*. at 2439) it continues to exist and no one "has come across the idea of how to stop it." (*Id*. at 2445.)

4. The district court found that Ackerman and Shaykin's beliefs had been substantially burdened, without justification.

Following the bench trial, the court ruled that Ackerman and Shaykin had proven that they "sincerely believe their religion requires them to consume meat and dairy on the Sabbath and the holidays of Rosh Hashanah, Yom Kippur, Sukkot, and Shavuot . . . [and] that cheesecake is imperative for the Shavuot celebration." (Bench Op., R. 243, Page ID # 2542.) MDOC, by mandating a vegan diet for inmates approved to receive a Kosher diet, placed a "substantial burden on [Ackerman and Shaykin's] religious beliefs . . . not alleviated by the availability of

kosher meat and dairy products in the prison stores." (*Id*.) The court further found that MDOC had failed to demonstrate that the vegan religious meal furthered "a compelling governmental interest" or was the "least restrictive means of furthering its interests." (*Id*.) The court therefore found that MDOC had violated Ackerman and Shaykin's rights under RLUIPA. (*Id*.) MDOC must therefore provide Ackerman, Shaykin, and qualified class members with Kosher meat and dairy products on the Sabbath and on Rosh Hashanah, Yom Kippur, Sukkot, and Shavuot, and with cheesecake on Shavuot in a form that maintains their Kosher status (i.e., with meat and dairy provided at different meals and prepared in such a way that there is no risk of cross-contamination). (Judgment, R. 251, Page ID # 2618–21.) MDOC appealed this ruling. (Not. of App., R. 264, Page ID # 2754.)

STANDARD OF REVIEW

"After a bench trial, we review the district court's factual findings for clear error and its conclusions of law de novo." *Fox v. Washington*, 949 F.3d 270, 276 (6th Cir. 2020) (quoting *Foster v. Nationwide Mut. Ins. Co.*, 710 F.3d 640, 643–44 (6th Cir. 2013)). "A finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.* (quoting *Osborn v. Griffin*, 865 F.3d 417, 436 (6th Cir. 2017)). "Under this standard, if the district court's account of the evidence is plausible in light of the record viewed in its entirety, the

court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Osborn*, 865 F.3d at 436 (citation omitted).

An evaluation of whether a belief is sincerely held and substantially burdened is reviewed for clear error. *See Fox*, 949 F.3d at 273 (reviewing whether the district court correctly determined that there was no substantial burden for clear error); *Cavin v. Mich. Dep't of Corr.*, 927 F.3d 455, 459 (6th Cir. 2019) (holding that a district court's finding of sincerity was one of fact); *see also*, *World Outreach Conference Ctr. V. City of Chicago*, 591 F.3d 531, 539 (7th Cir. 2009) (holding that determining whether a burden is substantial is an issue of fact).[4] Whether a given regulation is the least restrictive means is subject to de novo review. *Hoevenaar v. Lazaroff*, 422 F.3d 366, 368 (6th Cir. 2005). However, under RLUIPA, government action is subject to strict scrutiny. *Haight v. Thompson*, 763 F.3d 554, 566 (6th Cir. 2014).

SUMMARY OF ARGUMENT

The district court correctly applied the burden-shifting test for challenges to prison regulations under Section 3 of the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc-1, finding that Ackerman

[4] MDOC alleges that, under *Livingston Christian Sch. v. Genoa Charter Twp.*, 858 F.3d 996, 1001 (6th Cir. 2017), a de novo standard applies. This case related to an appeal from summary judgment, not a bench trial, and religious land use rather than the religious exercise of religious persons. *See id*. at 1000.

and Shaykin's sincerely held religious beliefs were impermissibly and substantially burdened by a 2013 MDOC regulation imposing a universal vegan meal for all inmates approved to receive religious meals. The vegan meals MDOC provides do not meet Kosher requirements, because Ackerman and Shaykin, as well as the class members they represent, are unable to access Kosher meat and dairy under the policy on the Sabbath and four other Jewish holidays. This leaves them unable to follow the religious mandates that command them to do so, and is therefore a substantial burden on their religious exercise. The items available for purchase only partially satisfy the Kosher requirements at issue, because not all required items are available and none can be eaten as part of a meal in the chow hall. Moreover, Ackerman and Shaykin cannot reliably afford to purchase the few items that are available. MDOC claims that this policy fulfills its compelling interest in managing prison costs, but the evidence shows that the price of Kosher meals is minimal, at just .02% of MDOC's annual food budget. Moreover, other, less restrictive options are available. Ackerman and Shaykin therefore ask that this Court affirm the district court's order granting permanent injunctive relief.

ARGUMENT

At trial, the district court held that Ackerman and Shaykin's sincerely-held religious beliefs were substantially burdened by MDOC's failure to provide Kosher meat and dairy on specific holidays. The MDOC has no compelling

government interest justifying that failure, much less that this failure was the least restrictive means of achieving that interest. The district court therefore correctly found that their rights under RLUIPA were violated.

RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise" of an institutionalized person unless the government demonstrates that the burden "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc–1(a). RLUIPA "provide[s] very broad protection for religious liberty." *Holt v. Hobbs*, 574 U.S. 352, 356 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 693 (2014)). RLUIPA's protections are defined broadly, and "religious exercise" includes "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); *see also*, *Holt*, 574 U.S. at 358.

RLUIPA employs a burden-shifting test in evaluating whether a government has imposed a substantial burden on religious exercise. *Cavin*, 927 F.3d at 458. First, "the inmate must demonstrate that he seeks to exercise religion out of a 'sincerely held religious belief.'" *Id*. (quoting *Holt*, 574 U.S. at 361). Second, the inmate "must show that the government substantially burdened that religious exercise." *Id*. Upon satisfaction of these two steps, the burden then shifts to the government, which "must meet the daunting compelling-interest and least-restrictive-means test." *Id*. Ackerman and Shaykin proved that they have a

sincerely held belief that their religion requires them to consume Kosher meat and dairy meals on the Sabbath and specific holidays, which was substantially burdened by MDOC's refusal to provide such meals. MDOC failed to show that it had either a compelling interest in not providing only vegan meals or that the vegan meals were the least restrictive means of achieving that interest. The district court was therefore correct to hold that Ackerman and Shaykin's rights were violated under RLUIPA.

A. The district court was not clearly erroneous in finding that Ackerman and Shaykin demonstrated that they had a sincerely held religious belief that was substantially burdened by MDOC's refusal to provide appropriate meals on The Sabbath and four primary Jewish holidays.

RLUIPA protects "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). An "exercise of religion" is "not limited to beliefs which are shared by all of the members of a religious sect." *Holt*, 574 U.S. at 362 (citing *Thomas v. Review Bd. of Indiana Employment Security Div.*, 50 U.S. 707, 715–716 (1981)). Under RLUIPA, "the 'exercise of religion' often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation." *Fox v. Washington*, 949 F.3d 270, 278 (6th Cir. 2020) (citing *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990)), superseded on other grounds by

statute). Such an exercise is "substantially burdened" under RLUIPA when the petitioner is compelled to "engage in conduct that seriously violates [his] religious beliefs." *Holt*, 574 U.S. at 361 (citing *Hobby Lobby*, 573 U.S. at 720).

The district court had substantial and competent evidence to support its finding that Ackerman and Shaykin sincerely believe that the code of Jewish law requires that they consume meat and dairy on the Sabbath and four other religious holidays, and that on Shavuot, the dairy takes the form of cheesecake. (Bench Op., R. 243, Page ID # 2511–23; 2526–30.) The district court had the opportunity to evaluate the credibility of the four witnesses at trial and compare the competing narratives, and its "account of the evidence is plausible in light of the record viewed in its entirety" and so is not clearly erroneous. *See Osborn*, 865 F.3d at 436. Similarly, the district court was justified in concluding that the evidence demonstrated that MDOC's vegan religious meal policy substantially burdens that belief by prohibiting Ackerman and Shaykin from keeping Kosher on the days that require meat and dairy consumption. (Bench Op., R. 243, Page ID # 2531–35.) They therefore have met their burden under RLUIPA.

1. Ackerman and Shaykin sincerely believe that they must consume meat and dairy on religious holidays.

A "properly developed record" on the sincerity issue "includ[es] testimony from the inmates" and "reference to religious texts." *Fox*, 949 F.3d at 277 (citing *Haight*, 763 F.3d at 565–66). Evidence of a sincerely held belief may include

testimony that the petitioners have adhered to the faith in question for many years, can cogently discuss the underlying religious literature or teachings, and explain the beliefs at trial. *See id*. Ultimately, this is a "credibility assessment." *Kay v. Bemis*, 500 F.3d 1214, 1219 (10th Cir. 2007). To that end, a sincerely held but idiosyncratic belief is still protected under RLUIPA. *See id*. ("Petitioner's belief is by no means idiosyncratic. . . . But even if it were, the protection of RLUIPA" do not require that a belief be universal among a religion's followers). Sincerity is distinct from reasonableness—a court may inquire into the sincerity of a belief, but not whether it is reasonable. *Fox*, 949 F.3d at 277. It is not the court's place "to say that their religious beliefs are mistaken or insubstantial." *Id*. (citing *Hobby Lobby*, 573 U.S. at 718).

The district court relied on plausible evidence from Ackerman and Shaykin supporting the sincerity of their belief in the requirement that they consume Kosher meat and dairy on proscribed days, and so was not clearly erroneous. *Osborn*, 865 F.3d at 436. Ackerman and Shaykin spoke about the specific types of food they grew up preparing and eating, and presented testimony that, even while incarcerated, they consumed those foods where possible, for example, when Jewish charitable organizations donated pastrami and cheesecake for inmates.[5] They also presented evidence that this is not a *pro forma* requirement, where a bite of a meat

[5] *Supra* § 1.

stick or a glass of milk will suffice. Instead, Ackerman and Shaykin sincerely believe that the teachings of their faith require that they consume a "joyful meal[,]" including, on Shavuot, cheesecake. (Trial Tr., R. 233, Page ID # 2353, 2393). This evidence was sufficient to support the district court's finding that the beliefs are sincerely held. (Bench Op., R. 243, Page ID # 2530.)

a. Ackerman and Shaykin do not need to purchase exclusively Kosher items to prove that their beliefs are sincere.

MDOC's primary basis to contest the district court's finding is some evidence that they occasionally purchased coffee and snacks from the commissary, instead of kosher items. (*See* App. Br., R. 17, Page # 28.) But Ackerman testified—and MDOC does not contest—that inmates are not permitted to bring items from the commissary into the mess hall for meals. (Trial Tr., R. 2333, Page ID # 2396). Even if Ackerman and Shaykin were to spend every penny they earn on Kosher meat and dairy, they would still not be able to fulfill the mandates of their religion, which requires a holiday *meal*, "not to have a meal and then supplement it later at some other time." (*Id*.) Moreover, Kosher cheesecake is not available at all, and both Ackerman and Shaykin testified is part of the "joyous meal" they are compelled by their religious beliefs to enjoy. (Trial Tr., R. 233, Page ID # 2358, 2380.) In short, there is nothing Ackerman and Shaykin can do to properly follow the mandates of their Jewish heritage and engage in religious exercise.

Even if they could have and chose not to purchase Kosher items, this does not render the district court's finding erroneous. A prisoner's sincerity is not undermined by failing to maintain scrupulous observance: "[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?" *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012); *see also*, *Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2012), as corrected (Feb. 20, 2013) (Holding that a "finding of sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time" and a prisoner who purchased non-Kosher items such as cookies, soft drinks, coffee, and candy could still be sincere in his beliefs). Indeed, the economic evidence that MDOC itself presented at trial shores up this finding, because it made clear that MDOC also ignores the straightforward economics presented at trial showing that no prisoner can actually afford to buy the available Kosher items. *See infra* § A.2.c. The district court was therefore justified by the record in holding that the prisoners' decision to purchase coffee and toiletries instead of Kosher items, especially given evidence that some of these purchases are used for barter. (Bench Op., R. 243, Page ID # 2530).

b. The district court was not clearly erroneous in holding that Ackerman and Shaykin sincerely believe that they must have cheesecake on Shavuot, regardless of whether they used MDOC's "magic words" during the trial.

Ackerman and Shaykin both testified extensively about their belief that consuming cheesecake, or "dairy mezonot," is a traditional practice that is central to their ability to observe Shavuot.[6] Nevertheless, MDOC contests whether the consumption of cheesecake is a sincere belief, or merely a favored custom. (App. Br., R. 17, Page # 29–35.) MDOC makes much of the fact that Shaykin testified that cheesecake is a "specific food that [he] is supposed to eat" on Shavuot, and that "traditionally" he ate cheesecake. (App. Br., R. 17, Page # 30–31, citing Trial Tr., R. 233, Page ID # 2353, 2357–58.) MDOC similarly attacks Ackerman for testifying that he has "traditionally celebrated [Shavuot] every day of [his] life" by eating cheesecake, rather than that it was *required*, and for his explanation that the Shulchan Aruch provides that, "Some have a custom to just eat some dairy mezonot, cake, and beverage after Kiddush, and then make a berachah acharonah." *Id*. at 32 (citing Trial Tr., R. 233, Page ID # 2376.) This testimony demonstrated explicitly that Ackerman and Shaykin believe the consumption of cheesecake on Shavuot is a tenet of the holiday celebration. But MDOC apparently believes that, in order to be sincerely held, a petitioner must use the specific magic words "required" or "religious belief." *See id*. at 31, 34, 35. RLUIPA has no such

[6] *Supra* § E.1.

requirement—this is a credibility evaluation, not a religious exam.[7] Even if there were, Ackerman and Shaykin *would actually meet it*. Shaykin clearly testified that his "religious beliefs would be better satisfied by cheesecake than by another dairy product," and that cheesecake was "required[.]" (Trial Tr., R. 233, Page ID # 2370.) Ackerman did the same. *Id*. at 2384 ("THE COURT: . . . Tell me, do you read that as requiring cheesecake to be eaten or consumed on the Shavuot? THE WITNESS: Yes, ma'am.").[8] When specifically asked by MDOC's counsel, Shaykin firmly denied that this was a family tradition or personal preference. *Id*. at 2369.

Ultimately, this line of argument ignores the distinction drawn by this Court between "sincerity" and "reasonableness," and MDOC begins to question the centrality and accuracy of this belief. *See New Doe Child #1 v. Congress of the United States*, 891 F.3d 578, 586 (6th Cir. 2018) ("Sincerity is distinct from reasonableness."). But as this Court has made clear, "RLUIPA protects a broad spectrum of sincerely held religious beliefs, including practices that non-adherents

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[7] *See Fox*, 949 F.3d at 277–78 (noting that this prong is satisfied through evidence of the petitioner's beliefs as they understand them, and does not inquire into the reasonableness of those beliefs or say that they are insubstantial); *Kay*, 500 F.3d at 1219 (holding that "[t]he inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment . . .").

[8] MDOC makes much of the fact that this second line of questioning comes from the district court, rather than counsel. But there is no rule that a court cannot ask its own questions of testifying witnesses during a bench trial.

might consider unorthodox, unreasonable or not 'central to' a recognized belief system." *Haight v. Thompson*, 763 F.3d at 565 (citing 42 U.S.C. § 2000cc-5(7)(A)). MDOC asks this Court "to stray into the realm of religious inquiry, an area into which we are forbidden to tread." *Moussazadeh*, 703 F.3d at 792. But the "sincerity inquiry" must be handled with a "light touch." *Id.*

LaFevers v. Saffle, a Tenth Circuit opinion, is instructive. There, the petitioners claimed that an Oklahoma prison's refusal to provide him with a vegetarian diet violated his religious beliefs and practices as a Seventh Day Adventist. 936 F. 2d 1116, 1118 (10th Cir. 1991). The district court concluded that the claims "were without merit because a vegetarian diet is recommended but not required by the Seventh Day Adventist Church." *Id*. The Tenth Circuit disagreed, based on the petitioner's evidence that "one-half of Seventh Day Adventists are vegetarians, and that a vegetarian diet is highly recommended by the Church." *Id*. at 1119. The court noted that "[d]iffering beliefs and practices are not uncommon among followers of a particular creed." *Id*. Instead, if the petitioner sincerely believed that he must maintain a vegetarian diet, that is sufficient, regardless of whether his church requires such a diet. *Id*. "[A]n individual's genuine and sincere belief in religious dietary practices warrants constitutional protection." *Id*. Ackerman and Shaykin have clearly and unwaveringly testified that they believe

cheesecake is a necessary part of their Shavuot observances, and therefore have demonstrated that the belief is sincerely held.

2. Nominal access to some Kosher items for purchase does not alleviate the burden MDOC placed on Ackerman and Shaykin's exercise of their religious beliefs.

MDOC's policy of serving only vegan Kosher meals leaves Ackerman and Shaykin in a position where they are unable to maintain the diet their religion commands. The district court's finding that MDOC has placed a substantial burden on the exercise of their religion was therefore not erroneous. (Bench Op., R. 243, Page ID # 2531.) Nominal access to some Kosher meat and dairy items through the commissary does not relieve this burden.

Exercise of religion is "substantially burdened" when a prison administration forces an inmate to "engage in conduct that seriously violates [his] religious beliefs." *Holt*, 574 U.S. at 361 (citing *Hobby Lobby*, 573 U.S. at 718). RLUIPA does not define "the term 'substantial burden.' Neither has the Supreme Court. But this Court has spoken clearly . . . : '[T]he Government substantially burdens an exercise of religion when it places substantial pressure on an adherent to modify his behavior and to violate his beliefs or effectively bars his sincere faith-based conduct.'" *Fox*, 949 F.3d at 278 (internal citations omitted).

Here, as argued in more detail in Section A.1, Ackerman and Shaykin are not able to eat Kosher meat and dairy as part of their mandated "joyful meal" under

MDOC policies. With some exceptions, Kosher meat and dairy is not available to inmates. Cheesecake for Shavuot is not accessible at all,[9] and while there are limited Kosher meat options in the commissary, the prices make it functionally impossible for prisoners to access those options in the necessary quantities. Even if the inmates were to spend a portion of their income buying Kosher meat for some of the holidays, they are unable to bring it into the mess hall and so cannot incorporate it into a meal. Ackerman and Shaykin's ability to fulfill the mandates of their religion is therefore entirely curbed, and the district court correctly held that their religious exercise was substantially burdened.

a. There is no case law supporting MDOC's argument that it need incur no affirmative burden to ensure religious rights are not violated.

MDOC attempts to rewrite Supreme Court case law to justify the burden it imposes on Ackerman and Shaykin's religious exercise, claiming that it has no obligation to pay for Kosher meals. (App. Br., R. 17, Page # 36–41). It points to *Cutter v. Wilkinson*, 544 U.S. 709, 725, n.13 (2005) and *Holt*, 574 U.S. 352, to argue that it need not pay for "devotional accessories." *Id*. But this conveniently skims over the fact that, without Kosher meals provided by MDOC, the prison has

[9] MDOC does not challenge that the denial of any access to cheesecake is a substantial burden. (App. Br., R. 17, Page ID # 26–49.) However, it is worth noting that the deprivation is driven entirely by MDOC policies, which prohibit donations of cheesecake from outside organizations but did not replace donations with another avenue to procure cheesecake. (*See* Trial Tr., R. 233, 2378–79; 2356–57.)

ensured that there is no way to access Kosher meat and dairy and fulfill the mandates of the religion.[10] Ackerman and Shaykin and the rest of the class cannot afford most Kosher meals, cannot buy cheesecake at all, and cannot eat what they do procure as part of a meal. Here, the question asked by RLUIPA, that is, was a religious practice substantially impaired, is answered with a clear and simple *yes*.

Moreover, *Holt* and *Cutter* do not say, as MDOC would imply, that a prison need never incur an additional cost to ensure that there is no burden on religious exercise. Indeed, they hardly even raise the question. In *Holt*, the prison system improperly prohibited the religiously mandated practice of wearing a beard. 574 U.S. at 352. At no point did the *Holt* court consider who should pay for the scissors to trim a beard or the beard oil to facilitate the trim. Meanwhile, in *Cutter*, the Supreme Court, concerned with an Establishment Clause challenge to RLUIPA, evaluated whether RLUIPA walked the line between accommodating religious practices without improperly advancing religion. *See* 544 U.S. at 717–18. MDOC hangs its hat on one short footnote noting that RLUIPA does not require a State to pay for devotional accessories. *Id*. at 720 n.8. But the Supreme Court made no analysis of a prison's affirmative obligations under RLUIPA, or how far they extend. Indeed, RLUIPA *explicitly* provides that a government may "incur

[10] It also disregards that MDOC *does* pay for religious meals, for any individual who sincerely believes that a vegan meal satisfies his or her religious mandates. (*See* Trial Tr., R. 233, Page ID # 2405) (Weissenborn testifying that a vegan meal is more expensive than the standard meal by about $0.12 per day).

expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3(c); *see also*, *New Doe Child*, 891 F.3d at 585 (noting that "the Government may be required to expend additional funds for [religious] accommodations"). These cases do not absolve MDOC of the burden imposed on Ackerman and Shaykin or stand for the proposition that MDOC cannot be required to pay for the religious accommodation.

MDOC is not the first prison entity to claim that there is no burden where they do not wholesale bar access to Kosher food, but merely force prisoners to purchase their own Kosher supplements. The Fifth Circuit, in *Moussazadeh*, confronted exactly the same argument. 703 F.3d 781. There, the Texas prison system implemented two types of Kosher units in different facilities. *Id*. at 786. The more common unit offered Kosher items in the commissary, while the other type had a separate Kosher kitchen. *Id*. The petitioner was housed at a facility with only the former, and was not eligible to transfer to the latter. *Id*. at 787. The Fifth Circuit held that where "an inmate is denied a generally available benefit because of his religious beliefs, a substantial burden is imposed on him." *Id*. at 794. Because other prisoners were able to receive religious meals free of charge but the petitioner had to pay for his meal, he was substantially burdened. *Id*.

The Fifth Circuit specifically rejected the prison system's argument that *Cutter* stood for the proposition that a prison need not "underwrit[e]" a religious

practice. *Id*. at 793. It held that *Cutter* was distinguishable, first, because it addressed an Establishment Clause challenged to RLUIPA and did not analyze a substantial burden question, and second, because there is a substantive difference between provision of religious items and religiously sufficient food. *Id*. The latter is essential benefit for all prisoners regardless of religion. *Id*.

The same is true here. Because Ackerman, Shaykin, and the other similarly situated prisoners are compelled to purchase their religious meals where they are available at all, they have been denied a generally available benefit, imposing a substantial burden on their religious exercise. The fact that remedying this may have a financial impact on MDOC does not change the burden imposed.

b. Even if Ackerman and Shaykin could access Kosher meat and dairy, they would be unable to consume it in a manner dictated by their religion.

Ackerman and Shaykin presented evidence that Kosher meat and dairy must, under Jewish law, be consumed as part of a meal, not as a snack or supplement. (Trial Tr., R. 233, Page ID # 2396.) MDOC responds that Ackerman and Shaykin "do not have a right to be served specific meals at mealtime." (App. Br., R. 17, Page # 43.) But a substantial burden analysis does not look to whether there is a second-best way of practicing religion when the preferred practice is prohibited. The Supreme Court and Sixth Circuit case law holding that a "second best option" does not alleviate a burden is extensive. *See Holt*, 574 U.S. at 361–62 (holding that

allowing a Muslim inmate to have a prayer rug and access to a religious advisor did not alleviate the substantial burden imposed by barring him from growing a beard); *Fox*, 949 F.3d at 280 (the ability to engage in group worship with other religions could not stand in for the petitioner's need to attend separatist group services); *Haight*, 763 F.3d at 559 (allowing Native American inmates to have fry bread at "a faith-based once-a-year powwow" did not justify prohibiting them from having corn pemmican and buffalo meat); *Cavin v. MDOC*, 927 F.3d at 459 (a prohibition on a Wiccan engaging in communal celebrations was not saved by the option to worship in his cell).

In *Fox v. Washington*, this Court evaluated whether a group of Christian inmates whose beliefs included separatist principles had been substantially burdened by MDOC's refusal to permit them to have group worship separate from other religions. 949 F.3d at 273–74. These inmates presented evidence that their religious beliefs placed a strong preference on group worship, and that worship with other religions violated their religious teachings. *Id*. at 278–80.[11] The MDOC nevertheless claimed that there was no burden, because the inmates were able to attend weekly worship services and observe holidays with members of other religions. *Id*. at 279. As MDOC put it, they were not "entirely prevented from

[11] For example, they could not worship with Jewish prisoners, because "the Jewish faith denies Jesus Christ." *Id*. at 280.

observing their seven holy days or communally meeting to worship. They just do not like the way they [sic] that MDOC allows them to do it." *Id*.

This Court disagreed. By pointing to other ways that the petitioners could worship, MDOC had proposed a "second-best option" that "reframes the nature of what [petitioner] seeks to do . . . ." *Id*. at 280 (citations omitted). But when "determining the substantiality of a burden, we cannot look to whether the RLUIPA claimant is able to engage in other forms of religious exercise." *Id*. (citations omitted).

Similarly, here, MDOC's argument is that Ackerman and Shaykin can eat some Kosher meat and dairy outside of the mess hall, and therefore there is no burden. But MDOC is not entitled to decide how and when a prisoner must actuate the mandates of its religion. This "second-best option" (setting aside that they cannot actually afford to purchase that meat and dairy, and that cheesecake is not available at all) does not alleviate the burden placed by MDOC.

MDOC also cites to cases holding that prisoners do not have the right to be served the food that they would *prefer*.[12] But here, the evidence is clear that the

[12] *Robinson v. Jackson*, 615 Fed. App'x 310, 314 (6th Cir. 2015) (Holding that prisoners "have a constitutional right to be served meals that do not violate their sincerely-held religious beliefs" but not a right to meals of their preference); *see also Sareini v. Burnett*, No. 08-13961-BC, 2011 U.S. Dist. LEXIS 34525, at *15 (E.D. Mich. Mar. 31, 2011) (Noting that the plaintiff's preference for Halal meat rather than vegetarian substitutes is not a consideration); *Robinson v. Crutchfield*, No. 1:14-cv-115, 2014 WL 934548 (S.D. Ohio Mar. 10, 2014) ("[F]ederal courts

request for Kosher meat and dairy is not based on a preference, but instead, on a religious mandate. As MDOC's own authority says, prisoners "have a constitutional right to be served meals that do not violate their sincerely-held religious beliefs . . . ." *Robinson*, 615 Fed. App'x at 314. Being served a vegan meal on The Sabbath, Rosh Hashanah, Yom Kippur, Shavuot, and Sukkot violates Ackerman and Shaykin's sincerely-held religious beliefs. In this specific scenario, the restriction on their ability to eat Kosher meat and dairy in a way that their religion mandates is a substantial burden.

c. Because Ackerman and Shaykin cannot afford the Kosher options that are available, they are effectively precluded from observing their sincerely held religious beliefs related to meat and dairy.

The trial record contained extensive evidence to support the district court's conclusion that Ackerman, Shaykin, and other members of the class do not have the financial resources to purchase the Kosher meat and dairy items that are available through the prison commissary. The MDOC's inmates make anywhere from a few cents to a few dollars a day, and this money goes toward purchasing toiletries, paying for over-the-counter medication and co-pays, buying postage and telephone minutes, and procuring coffee for both personal use and for use in the robust prison barter system. (Trial Tr., R. 233, Page ID # 2324–26, 2353.) Food

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have consistently recognized that a prohibition of halal meat does not amount to a substantial burden on religious exercise when vegetarian options are available.").

items, including Kosher meat and dairy is available. However, the high prices for Kosher items mean that, even if a prisoner were to only buy items for religious use, they would still be unable to cover the cost of meat and dairy for the 56 days where such observances are required. *See id*. at 2347.

As the district court noted, the facts of this case are very similar to *Jones v. Carter*, 915 F.3d 1147 (7th Cir 2019). There, a Muslim inmate who believed the Qur'an commanded adherents to eat meat was substantially burdened by prison implementation of a vegan meal. *Id*. at 1150–51. The prison administration argued that it would cost only a few dollars a day for the inmate to buy his own meat at the commissary. *Id*. at 1150. But the inmate also only earned a few dollars a day, at most, and while this was supplemented by money from friends and family, the inmate was unable to reliably afford commissary meals. *Id*. The Seventh Circuit held that the "state [wa]s in effect demanding that [the inmate], uniquely among all inmates, zero out his account and forgo purchasing other items such as hygiene products or over-the-counter medicine, if he want[ed] to avoid a diet that violate[d] his religious beliefs." *Id*. The prison imposed a substantial burden by forcing the "prisoner to give away his last dime so that his daily meals will not violate his religious practice . . . ." *Id*.

The *Jones* court was not alone in holding that a substantial burden exists where religious prisoners must pay for their own religious meals, particularly if

they must sacrifice a large portion of their income to do so. *See Moussazadeh*, 703 F.3d at 793–94 (holding it is a substantial burden to require an inmate to pay for a kosher meal because daily meals are a generally available benefit); *Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000) (rejecting the argument that the availability of food for purchase at the commissary alleviated the substantial burden on an indigent inmate); *Beerheide v. Suthers*, 286 F.3d 1179, 1188 (10th Cir. 2002) (calling a 25% co-payment program for kosher meals that would require inmates "to sacrifice nearly all of that income to maintain their religious duties" a "Hobson's choice rather than a true alternative"); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1317 (10th Cir. 2010) ("[A]ny ability to purchase is chimerical where a plaintiff is indigent . . . .").

The evidence here demonstrates that same "Hobson's choice." *Beerheide*, 286 F.3d at 1188. In total, it would cost Ackerman and Shaykin approximately $800 each annually to purchase a four-ounce serving of Kosher meat fifty-six times a year, to supplement the diet the prison offers on the identified religious holidays. (Trial Tr., R. 233, Page ID # 2347.) Purchasing powdered milk, the only Kosher dairy product available, would cost $200 annually. *Id*. Shaykin's prison wages totaled around $400 per year. *Id*. at 2353. He cannot manage to purchase Kosher meat and dairy to satisfy his religious requirements for even half of the 56 days a year where he is required to do so, even if he went without any other

necessities. Ackerman, who makes closer to $800 per year, could come closer to meeting his religious needs, but would be left with nothing with which to purchase other necessities, such as toiletries or over-the-counter medicine, or coffee for personal use or barter. *Id*. at 2324–26. Neither would be able to avail themselves of resources to stay in contact with friends and family outside of prison, since they would no longer be able to purchase envelopes and stamps or money for their telephone accounts. Other inmates in the class are similarly limited—Ackerman had one of the highest-paying jobs in the prison. *Id*. at 2326. No inmates have the means to buy Kosher meat and dairy, no matter what MDOC would like this Court to believe. (*See* App. Br., R. 17, Page # 28.) The district court was therefore correct to conclude that MDOC imposed a substantial burden on Ackerman and Shaykin's religious exercise by providing Kosher meat and dairy only through expensive commissary options.

B. MDOC has not met its burden of proving that it has a compelling interest in restricting Ackerman and Shaykin to vegan meals, nor that doing so is the least restrictive means of meeting that interest.

As the district court correctly held, Ackerman and Shaykin have met their burden of proving that they have a sincerely held religious belief that has been substantially burdened by MDOC policies. The burden therefore shifts to MDOC to prove that it has a compelling interest in the policy, and that the policy is the

least restrictive means of accomplishing that interest. 42 U.S.C. § 2000cc-1(a); *Cavin*, 927 F.3d at 458. MDOC can do neither.

Under RLUIPA, government action, and whether it meets the "compelling-interest and least-restrictive-means test," is subject to strict scrutiny. *Haight v. Thompson*, 763 F.3d 554, 566 (6th Cir. 2014). While courts should respect prison officials' expertise in running prisons and "evaluating the likely effects of altering prison rules," RLUIPA "does not permit . . . unquestioning deference" to the prison system's assertions about its own interests. *Holt*, 135 S. Ct. at 864. To that end, courts ought not to take a prison's assertions that there is a compelling interest at face value, but evaluate the assertion and the evidentiary support thereof. *See Haight*, 763 F.3d at 561 (a challenged prison policy did not serve "the government's compelling interest in safety and security at a maximum security prison" where the only evidentiary support was that there was no precedent for the requested accommodation and that it would set a precedent for other accommodations). For example, a court might look at how other prisons have dealt with a request to determine whether there was a security risk. *Id*. If the government proves that there is a compelling interest, it must then also present actual evidence that the prison has "considered and rejected alternatives more tailored to its" compelling interest to show that the government action is the least restrictive means to carry out that interest. *Id*. at 564.

1. MDOC has failed to prove it has a compelling interest advanced by the vegan religious meals.

The only interest MDOC alleges is advanced by its limitation on Kosher meals is cost reduction.[13] But the evidence is that the cost savings were *de minimis* and so MDOC has not carried its burden to show that this is a compelling interest under RLUIPA.

To evaluate whether the government has proven a compelling interest, a court must "'look beyond broadly formulated interests' and to 'scrutinize the asserted harm of granting specific exemptions to particular religious claimants'—in other words, to look to the marginal interest in enforcing the contraceptive mandate in these cases." *Hobby Lobby*, 573 U.S. at 726–27 (citing *O Centro,* 546 U.S. at 431)). RLUIPA specifically contemplates that the law "may require a

[13] MDOC also states that it has an interest in the orderly administration of prison meals. But as MDOC presents the interest, it is just a different way of saying cost reduction. "Orderly administration," as MDOC sees it, is that "increased food costs would result if all 28 religions were to request these special 'add-ons' to their vegan meals." (App. Br., R. 17, Page ID # 52.) This is just another way of saying that the Kosher meals requested would increase prison costs. Moreover, to the extent MDOC asks this Court to consider not only the increased cost of the specifically requested accommodation (Kosher meat and dairy 56 times a year) but also the cost of differentiated religious meals for all religions, it has gone beyond the scope of the compelling interest analysis. As the Supreme Court explained, the "compelling interest test is satisfied through application of the challenged law to the person—the particular claimant whose sincere exercise of religion is being substantially burdened." *Hobby Lobby*, 573 U.S. at 726 (citation omitted). By looking to the larger "orderly administration," rather than restricting itself to the harm of the specific exemption at issue, MDOC casts the alleged government interest too broadly. *See id*.

government to incur expenses in its own operations to avoid imposing a substantial burden." 42 U.S.C. § 2000cc–3(c). For example, where the cost savings highlighted are a small portion of a larger budget, the court should view with skepticism the claim that this is a compelling interest. *Ali v. Stephens*, 822 F.3d 776, 792 (5th Cir. 2016) (citing *Moussazadeh*, 703 F.3d at 795) (noting that while the inquiry is fact-intensive, savings of less than .05% are unlikely to be a compelling interest).

The facts presented at trial demonstrate that it would cost MDOC approximately $10,000 to provide a Kosher meat option on the 56 holidays identified. (Trial Tr., R. 233, Page ID # 2405). If MDOC were to provide cheesecake one day a year, the cost is unlikely to be dramatically outside that range, although no evidence was presented as to this cost. These numbers pale in comparison to the total MDOC food budget of $39 million annually. *Id*. at 2429. In other words, MDOC balks at spending .02% of its food budget on Kosher meals.

As for MDOC's claim that an exception for Jewish prisoners could lead to increased costs to provide specific meals for all 28 recognized religions, it is the exact type of "slippery slope" argument this Court rejected in *Haight*:

> This kind of argument, as the Chief Justice put it, represents "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436, 126 S. Ct. 1211, 163 L. Ed. 2d 1017 (2006). Just as a no-exceptions policy failed to work in *O Centro*, it

> fails to work here on this threadbare record. Keep in mind that the idea behind offering statutory protection for faith-based practices is to make accommodations—exceptions—for individuals who believe they must do certain things because their faith requires it. Rejecting accommodation requests on the ground that an exception to a general prison policy will make life difficult for prison wardens is a fine idea in the abstract and may well be a fine idea under *Smith*. But it has no place as a stand-alone justification under RLUIPA.

763 F.3d at 562. MDOC attempts to distinguish *Haight*, claiming that in *Haight*, the court was considering an "exception," whereas here, MDOC is concerned that an "add-on" for one religion will open the door for add-ons for all other religions. (App. Br., R. 17, Page # 52). But this is a logical fallacy: a distinction without a difference. An add-on is the same as an exception—both seek an accommodation for a specific sub-set of the population based on their religious preferences under RLUIPA. MDOC's claim that offering a Kosher meat and dairy accommodation starts it down a slippery slope does not create a compelling government interest in refusing to offer the accommodation.

2. Wholesale prohibition of Kosher meat and dairy is not the least restrictive means of achieving any government interest.

Even if cost reduction is, in this instance, a compelling government interest, wholesale restrictions of the kind MDOC put in place are not the least restrictive means of furthering that interest. As the district court correctly held, "'[t]he least-restrictive-means test is exceptionally demanding,' and it requires the government to 'show that it lacks other means of achieving its desired goal without imposing a

substantial burden on the exercise of religion by the objecting party.'" *Holt*, 574 U.S. at 364 (citing *Hobby Lobby*, 573 U.S. at 728). If there is a less restrictive means available that will promote the same goal, MDOC must use it. *Id*.

Here, there is evidence that a charitable organization previously provided at least some portion of the Kosher meat and dairy in the past. (Trial Tr., R. 233, Page ID # 2378–79; 2356–57.) MDOC hazards that donations may no longer be available, and that there was no evidence that the Aleph Institute still operates. (App. Br., R. 17, Page # 53.) There was also no evidence to the contrary. MDOC put a stop to the donations and MDOC has not provided any evidence that, if it were to east its own restrictions, the donations would not resume.[14] There is also no evidence in the record that the donor need visit the MDOC facilities to provide these donations, as MDOC implies. (App. Br., R. 17, Page # 53) ("[T]here are times when visitors are not allowed into MDOC facilities. This is currently the case due to the coronavirus pandemic. Thus . . . Ackerman and Shaykin's proposed alternative is not feasible . . . .). MDOC's arguments against allowing donations are red herrings. Additionally, if Aleph Institute provides meals for even some portion of the 56 holidays at issue, that will reduce the burden on the prison even further, making the government interest in cost reduction even less compelling.

[14] In fact, a quick Google search proves that the Aleph Institute is still providing services to prisoners.

For these reasons, MDOC has failed to show that its current method of cost reduction is the least restrictive, and the district court decision should be affirmed.

CONCLUSION

The district court accurately concluded that the vegan diet instituted to replace a Kosher meal in MDOC facilities violates Ackerman and Shaykin's religious rights under RLUIPA by failing to allow access to meat and dairy on the Sabbath and four additional holidays. For these reasons, Ackerman and Shaykin respectfully request that the Court enter an order affirming the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the length of the brief is 10,834 words and does not exceed 15,300 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(f).

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2020, I electronically filed the foregoing document through the court's electronic filing system, and that it has been served on all counsel of record through the court's electronic filing system.

By: /s/ Thomas J. Rheaume (P74422)

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record Entry	Description	Page ID Range
1	Compl.	1–15
65-2	MDOC PD 05.03.150	1010–15
90	Mot. to Am. Compl.	1195-99
90-1	First Am. Compl.	1201–06
96	Order re Mot. Summ. J.	1262-64
106	Reconsideration Order	1300
125	54(b) Mot.	1430–35
125-2	Affidavit of Rabbi Neustadt	1441
127	Mot. Summ. J.	1487-88
155	Stip.	1828
157	Order re Class. Cert.	1833
159	Order re 54(b) Mot.	1861–62
201	Stip. Order re Sub-Class Definition	2077–78
213	Settlement Agreement	2177
233	Trial. Tr.	2315–405
243	Bench Op.	2509–42
251	Judgment	2618–21
264	Not. of App.	2754