No. 19-16283

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

David Jonathan Thomas,

Plaintiff-Appellee,

v.

Isidro Baca, et al.,

Defendants-Appellants.

On Interlocutory Appeal from the
United States District Court for the District of Nevada
Case No. 13-cv-508, Hon. Robert C. Jones

BRIEF FOR APPELLEE DAVID JONATHAN THOMAS

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INTRODUCTION

Because "the right to exercise religious practices and beliefs does not terminate at the prison door," *McElyea v. Babbit*, 833 F.2d 196, 197 (9th Cir. 1987), courts have consistently found that prisoners have a right to meals that conform to their religious beliefs. *See, e.g.*, *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008); *McElyea*, 833 F.2d at 198. Time and again, courts have held that, no matter the (un)orthodoxy of their beliefs, *Shilling v. Crawford*, 377 F. App'x 702, 704 (9th Cir. 2010), a prisoner is entitled to basic nutrition that does not "require a believer to defile himself," *Ward v. Walsh*, 1 F.3d 873, 878 (9th Cir. 1993). This right is protected by both the First Amendment, *McElyea*, 833 F.2d at 197-98, and the Religious Land Use and Institutionalized Persons Act, which protects religious observance by prisoners, *Shakur*, 514 F.3d at 888-89.

For years, Appellee David Jonathan Thomas has asked Defendants to allow him to exercise this basic right with a simple request: a vegetarian-kosher diet, as his religion requires. Thomas provided Defendants with passages from the Old Testament that command him to eat vegetarian-kosher food and explained that his dietary requirements could be met by making the simple substitution of peanut-butter-and-jelly sandwiches or beans for almost every meal. Yet at every turn Defendants told Thomas that he could eat vegetarian or he could eat kosher, but not both.

Defendants insist that Thomas was never entitled to a vegetarian-kosher diet because Thomas's beliefs are not actually rooted in his religion. Though Defendants are wrong on that score, that is not a question this Court can address at this time. Defendants made this argument to the district court, and it held that the motivation

behind Thomas's beliefs is a disputed question of material fact, precluding summary judgment. And, as *Johnson v. Jones*, 515 U.S. 304, 313 (1995), made clear a quarter century ago, this Court's jurisdiction over interlocutory orders denying qualified immunity does not extend to factual disputes.

Paying lip service to the summary-judgment standard and this Court's limited jurisdiction, Defendants now draw factual inferences in their favor, without evidence, often on issues that they never presented to the district court. But Defendants cannot skirt the basic principles that govern this Court's appellate jurisdiction: The Court's jurisdiction is limited to purely legal issues, factual inferences must be drawn in the nonmovant's favor at summary judgment, and issues not presented to the district court are not grounds for appeal.

The Court should dismiss this appeal for lack of jurisdiction.

JURISDICTIONAL STATEMENT

As addressed more fully below in Section I of the Argument, this Court does not have jurisdiction because an interlocutory appeal from a denial of qualified immunity that turns on a dispute of material fact, as this one does, is not an appealable, final decision under 28 U.S.C. § 1291. *See Johnson v. Jones*, 515 U.S. 304, 313-18 (1995).

ISSUES PRESENTED

This Court has jurisdiction to hear denials of summary judgment based on qualified immunity only when they present "a dispute concerning an abstract issue of law." *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (cleaned up). But when an interlocutory appeal from a denial of qualified immunity turns on a dispute of material fact, this

Court does not have jurisdiction. *Johnson v. Jones*, 515 U.S. 304, 313-18 (1995). In denying summary judgment to Defendants, the Magistrate Judge found that "there are material issues of fact that should be resolved by the fact finder as to whether Plaintiff's requests for a 'vegetarian' kosher meal[] [are] based on sincerely held religious beliefs and whether those beliefs are properly rooted in his faith." ER 38 (Mag. R. & R. at 11).

I. The primary (and, in Thomas's view, dispositive) issue in this appeal is whether, at this stage of the case, this Court has jurisdiction to revisit the district court's conclusion that the record presents a genuine dispute of material fact.

II. If the Court holds that it has jurisdiction to consider this appeal, the second issue is whether—after viewing all factual disputes as if they had been resolved in Thomas's favor—it was clearly established at the time of the alleged illegalities that an inmate is entitled to meals conforming to his sincerely held religious beliefs, where the prison has not put forth any evidence showing that it would be incapable of providing the meals.

STANDARD OF REVIEW

As indicated, Appellee Thomas maintains that this Court should not engage in review because it lacks appellate jurisdiction. If the Court disagrees, the following standards apply: When this Court reviews an officer's appeal from a denial of summary judgment on qualified-immunity grounds, all facts must be viewed in the light most favorable to the nonmovant, *Tuuamalemalo v. Greene*, 946 F.3d 471, 476 (9th Cir. 2019), here, Thomas. Then, this Court's jurisdiction is limited to answering pure questions of law, which it reviews de novo. *See Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1067 (9th Cir. 2012).

STATEMENT OF THE CASE

I. Factual background

A. Thomas's religious beliefs

Appellee David Thomas was incarcerated at the Northern Nevada Correctional Center (NNCC) beginning in 2011. ER 30 (Mag. R. & R. at 3). Thomas has practiced Judaism since 1999. ER 808. As a member of the Yahudim Natzarin, a scripture-based sect of Judaism, ER 76, Thomas must follow scriptures over the teachings of rabbinical leaders if those teachings conflict with the Torah. ER 76, 408. Thomas reads, studies, and recites scriptures of the Torah and believes he is "mandated to observe [its] tenets." ER 808.

Thomas's religion requires him to maintain a vegetarian-kosher diet. *E.g.*, ER 77-78, 195; *see also* ER 256, 350. Thomas has required a vegetarian-kosher diet since he converted to Judaism in 1999. *See* ER 76. As Thomas puts it, Yahudim Natzarin requires a vegetarian diet "[b]ecause Yahweh [God] commands it!" ER 77-78.

In light of his religious beliefs, Thomas has been requesting vegetarian-kosher meals since before arriving at NNCC. ER 80. Thomas repeatedly explained to NNCC staff his religious reasons for requesting a vegetarian-kosher diet. For example, when filling out NNCC's Religious/Spiritual Belief Diet Accommodation Request and Registration form in early 2012, Thomas cited *Genesis* 1:29-30 to explain his dietary restrictions. ER 77, 256. The scripture reads: "And Elohim [God] said, 'See, I have given you every plant that yields seed which is on the face of all the earth, and every tree whose fruit yields seed, to you it is for food.'" ER 256. Thomas has used other Torah passages to explain

the reason for his vegetarian-kosher diet, such as: "I [Elohim/God] gave the green plants. But do not eat flesh with its life, its blood." ER 258.

Thomas considers his vegetarianism a part of his spiritual and religious development even though he was vegetarian before he converted to Judaism. ER 78. He did not like the taste of meat, and the undercooked meat he received while incarcerated in Nevada facilities caused him to become vegetarian in the first place. ER 195. Once he converted to Judaism, Thomas's vegetarianism was commanded by scripture, as explained above. ER 195, 258. Thomas explained that because he was already a vegetarian "before [he] started [his] journey," he "like[s] the religious/spiritual belief diet [he] is required to practice"—keeping vegetarian-kosher. ER 78.

For years, Thomas's religious-meal requests were denied by NNCC. *See, e.g.*, ER 80, 94, 102. For example, in 2011 when Thomas contacted NNCC's Chaplain James Stogner to ask if he would receive the Passover meals he had previously requested, Stogner replied that he would not. ER 350. Stogner (along with Warden Isidro Baca) was responsible for accommodating inmates' religious practices, *see* ER 488, yet he responded to Thomas's request as if there was nothing he could do, telling him "[t]he policies, procedures, and operations of this prison will not be changed in reaction to your personal preferences." ER 346.

B. The Common Fare diet

In 2012, the Nevada Department of Corrections (NDOC) replaced its kosher diet in all prisons with the "Common Fare" diet. ER 238. The Common Fare diet was intended to accommodate the needs of kosher inmates and those whose "sincere

religious/spiritual dietary needs cannot be met by the Master Menu" with a single, nutritionally adequate meal plan. ER 128. The Common Fare diet was "designed to meet the needs of all religious diets." ER 238. The diet fails to do so, however, as it contains meat and fish, banned in many religions represented at NNCC, including Buddhism, Hinduism, Krishna Conscious, Rastafarianism, Seventh Day Adventist, Siddha Yogi, and Sikh. ER 175-83. Inmates practicing those religions—unlike Thomas—could eat the vegetarian, non-Common Fare meals, which are not kosher. ER 94. To be kosher, meals must be prepared in a separate space with particular cooking utensils. ER 133-34. Common Fare meals are prepared in designated areas with dedicated equipment, ER 129, but are not vegetarian.

In early 2012, Thomas filled out the Religious/Spiritual Belief Diet Accommodation Request and Registration Form—used for inmates to sign up for the special diet—but he noted on the form that he needed a vegetarian version of the diet. ER 81. In later correspondence, Thomas reiterated that his acceptance of the Common Fare diet was contingent upon his receiving a vegetarian version. ER 102. In an informal grievance sent to NNCC staff, Thomas explained, "I got on the 'Common Fare' Diet under the assumption that it was 'Vegetarian.'" ER 102. Without the vegetarian accommodations to the Common Fare diet that Thomas requested, the meal plan did not comply with his religious need for a vegetarian-kosher diet.

C. Thomas's continued requests for a religiously appropriate diet

Beyond the Common Fare request form, Thomas has unfailingly requested religious-meal accommodations consistent with his beliefs (both for his daily diet and

for meals during the Jewish holiday of Passover). *E.g.*, ER 79-80, 341-44, 347-48. On one occasion in 2012, Thomas requested vegetarian-kosher meals. ER 101-02. Stogner's response again did not address Thomas's religious concerns; instead, he told Thomas that "to eat or not to eat is a choice!" ER 102. But for Thomas there "was not a choice if [he were] to follow the Torah!" ER 102.

Thomas did not want to "cause problems" or "sue anyone," but wanted only to be provided the meals his religion requires. ER 103. To that end, Thomas tried to help the prison provide him with a vegetarian-kosher meal plan. Rather than demand that NNCC purchase additional foods, he suggested that it use some of "the Kosher certified food products currently being purchased" for the Common Fare menu. ER 93. Nor did Thomas ask NNCC to create lavish meals for him. His original request included substituting a peanut-butter-and-jelly sandwich for almost all meat-based Common Fare meals. ER 85. For the others—meat-and-rice dishes—he asked that the meat simply be replaced with beans. ER 85.

And although NNCC staff repeatedly ignored Thomas's requests for simple substitutions, they have acknowledged that they are able to make substitutions—for example, at one point they assured Thomas that he was "supposed to get peanut butter in place of eggs," even though he did not. ER 379.

D. No alternative means for Thomas to receive vegetarian-kosher meals

Without the prison providing vegetarian-kosher meals, Thomas had no way of maintaining his faith-based diet. He could not afford to buy vegetarian-kosher food from the commissary or the coffee shop. ER 401. And in addition to making multiple

requests to NNCC staff directly, Thomas attempted to obtain food and religious items for Passover from an outside organization, Sabbath Keeper's Fellowship. ER 342. It is unclear if Thomas heard from the organization in time for Passover, if at all. *See* ER 344.

Thomas's efforts did not stop there. He and other inmates requesting vegetarian versions of religious diets met with NNCC staff in 2012, including Palmer, the NNCC warden at the time, and McDaniels, the Associate Director, to discuss the provision of their religious meals. ER 392-93. A rabbi attended the meeting as well, and told the inmates they had a right to a vegetarian-kosher diet. ER 90, 392. The inmates were assured they would be provided with a vegetarian-kosher diet, ER 393, but NNCC did not provide these meals as promised, *see* ER 90, 394. Instead, Assistant Warden Walsh wrote a memo to the meeting's participants stating that there would not be a combined vegetarian-kosher diet; rather, inmates were to choose between kosher or vegetarian diets. ER 394.

II. Procedural background

A. Thomas's claims

Thomas filed suit under 42 U.S.C. § 1983 in the District of Nevada against the following NNCC officials: NDOC Director James Cox, Warden Isidro Baca, Assistant Warden Lisa Walsh, Chaplain James Stogner, Admin Services Officer Kathryn Reynolds, and Food Services Manager Scott Kahler. ER 28 (Mag. R. & R. at 1). Thomas's first count claimed that Defendants violated his rights under the Free Exercise Clause of the First Amendment and under the Religious Land Use and

Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq.*, by refusing to provide him a vegetarian-kosher diet. ER 29 (Mag. R. & R. at 2). Thomas's second count, also brought under the Free Exercise Clause and RLUIPA, centered on NNCC's denial of proper meals during Passover. ER 29 (Mag. R. & R. at 2). Thomas's third count claimed Warden Baca was liable for failing to adequately train or supervise Admin Services Officer Reynolds, who had failed to respond properly to Thomas's requests for vegetarian-kosher meals. ER 29 (Mag. R. & R. at 2).

After the suit passed screening under the Prison Litigation Reform Act, 28 U.S.C. § 1915A(a), the district court dismissed the case on the ground that Thomas did not exhaust prison administrative remedies. ER 29 (Mag. R. & R. at 2). This Court reversed. ER 29 (Mag. R. & R. at 2); *Thomas v. Baca*, No. 15-16572 (9th Cir. Dec. 21, 2016).

B. Defendants' arguments below centered on whether Thomas's beliefs are sincerely held.

On remand, Defendants moved for summary judgment, arguing that Thomas's vegetarianism was the result of a personal, secular practice, not a sincerely held religious belief. Defendants asserted that they had not violated the First Amendment or RLUIPA because "the prison offered Thomas a nutritionally adequate kosher diet, but he refused it due to his personal preferences, and not due to any recognized religious need or belief." ER 50 (Defs.' Mot. S. J. at 2); 822-23 (Defs.' Reply in Supp. of Mot. S. J. at 1-2). Defendants also argued that they are protected by qualified immunity against Thomas's First Amendment claims because it was not clearly established that it was unconstitutional to refuse to modify an inmate's religious diet to align with his "personal or philosophical beliefs." ER 60-61 (Defs.' Mot. S. J. at 12-13). Defendants did not argue

that they are protected by qualified immunity against Thomas's RLUIPA claims. *See* ER 60-61 (Def's Mot. S. J. at 12-13).

In seeking summary judgment on Thomas's First Amendment and RLUIPA claims, Defendants argued only that Thomas's request was not religiously motivated. As observed by the Magistrate Judge, Defendants did not attempt to justify the denial of Thomas's request under the controlling First Amendment standard of *Turner v. Saffley*, 482 U.S. 78, 89-90 (1987), under which a court asks whether a denial of an inmate's religious request is reasonable under the Free Exercise Clause. *See* ER 38 (Mag. R. & R. at 11 n.4) ("Defendants have neither analyzed nor provided any argument or admissible evidence related to applicability of the *Turner* factors.").

Defendants did not present any reason why they could not offer Thomas a vegetarian-kosher meal. They did not make any arguments about the prison's penological interests in denying vegetarian-kosher meals or that Thomas was somehow able to worship in an alternative manner. And as to the prison's ability to provide Thomas a vegetarian-kosher diet, Defendants never contended it would cost too much, much less presented any evidence about how much Common Fare meals actually cost, let alone compared that cost to how much it would cost to make the simple substitutions Thomas had requested. *See, e.g.*, ER 49-58.

C. The Magistrate Judge's Report and Recommendation denies summary judgment to Defendants on the question whether Thomas was entitled to vegetarian-kosher meals.

The Magistrate Judge's Report and Recommendation characterized Defendants' opposition to Thomas's First Amendment and RLUIPA claims exactly as Defendants

had argued it: "whether Plaintiff's requested religious diet accommodation is based on a sincerely held religious belief as opposed to Plaintiff's personal preference." ER 44 (Mag. R. & R. at 17).

The Magistrate Judge denied summary judgment on the ground that "there are material issues of fact that should be resolved by the fact finder as to whether Plaintiff's requests for a 'vegetarian' kosher meal[] [are] based on sincerely held religious beliefs and whether those beliefs are properly rooted in his faith." ER 38 (Mag. R. & R. at 11).

Although the Magistrate Judge acknowledged that Thomas was a vegetarian before he converted to Judaism, she could not conclude that Thomas's requests for a vegetarian-kosher diet were unrelated to his sincere beliefs in Judaism. ER 37-38 (Mag. R. & R. at 10-11). To the contrary, the Magistrate Judge observed that Thomas "repeatedly asserted his request" for a vegetarian-kosher diet, and that on those repeated occasions Thomas explained that his belief was sincerely held. ER 38 (Mag. R. & R. at 11). She also emphasized that the scriptures Thomas cited supported his claim that his request for vegetarian-kosher meals was based on a sincerely held belief. ER 38 (Mag. R. & R. at 11).

The Magistrate Judge recommended that Defendants be granted summary judgment on Count II on the grounds that Thomas's complaint regarding an improper kosher meal was too sporadic and short-term to infringe on his rights and that the date on which the alleged violation occurred was not actually the date of Passover that year. ER 40-41 (Mag. R. & R. at 13-14). She recommended that Defendants be granted summary judgment on Count III as well, holding that Thomas did not present evidence that Warden Baca failed to properly train or supervise Reynolds. ER 43 (Mag. R. & R. at 16).

Turning to qualified immunity, the Magistrate Judge rejected Defendants' argument that for the law to be clearly established there must be a case in which the plaintiff's dietary request was based on personal, secular reasons. ER 44 (Mag. R. & R. at 17). The Magistrate Judge again pointed out that the nature of Thomas's belief was a dispute of material fact and highlighted that once that factual dispute is resolved in Thomas's favor, the question is whether it was clearly established that Thomas had the right to a diet required by his sincerely held religious beliefs. ER 44 (Mag. R. & R. at 17) She found that law to be clearly established under this Court's decision in *Shakur v. Schriro*, 514 F.3d 878 (9th Cir. 2008).

Defendants filed a partial objection to the Magistrate Judge's Report and Recommendation, taking issue with her findings on Count I and on qualified immunity. ER 1041, 1043 (Defs.' Partial Obj. to Mag. R. & R. at 2, 4). In objecting to the Count I findings, Defendants again argued that Thomas's vegetarianism was a personal, secular preference rather than a religious commitment. ER 1042 (Defs.' Partial Obj. to Mag. R. & R. at 3). They also argued that Thomas's belief was not substantially burdened because when they refused to provide him a vegetarian-kosher diet, he returned to eating the standard prison diet (although he did not). ER 1042 (Defs.' Partial Obj. to Mag. R. & R. at 3). Objecting to the qualified-immunity findings, Defendants argued that because Thomas's vegetarianism was a personal belief before it was a religious belief, it was not clearly established that the prison had to provide him a vegetarian diet. ER 1043-44 (Defs.' Partial Obj. to Mag. R. & R. at 4-5). Defendants' qualified-immunity argument included mentions of both the Free Exercise Clause and RLUIPA, but it failed to acknowledge that Defendants had never earlier raised a RLUIPA qualified-

immunity defense and the Magistrate Judge had never addressed it. *See* ER 1043-44 (Defs.' Partial Obj. to Mag. R. & R. at 4-5).

The district court adopted the Magistrate Judge's recommendation in full. ER 47-48 (Dist. Ct. Order at 1-2). Defendants then filed a notice of appeal, and seek to appeal the denial of summary judgment on Count I. Br. 6.

SUMMARY OF ARGUMENT

I. This Court lacks jurisdiction to hear the question presented by Defendants. Defendants ask this Court to overturn the district court's finding that there exists a genuine dispute of material fact—namely, whether Thomas's requests for vegetarian-kosher meals were motivated by his sincere religious beliefs or his personal preference. They then ask this Court to resolve the dispute in their favor and, after that, to find them entitled to qualified immunity on that basis.

But under *Johnson v. Jones*, 515 U.S. 304 (1995), this Court lacks jurisdiction to resolve material factual disputes regarding qualified immunity on appeal from a denial of summary judgment, as here. And Defendants may not paper over this unreviewable factual dispute by raising new issues—also grounded in contested facts—that they never presented to the district court. Finally, Defendants forfeited any argument that they are entitled to qualified immunity on Thomas's RLUIPA claims, and this Court lacks jurisdiction to hear arguments on the merits of those claims. This Court should dismiss this appeal.

II. If this Court disagrees and finds that it has jurisdiction, that jurisdiction is limited. The Court must construe the record facts in Thomas's favor, including that

Thomas's beliefs were sincerely held; there were no financial or logistical reasons for NNCC to withhold provision of these meals; and Thomas's sincere religious beliefs could not be met through the acceptance of another existing diet, his own financing, or an outside volunteer group. Then, based on those facts, the only question this Court would have jurisdiction to hear would be a pure question of qualified-immunity law: Whether it was clearly established that Thomas was entitled to vegetarian-kosher meals conforming to his sincerely held religious beliefs, where the meals he requested could be provided with existing food products at the facility, and where Defendants have not put forth any evidence showing that they would be incapable of providing the meals.

The answer to that question is straightforward: Defendants violated Thomas's clearly established rights and are not entitled to qualified immunity. Construing all facts and permissible inferences in Thomas's favor, Thomas's commitment to eating a vegetarian-kosher diet is religious, not providing it to him burdens his religious exercise, and no legitimate penological interest justifies this burden. These rights are clearly established because, in light of decades of caselaw, any reasonable officers in Defendants' shoes would have known that refusing Thomas's requests was prohibited by the First Amendment and by RLUIPA.

ARGUMENT

I. This Court does not have jurisdiction to answer the question presented by Defendants.

Defendants ask this Court to resolve the material factual dispute identified by the district court. This Court lacks jurisdiction to decide that factual question on an interlocutory appeal and therefore should dismiss this appeal.

A. This Court lacks jurisdiction to consider, on an interlocutory basis, the district court's fact-based denial of Defendants' motion for summary judgment.

1. Under 28 U.S.C. § 1291, courts of appeals generally have jurisdiction to review only final decisions of district courts, and orders issued prior to final judgment typically are not appealable. The collateral-order doctrine, however, permits appellate review under Section 1291 of a "small class" of orders that conclusively resolve an important question of law completely separate from the merits and that would be effectively unreviewable if appealed after final judgment. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). Orders denying summary judgment on qualified-immunity grounds fall within the collateral-order doctrine only when they present pure questions of law; for example, when the appellant challenges the district court's determination of the clearly established law at issue. *See Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 530-35 (1985)).

Conversely, the courts of appeals do not have jurisdiction to hear appeals challenging a lower court's denial of qualified immunity to the extent that the denial turns on a genuine dispute of material fact. *See Behrens*, 516 U.S. at 313 (citing *Johnson v. Jones*, 515 U.S. 304, 313-18 (1995)); *Schwenk v. Hartford*, 204 F.3d 1187, 1195 (9th Cir. 2000). In other words, this Court cannot hear appeals seeking to overturn a lower court's finding that a factual dispute exists and then resolve that dispute, *see Brittain v. Hansen*, 451 F.3d 982, 987 (9th Cir. 2006), even in the course of deciding whether the law was "clearly established," *see Ortiz v. Jordan*, 562 U.S. 180, 188, 190-91 (2011). That is because an appeal that turns, even in part, on resolving a factual dispute would force the court to become enmeshed in the merits of the case, "abandon[ing]" the collateral-order

doctrine's separateness requirement. *Johnson*, 515 U.S. at 315. Put the other way around, appellate jurisdiction in the qualified-immunity context hinges on whether the appeal presents a "purely legal issue." *See Ortiz*, 562 U.S. at 188.

2. The question Defendants raise in this appeal is a factual one that this Court lacks jurisdiction to answer: Was Thomas's request for vegetarian-kosher meals rooted in religious belief or in personal preference?

To explain: Defendants argued below that they were entitled to qualified immunity because "it is not clearly established that offering a prison inmate a kosher diet accommodation that is recognized as kosher but not 'vegetarian' *under the inmate's personal or philosophical beliefs* would violate that inmate's First Amendment rights." ER 61 (Defs.' Mot. S. J. at 13) (emphasis added). The district court rejected Defendants' argument on purely factual grounds, finding that whether Thomas's request for a religious-meal accommodation was based on his personal preference or his sincerely held religious beliefs was genuinely disputed. ER 37-38 (Mag. R. & R. at 10-11). The district court then denied Defendants' motion for summary judgment because their qualified-immunity argument turned on resolution of this factual dispute—that is, the court could not accept Defendants' argument without also accepting their (disputed) contention that Thomas's motivations were personal, not religious. ER 38, 44 (Mag. R. & R. at 11, 17). This Court lacks jurisdiction to revisit the district court's finding that the factual dispute exists. *See Lee v. Gregory*, 363 F.3d 931, 932 (9th Cir. 2004).

3. Before this Court, Defendants again argue that Thomas's beliefs were in fact rooted in personal preference, not religious belief. They say that Thomas refused the Common Fare diet "due to his personal preferences, and not due to any recognized

religious need or belief" (at 15); that Thomas "professed a secular desire for vegetarian food" (at 26); that on his Common Fare application, Thomas gave "several answers that evidenced secular reasons for his request" (at 14); and that the "record and Thomas' admissions present a true hybrid of motivations for wanting a vegetarian diet" (at 15). They maintain (at 26) that "the District Court seems to have considered the impetus of Thomas' requests [to be] a hybrid of personal and religious." They cite Thomas's purportedly "secular reasons" for his diet requests and urge this Court to "consider [the] record taken as a whole"—specifically, Defendants' own "record citations [that they] put forth [as] evidence"—and find that there are "special circumstances in this case that differentiate it from just a request to the religious review team for a 'Vegetarian Kosher' diet." Br. 14 & n.56.

Thomas disagrees (of course) with Defendants' understanding of the evidentiary record. But for present purposes, that doesn't matter. Defendants' insistence that this Court "consider [the] record taken as a whole," Br. 14, is just a request that this Court reweigh the evidence, ignore the district court's finding that a factual dispute exists, and find that Thomas's requests were motivated by secular concerns. That kind of factual-dispute resolution is precisely what decades of case law flatly prohibit on interlocutory appeal. *See, e.g.*, *Foster v. City of Indio*, 908 F.3d 1204, 1212-13 (9th Cir. 2018); *Brittain*, 451 F.3d at 987; *Pellegrino v. United States*, 73 F.3d 934, 936-37 (9th Cir. 1996).

Defendants' reliance (at 13-14) on *Scott v. Harris*, 550 U.S. 372 (2007), is misplaced. At summary judgment, the nonmovant's version of the facts "is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). *Scott* involved the rare case in which the nonmovant's version of the

facts was not in *genuine* dispute because it was "blatantly contradicted by the record, so that no reasonable jury could believe it," and because the purported dispute could be resolved with indisputable video footage. 550 U.S. at 380. Here, to the contrary, Defendants contend that *Scott* permits this Court to reconsider the record as a whole, but they do not point to any evidence that "blatantly" contradicts Thomas's facts; they simply ignore Thomas's facts and then draw inferences in their own favor. The Magistrate Judge correctly recognized that Thomas has consistently and quite plausibly maintained that his vegetarianism is required by his religion, raising a dispute of material fact that a factfinder will need to resolve. ER 44-45 (Mag. R. & R. at 17-18).

4. To circumvent the jurisdictional bar on reviewing fact-based denials of summary judgment, Defendants attempt to frame their appeal as a legal question, arguing that the district court "failed to undertake a particularized qualified immunity analysis," and that "the law did not clearly establish, under the particularized … facts and circumstances of this case" a violation of Thomas's First Amendment and RLUIPA rights. Br. 3, 4. But this Court does not exercise jurisdiction simply because a defendant frames an interlocutory appeal as a purely legal issue; rather, it scrutinizes the defendant's argument to ensure that the issue appealed truly *is* a legal issue, and not a question of fact disguised as a legal issue. *See George v. Morris*, 736 F.3d 829, 834-35 (9th Cir. 2013); *see also Johnson*, 515 U.S. at 318.

Defendants claim to challenge the level of particularity at which the district court applied the clearly-established-law analysis. *See* Br. 4, 30-31. But what Defendants actually argue is that the district court should have used the "record taken as a whole" to draw inferences in *their* favor, *see, e.g.*, *id.* at 14, 22-27, including that Thomas's requests

were motivated by secular desires, *see id.* at 13-15. Again, whether Thomas's requests were rooted in sincerely held religious beliefs is the central dispute of material fact, the dispute the Magistrate Judge properly viewed in Thomas's favor, and a question this Court lacks jurisdiction to resolve.

5. Even if this Court agrees with Defendants' (mis)characterization of their appeal as raising a legal question, Defendants have forfeited the only plausible legal issue that they could have raised. *See Maddox ex rel. D.M. v. City of Sandpoint*, 732 F. App'x 609, 610 (9th Cir. 2018). For this Court to have jurisdiction, appellants must "concede the facts" as posited by the plaintiff and then "seek judgment [only] on the law." *Adams v. Speers*, 473 F.3d 989, 991 (9th Cir. 2007) (cleaned up). And they must concede the facts and structure their qualified-immunity argument around those facts *in their opening brief*, because arguments not raised "clearly and distinctly" in the opening brief are forfeited. *See Avila v. L.A. Police Dep't*, 758 F.3d 1096, 1101 (9th Cir. 2014) (quoting *McKay v. Ingleson*, 558 F.3d 888, 891 n.5 (9th Cir. 2009)). Accordingly, when defendant-officials "fail[] to present the facts in a light most favorable to the plaintiff" in their appellate opening brief, they "have forfeited the legal argument that, based on those facts, they are entitled to qualified immunity." *Maddox*, 732 F. App'x at 610 (citing *Avila*, 758 F.3d at 1101) (cleaned up); *see also George*, 736 F.3d at 837.

That is the case here. Because Defendants failed in their opening brief to "advance[] an argument as to why the law is not clearly established that takes the facts in the light most favorable" to Thomas, *George*, 736 F.3d at 837, they have forfeited any argument that they are entitled to qualified immunity using those facts, *see Maddox*, 732 F. App'x at 610. Nor can Defendants rely on this Court to reframe their argument under the facts

favorable to Thomas, as this Court "will not do an appellant's work for it … by manufacturing its legal arguments." *George*, 736 F.3d at 837 (quotation mark omitted) (quoting *W. Radio Servs. Co. v. Qwest Corp.*, 678 F.3d 970, 979 (9th Cir. 2012)). True, in their opening brief, Defendants say that "on an interlocutory appeal, the facts most favorable to the non-movant are to be construed by this Court." Br. 13. But after paying lip service to this requirement, Defendants immediately pivot to their contention that this Court should instead rely on their own "record citations [that] are put forth [as] evidence" to conclude that Thomas's diet requests were motivated by secular considerations. Br. 13-14 & n.56; *see also* Br. 14 nn.57-60.

Defendants took a risk by making only an impermissible fact-based argument in their opening brief. Because they forfeited the only potential legal argument in support of qualified immunity that this Court would have jurisdiction to hear, this Court should dismiss the case for lack of appellate jurisdiction. *See Maddox*, 732 F. App'x at 610.

B. Defendants cannot make new arguments—also grounded in contested facts—that they never presented to the district court.

1. On an appeal from the denial of summary judgment, appellate courts do not view in the movant's favor the disputed material facts identified by the district court. *Adams v. Speers*, 473 F.3d 989, 990 (9th Cir. 2007). And when it comes to contested facts presented for the first time on appeal, and thus not "tested in any judicial process," "*still less* are [appellate courts] in a position to accept as true something asserted to be a fact by the appellant." *Id.* at 990-91 (emphasis added). Accordingly, this Court will not address a forfeited issue unless the issue is "purely one of law" and either "does not depend on the factual record below" or involves a "fully developed" record. *Armstrong*

v. Brown, 768 F.3d 975, 981 (9th Cir. 2014) (quoting *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012)). Put simply, this Court will not hear forfeited issues that turn on resolution of disputed facts. *See Honcharov v. Barr*, 924 F.3d 1293, 1295-96 (9th Cir. 2019).

Forfeiture of issues not raised below is important to "preserv[e] the structure of hierarchical court systems" by allowing appellate courts "to act as courts of 'review, not first view.'" *Honcharov*, 924 F.3d at 1296 (quoting *Maronyan v. Toyota Motor Sales, Inc.*, 658 F.3d 1038, 1043 n.4 (9th Cir. 2011)). District courts, not appellate courts, are the proper bodies to test new factual allegations at summary judgment; appellate courts lack the resources to sift the record and resolve factual issues on interlocutory review, a task that would "consume inordinate amounts of appellate time." *Johnson*, 515 U.S. at 316.

2. Defendants ask this Court to wade into other (supposed) factual disputes that they never presented to the district court, to find facts in their favor, and then to use those facts to find qualified immunity. *See* Br. 21-27.

The several new and untested—and contested—factual allegations that Defendants impermissibly assert in their favor, and ask this Court to use in its clearly-established-law analysis, include:

a. That "Thomas signed a form document acknowledging that he would comply with departmental guidelines for receiving a common fare diet." Br. 27. Not so. Defendants ignore that Thomas's acceptance of the Common Fare diet was explicitly conditioned on it being made vegetarian. *See* ER 189 (Pl's S. J. Opp. at 4); *see also* ER 76, 77, 79, 81. And, as Thomas contends, the form misled him into believing he would "be

getting [his] diet according to how [he] describe[d] it in the Registration Form," that is, a vegetarian-kosher diet. ER 189 (Pl.'s S. J. Opp. at 4).

b. That "Thomas had alternative means of exercising his right to religious practice." Br. 27. In particular, Defendants contend that "[t]here is no record that the commissary could not supplement [Thomas's diet], no excuse that the alternative meatless [menu] was improper, nor any attempts to engage outside religious organizations." Br. 24. Defendants are triply wrong. As the record shows, Thomas did "not have money as some do to buy food off of the Canteen and/or Coffee Shop." ER 401. Moreover, the Alternative Meatless menu does not comply with Thomas's sincerely held religious beliefs because it is not kosher. ER 93-94, 99. And on at least one occasion, Thomas *did* seek donations from an outside religious organization. *See* ER 342, 344.

c. That Thomas could combine the Alternative Meatless and Common Fare diets to meet his request for a religious accommodation. Br. 26. That is, at the least, disputed. Defendants' own Religious Dietary Accommodations Policy expressly notes that an inmate's consumption of food from an alternative menu, when the inmate is enrolled in the Common Fare program, can lead to suspension from the program. *See, e.g.*, ER 422-23, 426.

d. That Thomas requested an "individualized [meal] plan," which Defendants suggest would raise administrative and economic burdens for NDOC. Br. 25, 27. This new assertion, again, highlights what would have been (if Defendants had ever properly raised it) a contested factual dispute. Thomas attested that he *and* other inmates requested accommodations for vegetarian-kosher diets. *See* ER 392-93. Moreover, Thomas's evidence suggests that kosher meat products are more expensive than

vegetarian-kosher products due to many processing requirements for meat, suggesting that meeting his (and others') requests to substitute vegetarian options would actually *decrease* costs for the facility. *See* ER 782. A decrease in costs is particularly likely for Thomas because his requested substitutions were simple and cheap, and were foods the prison already had in stock: peanut-butter-and-jelly and beans. ER 85.

e. That Defendants "simply did not have" a vegetarian-kosher diet plan to offer Thomas and that they were serving a "legitimate governmental interest in running simplified food service rather than a full-scale restaurant." Br. 26 (quoting *Barnowski v. Hart*, 486 F.3d 112, 122 (5th Cir. 2007)). But Thomas contends that Defendants had available vegetarian-kosher foods that were already provided under the Common Fare menu and prepared in accordance with Jewish law, and he even provided a list of those foods to Defendants. ER 81, 85; *see also* ER 93. And Defendants themselves concede that some of the foods from the vegetarian menu could supplement the removal of meat from the Common Fare diet because NNCC offered "two different diets [that] when combined could meet [Thomas's] request." *See* Br. 26.

3. In sum, Defendants ask this Court to overturn the district court's denial of summary judgment based on facts that Defendants never presented to the district court, that often are not supported by record evidence, and that, in any event, if they had been properly argued below by Defendants, would be at odds with the evidence Thomas presented. Defendants have forfeited their novel—and wrong—factual arguments for qualified immunity.

C. Defendants have forfeited any argument that they are entitled to qualified immunity on Thomas's RLUIPA claims.

Although Defendants argue (at 4, 15, 23-24) that they are entitled to qualified immunity on Thomas's RLUIPA claims, this issue is beyond the scope of this appeal. In their renewed motion for summary judgment, Defendants never argued that they are entitled to qualified immunity on Thomas's RLUIPA claim. *See* ER 57-58, 60-61. Instead, they stated that RLUIPA provides only injunctive relief, ER 58 (citing *Wood v. Yordy*, 753 F.3d 899, 904 (9th Cir. 2014)), and then focused on the merits of Thomas's RLUIPA claim. Following Defendants' lead, neither the Magistrate Judge nor the district court addressed the possibility of qualified immunity for Thomas's RLUIPA claim. *See* ER 43-44 (Mag. R. & R. at 16-17); 47-48.

Defendants' only suggestion that they may be entitled to qualified immunity on Thomas's RLUIPA claim was made in passing in their objections to the Magistrate Judge's Report and Recommendation. ER 1043-44. Tacked on to their objections to the denial of qualified immunity for Thomas's First Amendment claim, Defendants simply asserted, without elaboration, that "it is not clearly established particularized to the facts and circumstances of this case" that they violated the "free exercise clause or RLUIPA." ER 1043. But because qualified immunity on the RLUIPA claim was never seriously argued or addressed below, this Court should not take up the issue. *See In re Mercury Interactive Corp. Secs. Litig.*, 618 F.3d 988, 992 (9th Cir. 2010) (applying "a general rule against entertaining arguments on appeal that were not presented or developed before the district court" subject to exceptions not relevant here (quoting *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1321 (9th Cir. 1998))).

Resolving the question that Defendants asked, the district court concluded that a dispute of material fact precluded summary judgment on the merits of Thomas's RLUIPA claim. That denial of summary judgment on the merits of the RLUIPA claim is a quintessential nonfinal order over which this Court lacks appellate jurisdiction. *See Mitchell v. Forsyth*, 472 U.S. 511, 528-30 (1985).

II. Defendants violated Thomas's clearly established rights when they denied him the diet his religion requires without any justification.

As just argued, this Court lacks jurisdiction and should dismiss this appeal. But assuming this Court does have jurisdiction, that jurisdiction would be quite limited. The Court must first view all facts and plausible inferences in favor of the nonmovant (Thomas) and then decide the purely legal question whether Defendants violated Thomas's clearly established rights. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014). When the facts are properly construed, Defendants plainly are not shielded by qualified immunity for their violations of Thomas's First Amendment and RLUIPA rights.

A. If this Court assumes jurisdiction, it must view all facts and inferences in Thomas's favor and only then determine if Defendants violated Thomas's clearly established rights.

1. Defendants have never denied that if the facts and permissible inferences are viewed in the light most favorable to Thomas, as they must be, their failure to provide Thomas with vegetarian-kosher meals would have been a clearly established violation of the First Amendment and RLUIPA. To make that argument, Defendants first would have had to accept the following facts:

First, Thomas's vegetarianism is central to his practice of Judaism, and he sincerely believes that his religion requires him to be vegetarian. *See, e.g.*, ER 77, 256. That Thomas's level of sincerity is disputed and material is the very reason the district court denied summary judgment. Thus, sincerity must be viewed in Thomas's favor. *See* ER 44-45 (Mag. R. & R. at 17-18).

Second, Thomas accepted the Common Fare diet on the condition that it was vegetarian. When he signed the Common Fare form, he added a note about needing a meal that was vegetarian, not just kosher, and he included an addendum menu. ER 81, 85. What's more, Thomas conveyed to facility staff that he signed off on the Common Fare diet under the assumption that he would receive a vegetarian modification to the diet, ER 102, and conveyed his need for a vegetarian-kosher meal to facility staff multiple times, *e.g.*, ER 79, 84, 90, 92-93, 105.

Third, Thomas could not rely on outside organizations for regular provision of his meals. The record shows that Thomas had previously contacted a religious organization for a Passover package well in advance of the holiday, but it is unclear whether he received the requested package in time (if ever). *See* ER 44, 342.

Fourth, Thomas cannot afford to pay for his own vegetarian-kosher food from the commissary or the coffee shop. ER 401.

Fifth, NNCC was able to provide Thomas vegetarian-kosher meals. Defendants have not presented evidence that they would be unable to provide a vegetarian-kosher meal for monetary reasons. Nor did Defendants face any logistical barriers to providing Thomas with vegetarian-kosher meals. They provide the Common Fare diet to kosher prisoners, *e.g.*, ER 238, and a vegetarian diet to accommodate others' religions, ER 175-

77, 179, 181-83. Thomas repeatedly suggested simple replacements to the Common Fare diet—using food the prison already served—to make it vegetarian. ER 81, 85, 93.

Sixth, NNCC never attempted to provide Thomas with a vegetarian-kosher daily meal plan. *See, e.g.*, ER 102.

Seventh, the vegetarian meals provided by the facility were not kosher. Kosher meals, whether they contain meat or not, must be prepared in a particular manner. Kosher meals require preparation in a separate kitchen, as NDOC itself recognizes given that its Common Fare diet guidelines require preparation of food using "designated Common Fare equipment and areas." ER 129; *see also* ER 93.

2. The question Defendants present to this Court mentions the "specific facts of the case," Br. 4, but Defendants do not accept any of the facts outlined above. Instead, they attempt "to define [this] case's 'context' in a manner that imports genuinely disputed factual propositions," rather than construe facts in the light most favorable to Thomas, the nonmovant, as required. *See Tolan*, 572 U.S. at 657.

Only after having "resolve[d] all factual disputes in favor of the plaintiff," *Cunningham v. City of Wenatchee*, 345 F.3d 802, 807 (9th Cir. 2003), could this Court answer the pure legal question whether Thomas's clearly established rights were violated. The only question that this Court could have jurisdiction to hear then is whether it was clearly established that Thomas was entitled to vegetarian-kosher meals conforming to his sincerely held religious beliefs, where the meals he requested could have been created by combining existing diets, and Defendants were capable of providing these meals. As shown in the next section, the answer to that question is plainly yes.

B. Defendants violated Thomas's clearly established rights, so they are not entitled to qualified immunity.

Government officials are liable for damages when "their conduct has violated a clearly established right"; otherwise, they are entitled to qualified immunity. *Tolan*, 572 U.S. at 654. In determining whether to afford an officer qualified immunity, courts apply a two-pronged test—whether (1) the officer's conduct violated a federal right, and (2) whether that right was clearly established. *Id.* at 655-56.

To determine whether a right that an officer violated was clearly established, the right must be specifically defined, taking into account the context of the case. *See Hardwick v. County of Orange*, 844 F.3d 1112, 1117 (9th Cir. 2017). This analysis asks whether "a reasonable official" in the context of the case would deduce from "pre-existing law" that "what he is doing violates" the right at issue. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Whether a right was clearly established is an objective inquiry. *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982). Officers' subjective beliefs are irrelevant. *See id.*; *Jones v. Williams*, 791 F.3d 1023, 1034 (9th Cir. 2015) (*Williams*).

Courts do not require the "very action in question" to have "previously been held unlawful" to conclude that a reasonable officer would have known it violated a right; they require only "that in the light of pre-existing law the unlawfulness must be apparent." *Anderson*, 483 U.S. at 640. Courts also do not define the right so specifically as to allow defendants to "define away all potential claims." *Nelson v. City of Davis*, 685 F.3d 867, 883-84 (9th Cir. 2012) (quotation mark omitted) (quoting *Kelley v. Borg*, 60 F.3d 664, 667 (9th Cir. 1995)). And finally, as explained earlier, courts must "take care not to define a case's 'context' in a manner that imports genuinely disputed factual

propositions," rather than construing facts in the light most favorable to the nonmovant. *Tolan*, 572 U.S. at 657.

1. Defendants are not entitled to qualified immunity on Thomas's free-exercise claim.

Under the Free Exercise Clause, individuals have the right to be free from substantial governmental burdens on their sincerely held religious beliefs and practices. *See Naoko Ohno v. Yuko Yasuma*, 723 F.3d 984, 1010 (9th Cir. 2013). "[G]overnment action places a substantial burden on an individual's right to free exercise of religion when it tends to coerce the individual to forego her sincerely held religious beliefs or to engage in conduct that violates those beliefs." *Williams*, 791 F.3d at 1033.

Prison inmates have free-exercise rights just like everyone else. *See Turner v. Saffley*, 482 U.S. 78, 84 (1987). That is because "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Id.* As a result, for a prisoner to state a claim under the Free Exercise Clause, he must first show that he sincerely holds beliefs rooted in religious views. *Walker v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015). If a prisoner's beliefs are both sincerely held and religious, prison officers may not substantially burden them unless the officer's actions are "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

i. Defendants violated Thomas's rights under the Free Exercise Clause.

a. Thomas has shown that eating vegetarian-kosher food is part of his religious practice by describing the religious nature of his commitments and citing scriptural passages as evidence that eating only vegetarian-kosher food is one of them. *See supra*

at 4-5. These beliefs are credible, especially when the facts are construed in the light most favorable to Thomas. *See Naoko Ohno*, 723 F.3d at 1011. And because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds," *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989), this Court should "give credence to [Thomas's] assertions of sincerely held religious beliefs," *see Naoko Ohno*, 723 F.3d at 1011.

b. The prison did not give Thomas vegetarian-kosher food between 2011 and 2013, forcing him to eat either Common Fare meals—certified kosher, but including meat—or a vegetarian diet that was not certified kosher. ER 394. This substantially burdened Thomas by forcing him to forgo his "sincerely held religious beliefs or to engage in conduct that violates those beliefs." *See Williams*, 791 F.3d at 1033.

Contrary to Defendants' suggestion (at 22), Thomas's (conditional) acceptance of the Common Fare diet does not mean that his religious beliefs were not substantially burdened. Thomas ate to survive, maintaining all the while that what he was eating did not comport with his religious beliefs. *See, e.g.*, ER 94. Denying Thomas vegetarian-kosher food forced on him the torturous choice to either go hungry or "defile himself by doing something that is completely forbidden by his religion." *See Williams*, 791 F.3d at 1033 (quotation mark omitted) (quoting *Ashelman v. Wawrzaszek*, 111 F.3d 674, 677 (9th Cir. 1997)). One prison official even explicitly told Thomas that "to eat or not to eat is a choice!" ER 102, as if to say, "if you don't like the food, feel free to starve." Thomas decided to eat food that was not vegetarian-kosher because "engag[ing] in conduct that violate[d] [his] beliefs" allowed him to stay alive, not because he wanted to relinquish his religious commitments. *See id.* at 1033.

c. Determining the reasonableness of the prison's substantial burden on Thomas's beliefs involves balancing four factors: (1) whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources"; and (4) "the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Turner v. Saffley*, 482 U.S. 78, 89-90 (1987) (cleaned up). Because *Turner* requires balancing the four factors, a prison's actions may fail scrutiny even if some factors weigh in its favor. *Ward v. Walsh*, 1 F.3d 873, 879 (9th Cir. 1993). Here, all factors weigh in Thomas's favor.

***Turner* Factor 1: Rational connection to legitimate penological interest.** To justify limiting an inmate's constitutional right, a prison must have a legitimate penological interest and demonstrate a rational connection between the interest and the prison's action. *See Shaw v. Murphy*, 532 U.S. 223, 229-30 (2001); *Turner*, 482 U.S. at 89. If the prison's action fails under this factor, "then the regulation fails, irrespective of whether the other factors tilt in its favor." *Shaw*, 532 U.S. at 229-30; *see also Hrdlicka v. Reniff*, 631 F.3d 1044, 1051 (9th Cir. 2011).

"*Turner* requires prison authorities to show more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks*, 548 U.S. 521, 535 (2006). So prison officials cannot escape liability from their action by citing an abstract legitimate penological interest if there is no valid, rational connection between it and their action, *Entler v. Gregoire*, 872 F.3d 1031, 1041 (9th Cir. 2017), or if the

connection is too weak, *see Brodheim v. Cry*, 584 F.3d 1262, 1272 (9th Cir. 2009) (citing *Bradley v. Hall*, 64 F.3d 1276, 1281 (9th Cir. 1995)). And "bare and unsupported assertion[s] in their motion for summary judgment and their brief on appeal" are insufficient; instead, "[a]n evidentiary showing is required." *See Walker v. Sumner*, 917 F.2d 382, 386-87 (9th Cir. 1990).

Defendants did not "point to specific facts in the record that could lead a rational trier of fact to find" a connection between denying Thomas vegetarian-kosher food and a legitimate penological interest. *See Beard*, 548 U.S. at 535 (quotation marks and citation omitted). In fact, Defendants did not present below *any* evidence that denying Thomas vegetarian-kosher food is connected to penological concerns. Although a prison can have legitimate penological interests in conserving limited resources and running a simplified food service, *Sefeldeen v. Alameida*, 238 F. App'x 204, 206 (9th Cir. 2007); *Ashelman*, 111 F.3d at 677, Defendants must show that specific interests support the action at issue, *see Entler*, 872 F.3d at 1041. Defendants simply conclude that an individualized meal plan would increase costs and inefficiency, Br. 25-26, but they point to no evidence in the district-court record that providing for Thomas would do so—because there is none.

Thomas, on the other hand, offered evidence to show that there was no connection between denying him vegetarian-kosher food and increased cost and inefficiency. For example, as noted above (at 22-23), Thomas submitted evidence that serving him vegetarian-kosher food would actually be cheaper than serving him kosher meat, *see* ER 782, and that NNCC already had vegetarian-kosher foods provided under the Common Fare menu that could be prepared in accordance with Jewish law, ER 81.

Defendants' inability to show any actual connection to a penological interest means that they fail under the first *Turner* factor. The analysis could stop here, but Defendants fail under the other *Turner* factors as well.

***Turner* Factor 2: Availability of alternative means of exercising the right.** A prison can sometimes justify regulation of a specific religious practice so long as an inmate has some means of exercising his religious beliefs. *See Turner*, 482 U.S. at 90. The prison has more leeway to limit a right that can be vindicated in many ways (like expression), but less where the prisoner has a right "to be free from a *particular* wrong." *See Michenfelder v. Sumner*, 860 F.2d 328, 331 n.1 (9th Cir. 1988) (emphasis added).

But by denying Thomas vegetarian-kosher food, NNCC staff left Thomas no alternative means to exercise his right. For Thomas, eating vegetarian-kosher food is more than merely "a religious practice which is a positive expression of belief." *Ward*, 1 F.3d at 878. It is "a religious commandment which [Thomas] may not violate at peril of his soul." *Id.*; *see also Henderson v. Terhune*, 379 F.3d 709, 714 (9th Cir. 2004); *Ashelman*, 111 F.3d at 677.

And, despite Defendants' (incorrect) assertion that Thomas could buy his own food, requiring an inmate to pay extra to exercise a constitutional right is not a true alternative means of exercising it. *See Morrison v. Hall*, 261 F.3d 896, 904 (9th Cir. 2001). Rather it "ignores the practical financial realities that many prisoners face." *Id.* at 904 n.6.

***Turner* Factor 3: Impact of accommodation on prison, staff, and other inmates.** An inmate's religious needs can sometimes be limited if they generate extra expense for the prison or create an extra burden on prison guards. *Sefeldeen*, 238 F. App'x at 206-07; *Henderson*, 379 F.3d at 714.

Apart from the bare assertions that giving Thomas vegetarian-kosher food would be burdensome and expensive—which, as discussed above (at 22-23) are contradicted by the record and were never raised below—Defendants do not describe any negative impact that accommodating Thomas's diet would have on the institution, staff, or inmates. The closest that Defendants come is to suggest that accommodating Thomas's diet may spur unrest over perceived special treatment. Br. 25. But the effect of perceived favoritism on other inmates is no reason to deny a religious accommodation. *Shakur*, 514 F.3d at 886-87.

***Turner* Factor 4: Availability of alternatives for prison.** A prison cannot justify burdening an inmate's religious beliefs if easy alternatives can achieve the prison's penological goals without limiting the prisoner's right. *Turner*, 482 U.S. at 90. The prison's action does not have to be the least-restrictive means, but if the prison has "an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Id.* at 90-91. Accommodating other dietary requirements is evidence that there are easy dietary accommodations for the prison to provide a particular inmate. *See Shakur*, 514 F.3d at 887; *Ashelman*, 111 F.3d at 678.

As discussed above (at 23), easy alternatives were available to NNCC that would have allowed Thomas to practice his faith and would not have jeopardized NNCC's penological interests. As Thomas repeatedly pointed out to prison officials, NNCC already has the ability to provide kosher food, as well as foods already used in other prison meal plans that would suffice for Thomas's needs. ER 81, 85. In *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997), this exact alternative cut in the plaintiff's

favor. There, this Court ruled that the ability to create kosher meals out of foods the prison already had was an easy alternative to denying Ashelman kosher food. *Id.* at 678. The same easy alternative is present here.

ii. Thomas's right to vegetarian-kosher food was clearly established.

Any reasonable prison official between 2011-2013 would have been on notice that Thomas had a constitutional right to vegetarian-kosher food consistent with his sincerely held religious beliefs. A reasonable prison official would also understand that no legitimate penological interests justified denying Thomas this dietary accommodation. Because any reasonable prison official would have known that Thomas's dietary request had to be granted, Thomas's right was clearly established.

This Court held in *Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008), that a prisoner had a right under the Free Exercise Clause to a kosher diet when a vegetarian diet caused health problems that kept him from regular prayer. There, a Muslim prisoner was receiving vegetarian meals to comply with halal standards. *Id.* at 882. But the vegetarian food upset his stomach, which interfered with the state of "purity and cleanliness" he said he needed for Muslim prayer. *Id.* This Court took as given—as it must here—the sincerity of his belief and thus held that refusing to provide a meat-based kosher diet violated the Free Exercise Clause if it was not rationally related to a legitimate penological interest. *Id.* at 885. In light of that holding, objectively reasonable officers at NNCC would have known that Thomas has a right to a vegetarian-kosher diet that aligns with his sincere religious beliefs.

Shakur did not break new ground. Decades earlier, in *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987), this Court established that inmates "have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion." McElyea's prison chaplain doubted the sincerity of McElyea's religious commitment to kosher food because he heard that McElyea previously ate nonkosher food. *Id.* This Court held that mere suspicion of insincerity does not overcome an inmate's professed need for kosher food. *See id.* at 198-99. Like McElyea's prison chaplain, Defendants now argue that Thomas's prior diet suggests that his commitment to eating vegetarian-kosher food is not a sincerely held religious belief. But as in *McElyea*, vague suspicion of insincerity is all they have. A reasonable NNCC officer would have known that to justify denying Thomas kosher food would demand much more than doubts about the sincerity of his religious beliefs.

In light of *Shakur* and *McElyea*, any objectively reasonable NNCC officer would conclude that the Free Exercise Clause protects Thomas' religious commitment to eating vegetarian-kosher food. *See Turner*, 482 U.S. at 89-90; *Shakur*, 514 F.3d at 885; *McElyea*, 833 F.2d at 198. And it is also clear that, as described above (at 31-35), the record shows no connection between denying Thomas vegetarian-kosher food and any legitimate penological interest. *See Turner*, 482 U.S. at 89-90. Therefore, an objectively reasonable NNCC officer would conclude that Thomas had to be provided vegetarian-kosher food, and, thus, Thomas's right to this diet was clearly established at the time.

2. Defendants are not entitled to qualified immunity on Thomas's RLUIPA claim.

As already explained (at 24-25), Defendants have forfeited any argument that they are entitled to qualified immunity under RLUIPA by failing to make that argument in the district court. If this Court disagrees and reaches the qualified-immunity issue, Defendants are not entitled to qualified immunity because (1) they violated Thomas's rights and (2) his rights were clearly established when they were violated.

i. Defendants violated Thomas's rights under RLUIPA.

To make out a prima facie case under RLUIPA, the plaintiff must show that his sincerely held religious belief was substantially burdened. 42 U.S.C. § 2000cc-1; *e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989, 994-95 (9th Cir. 2005). The burden of persuasion then shifts to the defendants, who must show that the substantial burden they have imposed on the plaintiff's religious exercise is justified because it furthers a compelling governmental interest and they have employed the least-restrictive means of serving that interest. *Warsoldier*, 418 F.3d at 995.

As already shown (at 29-31), Thomas's sincerely held religious belief was substantially burdened, so Thomas has made out his affirmative case under RLUIPA.

Defendants did not even attempt to meet their burden. To show that their actions served a compelling governmental interest, Defendants must do more than "generally refer" to a compelling interest. *Debarr v. Clark*, No. 12-cv-39, 2017 WL 2218311, at *11 (D. Nev. May 19, 2017). And they must show with evidence that their actions would actually serve the stated interest. *See Nance v. Miser*, 700 F. App'x 629, 633 (9th Cir. 2017). Defendants have not breathed a word about any compelling interest, either in their

opening brief to this Court or before the district court. Nor did they submit any evidence below from which a court could even infer that their actions advanced a compelling interest. The closest they come is the conclusory assertion in this Court that the basis for not providing Thomas a vegetarian-kosher diet was "the lack of that diet existing in NDOC," Br. 29, a statement contradicted by the record and plausible inferences drawn in Thomas's favor, *see supra* at 23; ER 81.

Nor can Defendants show that they served a compelling interest by the least-restrictive means. To show that they have employed the least-restrictive means, "[p]rison officials must show that they 'actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'" *Greene v. Solano Cty. Jail*, 513 F.3d 982, 990 (9th Cir. 2008) (quoting *Warsoldier*, 418 F.3d at 999). A prison's failure to seek out alternatives is dispositive in the plaintiff's favor. *See Davis v. Powell*, 901 F. Supp. 2d 1196, 1231-32 (S.D. Cal. 2012); *see also Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008). A prison's refusal to consider reasonable alternatives suggested by the plaintiff is also dispositive. *See Debarr*, 2017 WL 2218311, at *11. Defendants did not consider a single alternative to denying Thomas vegetarian-kosher meals, even Thomas's proposed solution of substituting Common Fare meat entrees with simple vegetarian alternatives (peanut-butter-and-jelly and beans) that they already had on hand. *See supra* at 7, 10; ER 85.

ii. Thomas's right to vegetarian-kosher food was clearly established.

Thomas's right to a diet that conforms to his religious beliefs has long been clearly established. This Court, other circuit courts, and district courts in this circuit have found

time and again that prisoners have a clear right under RLUIPA to be provided food that meets the requirements of their religion.

A prisoner's right under the First Amendment to "be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion" long predates RLUIPA. *See McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987). And RLUIPA was enacted in 2000 to ensure that prisoners' religious rights are protected *beyond* what the First Amendment demands. *See Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). It is no surprise, then, that courts have consistently found that, under RLUIPA, "if Plaintiff establishes that his need for his requested religious diet is a sincerely held religious belief, denial of the diet is a substantial burden to his religious practice." *Dean v. Corr. Corp. of Am.*, 108 F. Supp. 3d 702, 712 (D. Ariz. 2014); *see, e.g.*, *Shakur*, 514 F.3d at 888-91; *Vincent v. Stewart*, 757 F. App'x 578, 580-81 (9th Cir. 2018); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314-15 (10th Cir. 2010); *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007). As the Magistrate Judge recognized, this Court reaffirmed a prisoner's right to a meal that fulfills the dietary demands of his religion only a few years before Defendants denied Thomas's requests for vegetarian-kosher meals. *See Shakur*, 514 F.3d at 888-91; ER 44-45 (Mag. R. & R. at 17-18).

This Court has already found that the right under RLUIPA to religiously required meals has been clearly established for qualified-immunity purposes. This Court upheld a similar denial of summary judgment in 2010, holding that prison officials were not entitled to qualified immunity because the plaintiff's "rights under RLUIPA were clearly established in late 2005 and 2006 when defendants denied his requests for a vegetarian

diet based on his religious beliefs." *Grimes v. Tilton*, 384 F. App'x 603, 603 (9th Cir. 2010). Defendants are not entitled to qualified immunity.

CONCLUSION

This Court should dismiss this case for lack of jurisdiction. If the Court disagrees, and then overlooks Defendants' forfeiture, it may answer only the purely legal question that Defendants have failed to raise: After viewing all of the facts and permissible inferences in Thomas's favor, did Defendants violate Thomas's clearly established Free Exercise and RLUIPA rights? Because the answer to that question is plainly yes, this Court should affirm and remand the case for further proceedings on the merits.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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