IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 05-cv-01978 -WYD-MJW

TIMOTHY SHELINE,

Plaintiff,

v.

JOE ORTIZ, in his official capacity as Executive Director of Colorado Department of Corrections,

Defendant.

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

On November 21, 2005, Defendant Joe Ortiz, Executive Director of the Colorado Department of Corrections, filed a Motion to Dismiss First Amended Complaint, along with a Memorandum Brief. Plaintiff Timothy Sheline provides the following response.

INTRODUCTION

On October 11, 2005, Mr. Sheline brought this lawsuit to challenge the diet-revocation provisions of Administrative Regulation 1550-06 (AR 1550-06), both on their face and as they were applied to revoke his kosher diet in April of 2005.

Invoking the Religious Land Use and Institutionalized Persons Act (RLUIPA) and the Free Exercise Clause of the First Amendment, Mr. Sheline challenges the "two strike" rule of AR 1550-06, which requires the Colorado Department of Corrections (DOC) to revoke a prisoner's religious diet automatically, for a full year, when a prisoner

has been accused of a second violation of the Religious Diet Participation Agreement (RDPA). In challenging the regulation as an unjustifiable burden on his religious practice, Mr. Sheline disputes the low "two strike" threshold and the year-long duration of the revocation period. He also challenges the DOC's legal authority to rely on the specific "strikes" listed in the RDPA as conclusive proof that a prisoner's professed religious belief is insincere.

In his Due Process claim, Mr. Sheline challenges the DOC's authority to impose a "strike," or to revoke his religious diet, without prior notice and opportunity to be heard. Finally, Mr. Sheline's Equal Protection claim challenges the DOC's authority to revoke his religious diet when he is accused of minor violations of dining hall rules, accusations that are accompanied by less severe sanctions as well as procedural due process in the case of similarly-situated prisoners who do not receive religious diets.

When the initial Complaint was filed, counsel for the Defendant was notified that an immediate motion for temporary restraining order would be filed if Mr. Sheline's kosher diet were not restored within two days. The next day, counsel for the Defendant responded that Mr. Sheline's kosher diet had been reinstated. Thus, a request for temporary injunction became unnecessary. Mr. Sheline's claims for declaratory and permanent injunctive relief, however, remain viable.

ARGUMENT

I. NEITHER DEFENDANT'S MODIFICATION OF THE CHALLENGED REGULATION, NOR HIS RESTORATION OF THE PLAINTIFF'S KOSHER DIET, MAKES THIS CASE MOOT

Defendant asserts that he has now modified the RDPA and restored Mr. Sheline's kosher diet, and he contends that this case is therefore moot. Defendant is incorrect, for

three reasons. First, it is a well-settled principle that a defendant's claim to have voluntarily ceased his allegedly unlawful conduct does not make a case moot. Second, the modifications to the RDPA repair only a small portion of the statutory and constitutional defects that prompt Mr. Sheline's claims. The major objectionable features of AR 1550-06 and the RDPA remain in place. The DOC continues to maintain that it can revoke Mr. Sheline's kosher diet, without prior notice or opportunity to be heard, based on accusations that do not implicate the sincerity or insincerity of Mr. Sheline's religious beliefs. Third, even if the Defendant's post-lawsuit actions could somehow be deemed to moot Mr. Sheline's claims, they are subject to an exception to the mootness doctrine, because the challenged conduct is capable of repetition yet evading review.

A. The Defendant's Claim to Have Voluntarily Modified the Challenged Regulation Does Not Make This Case Moot

It is well-settled that a defendant's voluntary cessation of a challenged practice does not moot a case. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000); *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000). If a defendant could moot a case merely by stopping the challenged activity, then a defendant would simply be "free to return to his old ways," *United States v. W.T.Grant Co.*, 345 U.S. 629, 632 (1953), an outcome courts seek to avoid. For example, in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283 (1982), the plaintiff challenged a licensing ordinance that instructed the Chief of Police to consider whether an applicant had "connections with criminal elements." *Id.* at 288. The district court and the court of appeals held that the quoted provision was unconstitutionally vague. *Id*. While the case was on its way to the Supreme Court, the City of Mesquite amended the ordinance and removed the challenged phrase. Nevertheless, the Supreme Court held that the case was

not moot, because "the city's repeal of the objectionable language would not preclude it from reenacting precisely the same provision if the District Court's judgment were vacated." *Id*. at 289. Similarly, in this case, the Defendant's post-lawsuit actions do not preclude the DOC from reinstating the full text of the RDPA that was in place when the Complaint was first filed. Nor does the restoration of Mr. Sheline's kosher diet prevent the DOC from revoking it again, without notice or opportunity to be heard, on the basis of accusations that do not implicate the sincerity of Mr. Sheline's religious beliefs.

A defendant's unilateral decision to modify or change a challenged regulation can render a case moot only if the defendant meets a very strict two-part evidentiary burden. First, "[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth* , 528 U.S. at 189, quoting *United States v. Concentrated Phosphate Export Ass'n*., 393 U.S. 199, 203 (1968). The "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Id.* Second, the defendant must demonstrate that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Defendant has not met either of these tests.

1. Defendant has not met his heavy burden of demonstrating that it is absolutely clear that the challenged practices will not recur

The Defendant has not met his "heavy burden" of demonstrating that the challenged practice will not recur. To meet his burden, Defendant must make a factual showing, *see Friends of the Earth*, 528 U.S. at 193-94, but Defendant has made no effort to present facts. Defendant has done nothing more than provide the Court with a copy of

what he asserts is a newly-revised Religious Diet Participation Agreement.[1] It is Defendant's *burden* to demonstrate that he has resolved the controversy by permanently abandoning the challenged provisions of the RDPA. Defendant has not even come close. The Defendant has not provided any evidence that the revisions to the RDPA are permanent.[2] Nor has the Defendant demonstrated that the changes resolve the controversy. On the contrary, under the revised RDPA, the DOC continues to maintain that it can revoke Mr. Sheline's kosher diet, without procedural due process, for "strikes" that bear no reasonable relationship to the sincerity or insincerity of Mr. Sheline's religious beliefs. Thus, the revised RDPA "is sufficiently similar to the repealed ordinance that it is permissible to say that the challenged conduct continues." *Northeastern Florida Chapter Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993).

2. Defendant has not demonstrated that he has completely and irrevocably eradicated the effects of the challenged practices

Although Defendant asserts that Mr. Sheline's second "strike" has now been "expunged," Defendant's Brief at 6, 11, the Defendant also states that Mr. Sheline's first "strike" remains in place. *Id*. That first strike represents a "continuing present adverse effect" of the practices challenged in this lawsuit. *O'Shea v. Littleton*, 414 U.S. 488, 495-

[1] Indeed, Defendant has not presented an affidavit or any evidentiary material that demonstrates that the revised RDPA applies to Mr. Sheline, who was forced to sign the earlier version. The document attached as Exhibit 3 to Defendant's Brief does not state that the revised RDPA is retroactive or that it modifies the terms of all the RDPAs that had already been signed and that were already in force.

[2] On the contrary, it appears that the DOC has revised the challenged regulation several times. The version of AR 1550-06 targeted in Mr. Sheline's First Amended Complaint is materially different from the regulation described in the *Beerheide* litigation. *See* First Amended Complaint, ¶ 12. For example, the version discussed in the *Beerheide* case did not consider a prisoner's mere purchase of non-kosher food to be grounds for termination of a religious diet, nor did it provide for termination of religious diets when prisoners are accused of putting food in their pockets. *See Beerheide v. Suthers*, 82 F. Supp. 2d 1190, 1198-99 (D. Colo. 2000). The revised RDPA adopted after this lawsuit was filed represents yet another change. In light of the multiple changes to the rules governing revocations of religious diets in the DOC, the mere fact that the DOC rewrote the RDPA once again cannot, by itself, substitute for evidence that the latest changes are permanent.

496 (1974). It was imposed, without due process, because Mr. Sheline was accused of buying non-kosher items from the prison canteen. First Amended Complaint, ¶ 18. The mere purchase of non-kosher items, however, does not mean that Mr. Sheline has abandoned his sincere religious beliefs. Accordingly, Mr. Sheline's claims under RLUIPA and the Free Exercise Clause dispute the DOC's authority to impose this "strike." Because Mr. Sheline's first "strike" remains in place, it is clear that the Defendant has not "completely and irrevocably eradicated the effects of the challenged practices." *Davis*, 440 U.S. at 631. Accordingly, this case is not moot.

B. Objectionable Features of AR 1550-06 and the RDPA Remain in Place

Under the revised RDPA, the DOC continues to maintain that it can revoke Mr. Sheline's kosher diet, without prior notice or opportunity to be heard, on the basis of accusations that do not implicate the sincerity or insincerity of Mr. Sheline's religious beliefs. According to the Defendant, Mr. Sheline's first "strike" remains, for purchasing non-kosher food early in 2005. Defendant's Brief, at 6, 11. Pursuant to the revised RDPA, Mr. Sheline's kosher diet will be revoked automatically, for a full year, if he is accused again of buying a non-kosher food item from the prison canteen. Revised RDPA, ¶ D (Defendant's Brief, Exh. 3). Similarly, Mr. Sheline's religious diet will be revoked if he is accused of having an item on his food tray that was not served as part of his kosher diet, Revised RDPA ¶ C, even if that item is clearly kosher, such as an apple. Thus, if a fellow prisoner takes an apple from his own food tray and places it on Mr. Sheline's food tray, Mr. Sheline will lose his kosher diet. Similarly, if Mr. Sheline is accused of eating an apple provided by a prisoner who receives the general diet, Mr. Sheline's kosher diet will be revoked. Revised RDPA ¶ E.

"Where a superseding statute leaves objectionable features of the prior law substantially undisturbed, the case is not moot." *Naturist Society, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992). The Supreme Court applied this principle in *Northeastern Florida Chapter Associated General Contractors of America v. City of Jacksonville*, 508 U.S. 656 (1993). The City argued that post-lawsuit changes to the challenged ordinance rendered the case moot. In rejecting that argument, the Court looked to the "gravamen" of the plaintiff's complaint, which was that "its members are disadvantaged in their efforts to obtain city contracts." *Id.* at 662. The Court said the case was not moot because the revised ordinance "disadvantages [plaintiffs] in the same fundamental way." *Id*. at 662.

The same reasoning applies here. The Defendant has modified only a portion of the objectionable provisions that prompted this lawsuit.[3] The "gravamen" of Mr. Sheline's complaint, which the revised RDPA does not remedy, is that the DOC has revoked and threatens to revoke his religious diet, for a full year, without prior notice or opportunity to be heard, on the basis of accusations that do not implicate the sincerity or insincerity of Mr. Sheline's religious beliefs. The revised RDPA "leaves objectionable features of the prior law substantially undisturbed." *Naturist Society*, 958 F.2d 1515 at 1520. It "disadvantages [Mr. Sheline] in the same fundamental way" as the regulation that was in place when this lawsuit was filed. *Northeastern Florida Chapter*, 508 U.S. at 662. Accordingly, this case is not moot.

C. Defendant's Post-lawsuit Restoration of Mr. Sheline's Kosher Diet Does Not Make This Case Moot

[3] Pursuant to the change, prisoners do not earn a "strike" when they are accused of violating the conditions listed as paragraphs F, G, and H of the revised RDPA (see Defendant's Brief, Exh. 3).

Defendant contends that there is no longer a case or controversy because Mr. Sheline's kosher diet has been restored. Defendant's argument is erroneous for two reasons. First, as explained above, Defendant's voluntary decision to stop the challenged action, after the lawsuit is filed, does not moot the case. Second, even if the resumption of Mr. Sheline's kosher diet were regarded as a mooting event, (and it is not), then this case is subject to an exception to the mootness doctrine: the unjustified revocation of Mr. Sheline's kosher diet is "capable of repetition yet evading review." *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 594 n.6 (1999). This exception applies when "(1) the challenged action [is] in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 481 (1990); *see Beattie v. United States*, 949 F.2d 1092, 1094 n.2 (10th Cir. 1991).

1. The revocation of prisoners' religious diets is too short in duration to be fully litigated

Pursuant to the challenged regulation, the revocation of a prisoner's religious diet last for one year. Thus, even if the Defendant had not restored Mr. Sheline's kosher diet as soon as this lawsuit was filed, the diet would have been restored one year after it was revoked. One year is not enough time for a prisoner to fully litigate a challenge to a prison regulation. In *Roe v. Wade*, 410 U.S. 113 (1973), the Court explained that a case in which a plaintiff's pregnancy is critical to her standing will be one that "evades review" for purposes of this exception to the mootness doctrine. "The normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy

litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid." *Id.* at 125.

The same principle applies here. By its own terms, AR 1550-06 revokes a prisoner's diet for a one-year period. A prisoner wishing to litigate an unjustified termination of his religious diet must first exhaust the DOC's 3-step grievance process, which takes at least 95 days.[4] By the time a prisoner can file a complaint in court, therefore, only nine months remain before the revocation period ends. Thus, as in *Roe*, if the restoration of a prisoner's religious diet moots the claim, the claim will always evade review, because nine months is too short a time to litigate to a final judgment. Similarly, if the Defendant's restoration of Mr. Sheline's kosher diet is regarded as a mooting event, then it is even more clear that Mr. Sheline's claim "evades review."

2. There is a reasonable expectation that Mr. Sheline will be subjected to the same action again

As explained earlier, it is Defendant's "heavy burden" to persuade the court that it is "*absolutely* clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Adarand Constructors*, 528 U.S. at 222 (emphasis in original). Defendant has not and cannot make this showing. On the contrary, DOC continues to maintain that Mr. Sheline's kosher diet will be revoked again, without prior notice or opportunity to be heard, if he is accused of violating paragraphs C, D, or E of the revised RDPA.[5] Because there is a sufficient possibility of recurrence, the unjustified actions

[4] Pursuant to DOC AR 850-04, the DOC has 25 days to respond to a Step 1 grievance. First Amended Complaint, ¶¶ 29-30. It has another 25 days to respond to a Step 2 grievance, and 45 days to respond to a Step 3 grievance. *Id.*

[5] Indeed, the revised RDPA provides that Mr. Sheline's religious diet will be revoked even when Mr. Sheline does not have the knowledge or the power to prevent or avoid the event designated as a "strike." For example, when Mr. Sheline bought the spice drops that are the grounds for his first "strike," he did not know that the DOC regarded them as non-kosher. He believed they were kosher. First Amended Complaint, ¶ 18. Another example is provided by paragraph C of the revised RDPA. Under that provision,

that prompted Mr. Sheline to seek this Court's intervention are "capable of repetition." Thus, the challenged practices of the Defendant are capable of repetition yet evading review, and this case should not be dismissed.

II. CONTRARY TO DEFENDANT'S ARGUMENT, THIS LAWSUIT CANNOT BE DISMISSED FOR LACK OF STANDING

According to the Defendant, his post-lawsuit decision to modify a part of the challenged RDPA and his post-lawsuit decision to restore Mr. Sheline's kosher diet has deprived Mr. Sheline of standing to litigate his claims. Defendant's Brief, at 9. Defendant confuses the concept of mootness, which concerns developments that take place after litigation has begun, with the concept of standing. The Defendant makes precisely the same error as the courts of appeals whose decisions the Supreme Court evaluated and reversed in *Friends of the Earth*, 528 U.S. at 189 ("The Court of Appeals confused mootness with standing") and *Adarand Constructors*, 528 U.S. at 221 (the court of appeals "confused mootness with standing").

At page 9 of his brief, Defendant relies on *In re Yellow Cab Coop. Ass'n*, 132 F.3d 591 (10th Cir. 1997), which states that mootness is "the doctrine of standing set in a time frame." *Id.* at 594, quoting *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997), which quoted *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997). In *Friends of the Earth*, however, decided several years after *Yellow Cab* and *Arizonans for Official English*, the Supreme Court explained that "the description of mootness as 'standing set in a time frame' is not comprehensive." *Friends of the Earth*, 528 U.S. at 190.

Mr. Sheline is subject to a "strike" if another prisoner places a forbidden food item on Mr. Sheline's food tray.

As the Court explained, the standard a plaintiff must meet to demonstrate standing to initiate a lawsuit, is different (and more demanding) than the standard applied to determine, once a lawsuit has begun, whether the defendant's subsequent actions have rendered the case moot. *Id.* at 189-92. The inquiry into standing examines the facts at the time the lawsuit is filed, and the plaintiff seeking prospective relief bears the burden of demonstrating that "the defendant's allegedly wrongful behavior will likely occur or continue." *Id.* at 190. On the other hand, as the Court explained, and as Plaintiff explained in the previous section, "a defendant claiming that its voluntary compliance moots a case bears the formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* These two standards differ both in substance[6] and in the assignment of the burden of proof. To accept Defendant's argument would replicate the mistake of the court of appeals in *Adarand Constructors*, which "placed the burden of proof on the wrong party" and erroneously dismissed the case. *Adarand Constructors*, 528 U.S. at 221. Defendant does not argue that Mr. Sheline lacked standing when he filed this lawsuit on October 11, 2005. Defendant's argument about standing is really an argument about mootness. As explained in Section I, above, Defendant has not and cannot demonstrate that his post-lawsuit actions have made this case moot. His argument must be rejected.[7]

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[6] As the Court explained, "there are circumstances in which the prospect that a defendant will engage in (or resume) harmful conduct may be too speculative to support standing, but not too speculative to overcome mootness." *Friends of the Earth*, 528 U.S. at 190.

[7] Moreover, Mr. Sheline meets the legal standard the Defendant proposes. Mr. Sheline's first "strike" represents a "continuing present adverse effect" of the challenged regulation. *O'Shea v. Littleton*, 414 U.S. 488, 495-496 (1974). In addition, Mr. Sheline remains subject to the terms of AR 1550-06 and the revised RDPA, which loom as a constant threat that his religious diet will be revoked again, without due process, on the basis of accusations that do not implicate the sincerity or insincerity of his religious beliefs. Mr. Sheline's injury and threatened injuries are concrete and particularized. They are actual and imminent, not conjectural or hypothetical. *Friends of the Earth*, 528 U.S. at 181. The injuries and threatened injuries clearly can be traced to the challenged regulation. *Id.* And Mr. Sheline's injuries will be redressed by a

III. DEFENDANT'S MOTION TO DISMISS UNDER RULE 12(b)(6) MUST BE DENIED

A. Plaintiff Has Clearly Stated a Claim Under RLUIPA

As the Supreme Court recently explained, RLUIPA "is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter v. Wilkinson*, 125 S.Ct. 2113, 2117 (2005). The statute provides that "[n]o government shall impose a substantial burden on the religious exercise of a person confined to an institution. . . unless the government demonstrates that the imposition of the burden on that person (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling interest." 42 U.S.C. § 2000cc-1(a). By establishing the standards of compelling interest and least restrictive means, Congress made it crystal clear that prison regulations burdening religious practice were no longer insulated by the deferential standard of *Turner v. Safley*, 482 U.S. 78, 90 (1987), which expressly rejected applying a "least restrictive means" test to prison regulations alleged to burden prisoners' religious freedom. Indeed, RLUIPA also specifies that the government bears the burden of convincing the court that a challenged practice actually furthers a compelling interests by the least restrictive means. 42 U.S.C. § 2000cc-2(b). Finally, the statute commands that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution." 42 U.S.C. § 2000cc-3(g). The intent of Congress in enacting RLUIPA could not be more clear: when a prison regulation or practice substantially burdens a prisoner's religious exercise, this Court

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favorable decision, *id.* at 182, which would remove the "strike" that remains and would also remove the threat that Mr. Sheline's religious diet would be unjustifiably revoked in the future.

must hold the government to its burden of proof and must grant relief unless the government can meet the demanding standard of strict judicial scrutiny.[8]

1. The diet-revocation provisions of AR 1550-06 substantially burden Mr. Sheline's religious practice

A RLUIPA plaintiff presents a prima facie case when he shows the following:

> (i) that he wishes to undertake some form of religious exercise; (ii) that the religious belief underlying the desired exercise is sincere; and (iii) that the Defendants have imposed a "substantial burden" on that exercise.

Caruso v. Zenon, No. 95-1578, slip op. at 20 (D. Colo. Jul. 25, 2005),[9] citing *Grace United Methodist Church v. City of Cheyenne*, 235 F. Supp.2d 1186, 1195-96 (D. Wyo. 2002). In this case, the complaint clearly alleges, and the Defendant does not dispute, that Mr. Sheline desires to engage in a religious exercise that is motivated by a sincere religious belief. First Amended Complaint, ¶¶ 1, 9. Nor is there any question that revoking Mr. Sheline's kosher diet for an entire year substantially burdens Mr. Sheline's religious exercise. The Tenth Circuit and this Court have repeatedly recognized that denying prisoners a religious diet violates the Free Exercise Clause. *See*, *e.g.*, *Beerhide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002) (affirming permanent injunction ordering DOC to provide kosher meals and explaining that "prisoners have a constitutional right to a diet conforming to their religious beliefs"); *Makin v. CDOC*, 183 F.3d 1205, 1212-13 (10th Cir. 1999) (holding that Colorado DOC violated the Free Exercise Clause by failing to schedule a Muslim prisoner's meals to accommodate

[8] In RLUIPA, Congress also broadened the protection available to prisoners by making it clear that the term "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). At the same time, Congress amended the Religious Freedom Restoration Act (RFRA) so that it referenced the RLUIPA definition. *Kikumura v. Hurley*, 242 F.3d 950, 960-61 (10th Cir. 2001). Congress thus intended to correct some court decisions that had declined to protect a RFRA plaintiff's religious practice if it was not central to, or compelled by, the plaintiff's religion. *See* Derek L. Baubatz, *RLUIPA at Four: Evaluating the Success and Constitutionality of RLUIPA's Prisoner Provisions*, 28 Harv. J. Law & Policy 501, 522-29 (2004).

[9] A copy of the *Caruso* decision is attached to this brief.

daytime fasting during Ramadan); *Beerheide v. Zavaras*, 997 F. Supp. 1405 (D. Colo. 1998) (preliminary injunction ordering DOC to provide kosher meals); *Beerheide v. Suthers*, 82 F. Supp. 2d 1190 (D. Colo. 2000) (making injunction permanent). Because only substantial burdens are cognizable under the Free Exercise Clause, these holdings--even under the deferential *Turner* standard--necessarily recognize that denying prisoners a religious diet substantially burdens their religious exercise.

2. Because Mr. Sheline has alleged facts that establish a prima facie case, which shifts the burden of production and persuasion to the government, this case cannot be dismissed for failure to state a claim

Because Mr. Sheline can demonstrate that the diet-revocation provisions of AR 1550-06 and the RDPA substantially burden his religious exercise, RLUIPA shifts the burden of production and persuasion to the government. The DOC must demonstrate that revoking Mr. Sheline's kosher diet furthers a compelling government interest by the least restrictive means. *Caruso*, at 20, citing *Grace United Methodist Church*, 235 F.Supp.2d at 1195-96. The DOC cannot make such a showing in a motion to dismiss.

Based on the allegations of the First Amended Complaint, Mr. Sheline is entitled to proceed with this action and hold the government to its burden of proof. The DOC will undoubtedly argue that it has a legitimate interest in ensuring that its special religious diets are provided only to prisoners who are motivated by sincere religious beliefs. The DOC will be unable to demonstrate, however, that the challenged diet-revocation provisions, or its decision to revoke Mr. Sheline's diet, actually advances any such governmental interest. Nor will the DOC be able to demonstrate that the challenged diet-revocation provisions are the least restrictive means of limiting the availability of religious diets to sincerely religious prisoners.

For example, the DOC continues to defend its decision to impose Mr. Sheline's first "strike," which remains in place. Defendant's Brief, at 11. That "strike" asserts that Mr. Sheline purchased non-kosher food from the prison canteen. First Amended Complaint, ¶ 18. As paragraph D of the revised RDPA confirms, the DOC continues to regard the purchase of non-kosher food as conclusive proof that a prisoner's religious beliefs are not sincerely held. The DOC will not be able to demonstrate that this presumption reflects a sufficiently close fit to satisfy either the test of RLUIPA or even the "reasonable relationship" test of *Turner*. A mere purchase does not demonstrate that the buyer consumed the items or knowingly violated his religious diet. Even occasional sporadic straying from religious law does not signify abandonment of religious beliefs. As this Court has explained, a Muslim prisoner's purchases of non-*halal* foods on some 30 occasions over a three-year period may "demonstrate carelessness at best, and spiritual weakness at worst, but they do not suggest that his intent to adhere to Islamic law or a *halal* diet is somehow insincere." *Caruso,* at 22; *see also Beerhide*, 82 F. Supp. 2d at 1195 (finding plaintiff has a sincerely-held religious belief despite the fact that he failed to keep kosher for a long time before and after being sent to prison); *Young v. Lane*, 733 F.Supp. 1205, 1209 (N.D.Ill. 1990) (holding that "eating non-kosher food is not conclusive evidence of insincerity"), *rev'd on other grounds*, 922 F.2d 370 (7th Cir. 1991). Because the other "strikes" in the revised RDPA have even less of an arguable connection to the sincerity or insincerity of a prisoner's religious beliefs, the DOC will not be able to justify them.

It is also the DOC's burden to demonstrate that a "two strike" policy and a one-year revocation of a prisoner's religious diet represent the least restrictive means of

advancing a compelling government interest. This test requires the DOC to demonstrate that less restrictive alternatives, such as, for example a "three strike" or a "four strike policy," or less restrictive sanctions, such as a one-month suspension or a 3-month suspension, would not adequately advance the DOC's legitimate interests. The DOC has not made this showing, nor could it make such a showing in a motion to dismiss.

In its brief, the DOC has not argued that the diet-revocation provisions of the challenged regulation or their application to Mr. Sheline are in furtherance of a compelling government interest. The DOC has not attempted to justify the specific "strikes" listed in the RDPA, nor has it attempted to argue that a one-year revocation of Mr. Sheline's diet is the least restrictive means of achieving any compelling government interest. Instead, the DOC relies on its post-lawsuit reinstatement of Mr. Sheline's kosher diet. Defendant's Brief at 11. According to the DOC, it has removed the "alleged substantial burden," and therefore RLUIPA is satisfied. The DOC's argument is simply a restatement of its flawed argument that this case has become moot. For the reasons explained earlier, this case is not moot.

B. Plaintiff Has Stated a Valid Claim That Revoking His Kosher Diet Without Prior Notice and Opportunity To Be Heard Violates His Right To Procedural Due Process

Mr. Sheline has a constitutional right to a diet that conforms to his religious beliefs. *Beerhide v. Suthers*, 286 F.3d 1179, 1185 (10th Cir. 2002); *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991). Congress provided strengthened protection of that constitutional right when it enacted RLUIPA. Clearly, Mr. Sheline had a liberty interest in continuing to receive his kosher diet. The DOC quite properly assumes this liberty interest in its motion to dismiss. Defendant's Brief, at 11.

Mr. Sheline's first "strike" was based solely on a written accusation that he had purchased non-kosher food items from the prison canteen. Mr. Sheline received no prior notice and had no prior opportunity to be heard. Mr. Sheline's second "strike" was based solely on written accusations that he had taken two packets of kosher butter and two packets of Italian dressing from his kosher food tray and placed them in his pocket. Mr. Sheline received no prior notice and had no prior opportunity to be heard. When the second "strike" was imposed, Mr. Sheline's kosher diet was terminated. Mr. Sheline resorted to the DOC's grievance process. At the time the complaint was filed in this case, Mr. Sheline was still waiting for a response to his Step 3 grievance. First Amended Complaint, ¶ 30. By that time he had already been deprived of his kosher diet for more than five months.

The DOC is mistaken when it suggests, without citing any authority, that its "informal and formal grievance procedures" are adequate to satisfy the Due Process Clause. Defendant's Brief, at 12. The grievance procedures are not available until after the DOC has taken adverse action.[10] With a protected liberty interest at stake, Mr. Sheline is entitled to *pre*-deprivation process *before* the DOC terminates his constitutional and statutory right to a kosher diet. Even deprivations of property require pre-deprivation process when they are carried out, as in this case, by an authorized state procedure rather than by a random unauthorized act. *See Abbott v. McCotter*, 13 F.3d 1439, 1442 n.3 (10th Cir. 1994); *Smith v. Colorado DOC*, 23 F.3d 339, 340-41 (10th Cir.

[10] In concluding his due process argument, the Defendant asserts, inexplicably, that "Plaintiff is provided with adequate process *before* suspension of his religious diet through the CDOC's informal and formal grievance procedure." Defendant's Brief, at 12 (emphasis added). Defendant does not explain how Mr. Sheline would have been able to file a grievance over the termination of his kosher diet *before* the diet was terminated. Mr. Sheline's allegations, which must be accepted as true, state that Mr. Sheline received no prior notice and had no prior opportunity to be heard. *See*, *e.g.*, First Amended Complaint, ¶ 41.

1994). Deprivations of liberty require at least as much procedural protection as deprivations of property. *See*, *e.g.*, *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974).

Defendant is also incorrect when he claims that in *Beerheide*, the Tenth Circuit "approved" the diet-revocation procedures that are at issue in this case. Defendant's Brief, at 12. On the contrary, the Tenth Circuit neither considered nor discussed the procedural due process issue raised by the DOC's diet revocation procedures. In a footnote, the court noted that the DOC has "strict rules" for staying on a kosher diet, and it listed four occurrences that could be grounds for losing the right to a religious diet under the DOC regulation. The court did not mention or discuss whether prisoners were provided notice and an opportunity to be heard before a religious diet is revoked. *Beerheide,* 286 F.3d at 1192 & n.8.

Defendant's reliance on *Wilkinson v. Austin*, 125 S.Ct. 2384 (2005), is also misplaced. The Supreme Court in *Wilkinson* held that certain pre-deprivation procedures were sufficient to protect a prisoner's liberty interest in avoiding transfer to a supermax facility. The Court's validation of those pre-deprivation procedures, however, does not validate the diet revocation procedures at issue in this case, which provide no pre-deprivation process at all.

Mr. Sheline has stated a valid claim that AR 1550-06 has violated and threatens to violate his right to procedural due process. Defendant's motion to dismiss should be denied.

C. Mr. Sheline has stated a valid claim under the Equal Protection Clause

In his Equal Protection claim, Mr. Sheline challenges the DOC's authority to revoke his religious diet when he is accused of minor violations of dining hall rules.

These accusations are accompanied by less severe sanctions as well as procedural due process in the case of similarly-situated prisoners who do not receive religious diets.

Defendant argues that the revised RDPA moots this claim. Defendant's brief, at 14. The change to the RDPA has no mooting effect, however, unless and until the Defendant carries his "heavy burden" of persuading the Court that it is "absolutely clear" 1) that the revised RDPA applies retroactively to modify the version that Mr. Sheline was forced to sign; and 2) that the change is permanent. *See Friends of the Earth*, 528 U.S. at 189. Even if the Defendant makes that showing, however, the revisions to the RDPA affect only the portion of Mr. Sheline's equal protection claim that implicate paragraphs F, G, and H of the revised RDPA. The conduct described in these paragraphs is no longer a "strike" under the revised RDPA.

The revised RDPA does not affect Mr. Sheline's Equal Protection claim with regard to the conduct described in paragraphs C and E. Paragraph C imposes a "strike" if a prisoner is accused of possessing on his food tray any items that were not served as part of his religious diet. Paragraph E imposes a "strike" if a prisoner eats any foods from the general diet that are not served as part of the prisoner's religious diet. In both of these cases, the sanction imposed on prisoners with religious diets is far greater and far more serious than the sanction imposed on prisoners who engage in the same conduct but who are not receiving religious diets.

Defendant argues that prisoners who are not on religious diets are not similarly situated. Defendant's Brief, at 14. Defendant asserts, without evidentiary support, that the DOC "provides religious diets at considerable expense." *Id*. Defendant relies on "facts" that are not found in the complaint and that this Court must disregard when

deciding Defendant's motion to dismiss. If the cost of religious diets is even material to the Equal Protection claim, then Mr. Sheline is entitled to an opportunity to discover the facts and prove his claim. Indeed, Mr. Sheline may be able to prove that the cost of religious diets is the same or only negligibly more than the cost of the general diet.[11]

CONCLUSION

For the foregoing reasons, Mr. Sheline respectfully requests that the Defendant's motion to dismiss be denied.

Dated: December 30, 2005.

Respectfully submitted,

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[11] As Judge Posner has explained, "[a] plaintiff is free, in defending against a motion to dismiss, to allege without evidentiary support any facts he pleases that are consistent with the complaint." *Early v. Bankers Life and Casualty Co.*, 959 F.2d 75, 79 (7th Cir. 1992).

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of December 2005, I electronically filed the foregoing with the Clerk of Court using the EM/ECF system which will send notification of such filing to the following e-mail address:

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