

15-1018

Williams v. Annucci

1
2 In the
3 United States Court of Appeals
4 For the Second Circuit
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7 AUGUST TERM, 2017

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9 ARGUED: OCTOBER 11, 2017

10 DECIDED: JULY 10, 2018

11
12 No. 15-1018

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14 DEANDRE WILLIAMS, A/K/A DAVID WILLIAMS,
15 *Plaintiff-Appellant,*

16
17 *v.*

18
19 ANTHONY J. ANNUCCI, Commissioner of NYS Department of
20 Corrections and Community Supervision, CHERYL V. MORRIS,
21 Director, Ministerial, Family and Volunteer Services, NYS
22 Department of Corrections and Community Supervision, OMEGA
23 ALSTON, Assistant Director, Ministerial, Family and Volunteer
24 Services, Department of Corrections and Community
25 Supervision, D. ROCK, Superintendent, Upstate Correctional Facility,
26 M. LIRA, Deputy Superintendent, Upstate Correctional Facility,
27 TIMOTHY C. HAWK, Chaplain, Upstate Correctional Facility, a/k/a J.
28 HAWK, DON HAUG, Food Administrator, Upstate
29 Correctional Facility, KAREN BELLAMY, Director, Inmate Grievance
30 Program, NYS Department of Corrections and Community
31 Supervision, KENNETH S. PERLMAN, Deputy Commissioner, Program
32 Services, NYS Department of Correctional Services, ALEC
33 FRIEDMANN, Jewish Chaplain, Upstate Correctional Facility,

1 *Defendants-Appellees.*¹

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4 Appeal from the United States District Court
5 for the Northern District of New York.

6 No. 11 Civ. 379 – Norman A. Mordue, *Judge*, Therese Wiley Dancks,
7 *Magistrate Judge*.

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10 Before: WALKER, POOLER, *Circuit Judges*, and CRAWFORD, *District*
11 *Judge*.²

12 _____
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14 Plaintiff-Appellant DeAndre Williams appeals from a
15 memorandum and order of the United States District Court for the
16 Northern District of New York (Mordue, *J.*). The district court,
17 adopting the recommendation of the magistrate judge (Dancks, *M.J.*),
18 granted summary judgment to the defendants, various officials of the
19 New York State Department of Corrections and Community
20 Supervision (“DOC”), on Williams’s claim that the DOC’s policy of
21 not accommodating the dietary restrictions imposed by his Nazarene
22 Jewish faith violated the Religious Land Use and Institutionalized
23 Persons Act of 2000 (RLUIPA). The district court, adopting the
24 reasoning of the magistrate judge, denied Williams’s request for a

¹ The Clerk of the Court is directed to amend the caption as set forth above.

² Judge Geoffrey W. Crawford, of the United States District Court for the District of Vermont, sitting by designation.

1 permanent injunction because it found that, assuming Williams's
2 beliefs were "sincerely held" and "substantially burdened" by the
3 DOC's policy, the DOC's refusal to modify the menu for Williams
4 furthered a compelling state interest in minimizing costs and
5 administrative burdens, and the DOC's policy constituted the least
6 restrictive means of furthering those interests. Special App'x 45–47.

7 We conclude that the district court erred in granting summary
8 judgment to the DOC because, in the wake of the Supreme Court's
9 decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015), it failed to appreciate
10 the substantial showing that the government must make to justify
11 burdening an individual plaintiff's practice of a sincerely held
12 religious belief. We therefore VACATE the district court's grant of
13 summary judgment on Williams's claim for injunctive relief under
14 RLUIPA, and REMAND for further proceedings consistent with this
15 opinion. The DOC's motion to vacate the judgment and remand is
16 DENIED as moot.

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RAJEEV MUTTREJA, (Meir Feder, Lauren Pardee
Ruben, *on the brief*), Jones Day, New York, NY, *for*
Plaintiff-Appellant.

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ZAINAB A. CHAUDHRY (Andrew D. Bing, Barbara
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Underwood, Attorney General of the State of New
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3 JOHN M. WALKER, JR., *Circuit Judge*:

4 Plaintiff-Appellant DeAndre Williams appeals from a
5 memorandum and order of the United States District Court for the
6 Northern District of New York (Mordue, J.). The district court,
7 adopting the recommendation of the magistrate judge (Dancks, M.J.),
8 granted summary judgment to the defendants, various officials of the
9 New York State Department of Corrections (“DOC”), on Williams’s
10 claim that the DOC’s policy of not accommodating the dietary
11 restrictions imposed by his Nazarite Jewish faith violated the
12 Religious Land Use and Institutionalized Persons Act of 2000
13 (RLUIPA). The district court, adopting the reasoning of the magistrate
14 judge, denied Williams’s request for a permanent injunction because
15 it found that, assuming Williams’s beliefs were “sincerely held” and
16 “substantially burdened” by the DOC’s policy, the DOC’s refusal to
17 modify the menu for Williams furthered a compelling state interest in
18 minimizing costs and administrative burdens, and the DOC’s policy
19 constituted the least restrictive means of furthering those interests.
20 Special App’x 45–47.

21 We conclude that the district court erred in granting summary
22 judgment to the DOC because it failed to appreciate, in the wake of
23 the Supreme Court’s decision in *Holt v. Hobbs*, 135 S. Ct. 853 (2015),

1 the substantial showing that the government must make to justify
2 burdening an individual plaintiff's practice of a sincerely held
3 religious belief. We therefore VACATE the district court's grant of
4 summary judgment on Williams's claim for injunctive relief under
5 RLUIPA, and REMAND for further proceedings consistent with this
6 opinion. The DOC's motion to vacate the judgment and remand is
7 DENIED as moot.

8 BACKGROUND

9 Plaintiff-Appellant DeAndre Williams is a practicing Nazarite
10 Jew and a prisoner of the New York State DOC. As part of his faith,
11 Williams believes he must consume a grape-free, egg-free, vegetarian
12 diet that is also kosher. Williams also has a dairy intolerance.

13 At the time this appeal was filed, the DOC prepared meals for
14 inmates in two steps: first, it processed food at a central production
15 center; then, it shipped that food to each prison facility where meals
16 were prepared and served to inmates. The DOC makes two different
17 menus available to prisoners: the general confinement menu
18 ("GCM"), and the Cold Alternative Diet ("CAD"). The GCM meals,
19 which are not certified kosher, include an entrée, side dishes, and a
20 beverage. Many items on this menu include meat, dairy, or grapes.
21 The DOC also typically offers an alternative entrée that does not
22 contain meat, but that may contain dairy or grape products. The CAD

1 menu, on the other hand, provides kosher food, but it includes meat,
2 dairy, and grapes.

3 The DOC allows inmates to submit requests to substitute food
4 for medical reasons, which the DOC then reviews on a case-by-case
5 basis. The DOC generally does not permit substitutions for religious
6 reasons. Instead, the DOC's policy is to advise inmates to "refrain
7 from eating those food items which are contrary to [their] religious
8 beliefs." App'x 250.

9 The DOC accommodates Williams's dairy allergy, but often in
10 ways that conflict with his religion's requirements. For example, the
11 DOC frequently replaces Williams's cream cheese with grape jelly or
12 his cheese with meat. As a result, Williams cannot eat much of the
13 food the DOC offers him. His diet is largely confined to hot cereal,
14 bread, fruit, vegetables, soup, and peanut butter. Sometimes he tries
15 to trade the food he cannot eat with other inmates, even though
16 trading food is discouraged.

17 Since 2002, Williams has filed multiple grievances based on the
18 DOC's refusal to accommodate his religiously required diet. Over the
19 years, he has asked for a variety of accommodations, including
20 transferring him to a facility that serves full kosher meals, providing
21 him with a kosher vegetarian meal that does not include grapes,
22 replacing the items he cannot eat with other items on the CAD, or

1 removing the items he cannot eat from his tray.³ These requests were
2 denied in accordance with the DOC's policy regarding religious diets.

3 In April 2011, Williams, acting *pro se*, brought this action.
4 Williams alleged that the DOC violated his rights under the First
5 Amendment and RLUIPA by refusing to accommodate his religious
6 dietary restrictions, and he sought an injunction ordering the DOC to
7 provide him with the meals his religion required. The district court
8 denied Williams's motion for a preliminary injunction in March 2012,
9 but denied the DOC's motion to dismiss the following February.

10 In May 2014, the DOC moved for summary judgment, arguing
11 that it had a compelling interest in controlling costs and avoiding
12 administrative burdens. By way of support, the DOC proffered a
13 sworn declaration from Robert Schattinger, the DOC's Director of
14 Correctional Food and Nutritional Services. Schattinger claimed that
15 the DOC's experience with a kosher food line at its Green Haven
16 facility had taught it that running such a program is "extremely
17 expensive and administratively burdensome" and that such a service
18 "[could] not be provided" statewide. App'x 392. The declaration
19 stated that "maintaining the integrity of kosher [food] at the facility
20 level is problematic." *Id.* To make kosher meals available to inmates

³ To Williams, it is important that an item he cannot eat be removed from his tray because if it seeps onto other acceptable items it contaminates them.

1 statewide, Schattinger anticipated that the DOC would have to
2 prepare meals at a kosher site, seal them, and ship them to each
3 facility, which would require purchasing new equipment and hiring
4 more staff. Additionally, Schattinger anticipated that extra time and
5 energy would be required to figure out how to provide inmates
6 adequate nutrition in a menu without meat. Due to these “fiscal and
7 practical considerations,” Schattinger declared, “the Department has
8 determined that a [kosher vegetarian] menu will not be provided,”
9 since doing so is “not financially or administratively feasible.” App’x
10 392–93.

11 The district court assigned the motion for summary judgment
12 to a magistrate judge. The magistrate judge determined that there was
13 no dispute that Williams’s religious beliefs were “sincerely held” and
14 that those beliefs were “substantially burdened” by the DOC’s policy.
15 Special App’x 45–47. Nevertheless, the magistrate judge found that
16 the DOC’s refusal to modify the menu for Williams furthered a
17 compelling state interest in minimizing costs and administrative
18 burdens and was the least restrictive way of furthering those interests.
19 The magistrate judge thus recommended that the district court grant
20 summary judgment to the DOC. Shortly before the district court
21 decided the motion, the Supreme Court handed down *Holt v. Hobbs*,
22 135 S. Ct. 853 (2015), clarifying the standard applicable to RLUIPA
23 claims. The district court adopted the magistrate’s recommendation

1 and entered summary judgment for the DOC without considering
2 *Holt*. Williams timely appealed.

3 After the district court granted summary judgment, the DOC
4 reported that it had made significant changes to its kosher meal
5 program. In fact, the day after the DOC's brief was due in this appeal,
6 the facility where Williams was then housed adopted a new kosher
7 menu. The new menu is a largely vegetarian diet, with meat served
8 twice per week and eggs once per week. The new meals are prepared
9 at a kosher facility and prepackaged with a clear plastic lid and
10 double-wrapping. That packaging gives the DOC greater capability
11 to make kosher-compliant substitutions on a case-by-case basis.
12 Williams, however, was transferred to a facility that does not
13 participate in the new menu program. Regardless, even this new
14 menu includes items he cannot eat, and he has said that he will not
15 elect to adopt it.

16 In November 2015, we appointed *pro bono* counsel for Williams
17 to brief the issue of "whether summary judgment was warranted on
18 Appellant's claim for injunctive relief (a nutritionally adequate diet
19 compliant with his religious beliefs) under the Religious Land Use
20 and Institutionalized Persons Act." Mot. Order, *Williams v. Fischer*,
21 No. 15-1018 (2d Cir. Nov. 4, 2015), ECF No. 55.

DISCUSSION

Williams argues on appeal that the district court erred in granting summary judgment to the DOC because the district court misunderstood, post-*Holt*, the extent to which the DOC's evidence of a compelling interest and least restrictive alternatives must be particularized to adequately respond to Williams's specific request for accommodations.

"We review a grant of summary judgment *de novo*, examining the evidence in the light most favorable to, and drawing all inferences in favor of, the non-movant." *Sheppard v. Beerman*, 317 F.3d 351, 354 (2d Cir. 2003). Summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[T]he submissions of a *pro se* litigant must be construed liberally and interpreted to raise the strongest arguments that they suggest." *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (per curiam) (internal quotation marks and emphasis omitted).

I. Availability of a Permanent Injunction

The district court construed Williams's complaint as seeking a permanent mandatory injunction, but concluded that there was no defendant against whom effective injunctive relief could be awarded under RLUIPA. As the DOC concedes, this was an error.

1 Williams sued Brian Fischer, the Commissioner of the DOC, in
2 his official capacity. Before the district court ruled on Williams's
3 motion for summary judgment, Fischer retired, and Williams did not
4 separately sue his successor.

5 Fischer's retirement had no effect on Williams's ability to obtain
6 injunctive relief. It is settled that "suits against officers in their official
7 capacity . . . are directed at the office itself." *Tanvir v. Tanzin*, No. 16-
8 1176, 2018 WL 3096962, at *7 n.7 (2d Cir. June 25, 2018) (as amended)
9 (citing Fed. R. Civ. P. 17(d)). So, when a "defendant in an official
10 capacity suit leaves office, the successor to the office replaces the
11 originally named defendant." *Id.*; see also Fed. R. Civ. P. 25(d) ("An
12 action does not abate when a public officer who is a party in an official
13 capacity . . . ceases to hold office while the action is pending. The
14 officer's successor is automatically substituted as a party.").

15 Once Fischer retired, his successor, Acting Commissioner
16 Anthony Annucci, was "automatically substituted" as a defendant.
17 Fed. R. Civ. P. 25(d). And it is Annucci who has the power to order
18 that Williams be accommodated. See N.Y. Correct. Law § 112(1).

19 II. The Effect of Changes in DOC Policy

20 Next, we must decide what effect, if any, the recent changes to
21 the DOC's dietary policy have on Williams's appeal. The DOC
22 suggests that in light of these changes this case might be moot under
23 RLUIPA's safe harbor provision or otherwise.

1 “In order for a federal court to retain jurisdiction over a case,
2 an actual controversy must exist at all stages of review, not merely at
3 the time the complaint is filed.” *Prins v. Coughlin*, 76 F.3d 504, 506 (2d
4 Cir. 1996) (per curiam) (internal quotation marks omitted). “A case is
5 deemed moot where the problem sought to be remedied has ceased,
6 and where there is no reasonable expectation that the wrong will be
7 repeated.” *Id.* (internal quotation marks omitted). “[A] case becomes
8 moot only when it is impossible for a court to grant any effectual relief
9 whatever to the prevailing party.” *Chevron Corp. v. Donziger*, 833 F.3d
10 74, 124 (2d Cir. 2016) (internal quotation marks and emphasis
11 omitted). RLUIPA encourages institutions to accommodate inmate
12 requests by exempting from liability institutions that change
13 challenged policies, exempt substantially burdened inmates, or take
14 “any other means that eliminates the substantial burden.” 42 U.S.C. §
15 2000cc-3(e).

16 First, the DOC argues that the mootness point is better resolved
17 by the district court. The DOC relies on *Lumbermens Mutual Casualty*
18 *Co. v. RGIS Inventory Specialists, LLC*, 356 F. App’x 452, 453–54 (2d Cir.
19 2009), a case in which we remanded to the district court to determine
20 whether the action was mooted by a settlement in another case
21 because “the question of mootness is, at least in part, factual” and
22 “dependent . . . on the terms and circumstances of the settlement.” *Id.*
23 at 454. That case is distinguishable. Here, the facts pertaining to

1 mootness are uncontested: the DOC has not agreed to provide
2 Williams with his requested diet; the new menu, like the old menu,
3 includes items that Williams cannot eat; and the new kosher menu is
4 not available where Williams is currently incarcerated. No additional
5 factfinding is required.

6 In a variation of its mootness argument, the DOC argues that
7 we should remand without addressing the merits so the district court
8 can consider the new record in the first instance. The DOC's reliance
9 on *Farmer v. Brennan*, 511 U.S. 825, 846–48 (1994), for this point is
10 misplaced, however, because there the Supreme Court clarified the
11 Eighth Amendment standard before remanding for the district court
12 to apply it. *See id.* In the “interest[] of judicial economy,” we opt to do
13 the same with regard to Williams’s RLUIPA claim. *Florez v. Cent.*
14 *Intelligence Agency*, 829 F.3d 178, 189 (2d Cir. 2016).⁴

⁴ The DOC has also asked us to invoke our inherent authority to “vacate, set aside or reverse any judgment, decree, or order of a court” under 28 U.S.C. § 2106 and employ our so-called *Jacobson* remand procedure by remanding the case to the district court to “consider arguments” and “weigh relevant evidence . . . in the first instance” while keeping the appeal. *Florez*, 829 F.3d at 189; *see also United States v. Jacobson*, 15 F.3d 19, 21–22 (2d Cir. 1994). Because we conclude that there are independent reasons for remanding to the district court, we do not separately address this issue. On remand, as discussed further in Section III, *infra*, the district court should consider the DOC’s ability to accommodate Williams in light of the recent changes to DOC policy. *See Farmer*, 511 U.S. at 846–48 (clarifying applicable standard before remanding for the district court to apply it with reference to the updated factual record).

1 **III. RLUIPA Claim**

2 RLUIPA states that “[n]o government shall impose a
3 substantial burden on the religious exercise of a person residing in or
4 confined to an institution . . . unless the government demonstrates
5 that imposition of the burden on that person—(1) is in furtherance of
6 a compelling governmental interest; and (2) is the least restrictive
7 means of furthering that compelling governmental interest.” 42
8 U.S.C. § 2000cc-1(a). In practice, RLUIPA claims are evaluated under
9 a burden-shifting framework whereby a plaintiff must first
10 demonstrate that the state has imposed a substantial burden on the
11 exercise of her religion; the burden then shifts to the state to
12 demonstrate “that the challenged policy or action furthered a
13 compelling governmental interest and was the least restrictive means
14 of furthering that interest.” *Redd v. Wright*, 597 F.3d 532, 536 (2d Cir.
15 2010).

16 The district court agreed with Williams that his religious
17 exercise had been substantially burdened by the DOC’s policy of not
18 providing him with religious dietary accommodations, but
19 determined that the DOC had “met the burden of showing that for
20 financial and administrative reasons” the DOC had a compelling state
21 interest in limiting menu options. Special App’x 56. Williams argues
22 that the DOC’s compelling interest showing was inadequate
23 particularly in the wake of *Holt*.

1 In *Holt*, the Supreme Court considered a Muslim inmate's
2 RLUIPA challenge to an Arkansas Department of Correction policy
3 that prohibited him from growing a half-inch beard. *See* 135 S. Ct. at
4 859. The department justified its policy by asserting compelling
5 interests in (1) stopping the flow of contraband, and (2) facilitating
6 prisoner identification. *See id.* The department's staff testified to these
7 concerns, but was unable to point to any actual problems that beards
8 had caused. *See id.* at 861. One official acknowledged that prisoners
9 could also hide contraband in clothing or the hair on their heads and
10 could not explain why taking photos of inmates without a beard
11 would not address the identification concern. *See id.* That official also
12 testified that keeping track of exempt inmates' beard length would be
13 difficult, but he could not offer any reason why doing so would be
14 any more difficult than tracking the beard length of those with
15 medical exemptions, something the department already did. *See id.*
16 Even so, the district court held that the department had sufficiently
17 shown that banning half-inch beards was the least restrictive means
18 of furthering its compelling interest in security. *See id.* The Eighth
19 Circuit affirmed. *Id.*

20 The Supreme Court reversed, holding that the department's
21 evidence did not discharge its burden to show that it had a compelling
22 interest in burdening Holt. *Id.* at 863–67. The Court's reasoning is
23 helpful guidance in applying RLUIPA to Williams's case.

1 First, *Holt* made it plain that courts need not accept the
2 government's claim that its interest is compelling on its face. *See id.* at
3 864, 866. The Court held that the district court erred in thinking that
4 it was required to defer to the government's assertion that inmates
5 could hide contraband in their beards, a claim that even the
6 magistrate judge had remarked was "almost preposterous." *Id.* at 861,
7 863–64. The Court acknowledged that courts should respect prison
8 officials' expertise in "evaluating the likely effects of altering prison
9 rules." *Id.* at 864. But because Congress passed RLUIPA "to provide
10 very broad protection for religious liberty," courts abdicate their
11 responsibility to "apply RLUIPA's rigorous standard" by deferring to
12 the government's "mere say-so" without question. *Id.* at 859, 864, 866.

13 Second, evidence of a policy's underinclusiveness relative to
14 "analogous nonreligious conduct" may cast doubt on both whether
15 the government's asserted interest is compelling and whether that
16 policy actually is the least restrictive means of furthering that interest.
17 *See id.* at 866 (internal quotation marks omitted). In *Holt*, the Court
18 observed that the department insisted that it needed inmates to shave
19 their beards to stop the spread of contraband and to quickly identify
20 prisoners, but did not require them to go "bald, barefoot, or naked,"
21 which suggested a tailoring problem—namely, that "those interests
22 could be achieved by narrower ordinances that burdened religion to
23 a far lesser degree." *Id.* (internal quotation marks omitted); *accord*

1 *United States v. Sec’y, Fla. Dep’t of Corr.*, 828 F.3d 1341, 1349 (11th Cir.
2 2016) (noting that the lack of explanation for why the government
3 offered special, nonreligious diets at similar costs, but not kosher
4 meals, suggested a less burdensome policy was possible). This
5 observation was consistent with previous cases in which the Court
6 had found that a policy’s underinclusiveness suggests that the
7 proffered interest is not quite as compelling as the government claims.
8 *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520,
9 547 (1993) (“[A] law cannot be regarded as protecting [a compelling
10 interest] when it leaves appreciable damage to that supposedly vital
11 interest unprohibited.” (internal quotation marks and alteration
12 omitted)); *accord Yellowbear v. Lampert*, 741 F.3d 48, 60 (10th Cir. 2014)
13 (in which then-Circuit Judge Gorsuch wrote that “[a] law’s
14 underinclusiveness—its failure to cover significant tracts of conduct
15 implicating the law’s animating and putatively compelling interest—
16 can raise with it the inference that the government’s claimed interest
17 isn’t actually so compelling after all”).

18 Third, the government’s compelling interest must be defined at
19 an appropriately reduced level of generality—that is, the government
20 must justify its conduct by demonstrating not just its general interest,
21 but its particularized interest in burdening the individual plaintiff in
22 the precise way it has chosen. *See Holt*, 135 S. Ct. at 863. The Court in
23 *Holt* rejected the government’s “broadly formulated” interest in

1 prison safety and security and insisted instead that the government
2 “demonstrate that the compelling interest test is satisfied through
3 application of the challenged law to the person—the particular
4 claimant whose sincere exercise of religion is being substantially
5 burdened.” *Id.* (internal quotation marks and alterations omitted).
6 While the Court agreed that the government had a compelling
7 interest in “staunching the flow of contraband into and within its
8 facilities,” the Court rejected the government’s argument that “this
9 interest would be seriously compromised by allowing an inmate to
10 grow a ½-inch beard.” *Id.*

11 With these principles in mind, we consider Williams’s
12 challenge to the DOC’s dietary policy.

13 **A. The Government’s Interest**

14 In the district court, the DOC justified its refusal to
15 accommodate Williams’s dietary requirements by citing its
16 compelling interest in controlling costs and avoiding administrative
17 burdens. Neither party disputes that the DOC generally has a
18 compelling interest in controlling costs and avoiding administrative
19 burdens—or as another circuit has put it, an interest in “cost-efficient
20 food service.” *See Curry v. Cal. Dep’t of Corr. & Rehab.*, 616 F. App’x
21 265, 266 (9th Cir. 2015). What the parties do dispute is the specificity
22 with which the DOC is required to make such a showing.

1 We first observe that the government's interest in reducing
2 costs is less compelling in the RLUIPA context than it is elsewhere.
3 That is because RLUIPA explicitly states that complying with its
4 terms "may require a government to incur expenses in its own
5 operations to avoid imposing a substantial burden on religious
6 exercise," codifying a congressional preference that prisons incur
7 additional costs to accommodate inmates' free exercise rights. 42
8 U.S.C. § 2000cc-3(c).

9 Even before *Holt*, our circuit insisted that the government's
10 proffered interests be particularized. For instance, in *Salahuddin v.*
11 *Goord*, 467 F.3d 263, 275 (2d Cir. 2006), an inmate challenged the
12 prison's joint Ramadan services for Sunnis and Shi'ites. The prison
13 argued that the burden to the Sunni plaintiff of having to attend a
14 joint service was outweighed by the prison's legitimate penological
15 concerns regarding "security, as well as fiscal, space, and staffing
16 limitations," but did not point to any evidence in the record to
17 support those claims. *Id.* at 270, 275. We vacated the grant of summary
18 judgment to the defendants, reasoning that this court cannot
19 "manufacture facts out of thin air" and that "it is the defendants' duty
20 on summary judgment to cite record evidence" to establish that its
21 interest is compelling. *Id.* at 275. In contrast, in *Jova v. Smith*, 582 F.3d
22 410 (2d Cir. 2009) (per curiam), we held that the government had
23 sufficiently justified certain dietary restrictions it imposed on a

1 practicing Tulukeesh inmate who required a “complex, highly
2 regimented non-soybean-based vegan diet” only after the
3 government submitted “voluminous affidavits and exhibits”
4 documenting the burdens of accommodation. *Id.* at 414–16. In doing
5 so, we made clear that “the state may not merely reference an interest
6 . . . to justify its actions”; “rather, the particular policy must further
7 this interest, and must be more than conclusory.” *Id.* at 415 (internal
8 citation and quotation marks omitted).

9 The DOC, citing to pre-*Holt* cases, argues that the district court
10 correctly concluded that by proffering Schattinger’s declaration it met
11 its burden to show that it had a compelling interest in cost-efficient
12 food service. We disagree.

13 At the most, the DOC’s cases and others show that courts have
14 found a compelling government interest in reducing costs where the
15 government submitted detailed affidavits that showed that adopting
16 the requested dietary restriction would significantly increase costs
17 and administrative burdens. *See, e.g., Curry*, 616 F. App’x at 266, *aff’g*
18 2013 WL 75769, at *4, *9 (N.D. Cal. Jan. 4, 2013) (affirming grant of
19 summary judgment where the record included specific evidence
20 calculating the costs of accommodating the inmate’s restrictions to be
21 thirty times more than the regular cost of feeding a prisoner and
22 showing that the closest store where appropriate food could be
23 purchased was 35 miles away). *But see Moussazadeh v. Tex. Dep’t of*

1 *Criminal Justice*, 703 F.3d 781, 795–96 (5th Cir. 2012) (remanding for
2 further factfinding as to whether there was a compelling interest in
3 cost savings in denying kosher meals where there was evidence in the
4 record that providing kosher meals to all observant prisoners would
5 cost around \$88,000 a year, causing the court to be “skeptical that
6 saving less than .05% of the food budget constitutes a compelling
7 interest”).

8 The DOC has not shown on the present record that
9 accommodating Williams would significantly increase costs and
10 administrative burdens. The record, unlike the one in *Jova*, is not
11 replete with “voluminous affidavits and exhibits,” 582 F.3d at 414–16,
12 but instead includes only one declaration that claims, in a conclusory
13 manner, that “[d]ue to fiscal and practical considerations . . . the
14 Department has determined that a [kosher vegetarian] menu will not
15 be provided”; that “[d]esignating and providing a new kosher
16 vegetarian food line would bring . . . challenges”; and that providing
17 the food would be “exceedingly burdensome to existing staff and
18 facility resources” so it “is not financially or administratively
19 feasible.” App’x 392–93. The DOC has not said precisely how much
20 these changes would cost or the amount of that cost relative to the
21 overall cost of feeding inmates. Nor has it shown the added cost, if
22 any, of accommodating Williams’s alternative suggestions, such as
23 not placing foods he cannot eat on his tray or giving him more of

1 certain foods the DOC already prepares. The DOC's showing of what
2 seems to be its "marginal interest" in cost-efficiency as to Williams
3 falls short of meeting its justification burden. *Holt*, 135 S. Ct. at 863.

4 As was the case in *Holt*, the DOC's policy is underinclusive
5 because the DOC accommodates comparable medical dietary
6 restrictions. Such unexplained disparate treatment of "analogous
7 nonreligious conduct" leads us to question whether the DOC's
8 interest in cost-efficiency is as compelling as it suggests given that
9 there is no evidence that these medical accommodations have
10 increased costs significantly or impaired efficiency. *See Church of the*
11 *Lukumi Babalu Aye*, 508 U.S. at 546–47. Of course, the DOC might have
12 a reasonable explanation for this evident underinclusiveness, but, to
13 date, it has not offered one. *See Knight v. Thompson*, 797 F.3d 934, 944–
14 45 (11th Cir. 2015).

15 Even if the DOC's evidence were more detailed, it still might be
16 inappropriate to accept its word that Williams's accommodations
17 would be cost inefficient. *See Holt*, 135 S. Ct. at 866. The fact that the
18 DOC continues to operate a kosher meal facility at Green Haven and
19 has since reformed its system by providing prepackaged kosher
20 meals casts considerable doubt on the DOC's claim that providing
21 kosher vegetarian food to Williams is too expensive and
22 administratively burdensome. Indeed, it appears that the systems are
23 now in place that Schattinger anticipated would be too costly to

1 build—namely, systems for preparing food off site, individually
2 sealing it, and then reheating it on site. Taking the DOC at its word
3 under such circumstances would involve “a degree of deference that
4 is tantamount to unquestioning acceptance.” *Id.* at 864.⁵

5 To the extent that the DOC’s argument is that Williams’s
6 request is administratively burdensome because it would lead to
7 more requests for accommodation from inmates, it is the “classic
8 rejoinder of bureaucrats throughout history” rejected by the Supreme
9 Court in *Holt*. *Id.* at 866 (internal quotation marks omitted). In fact,
10 narrowing the pool of potential accommodations is what the sincerity
11 requirement accomplishes: it ensures that accommodations are only
12 available to the few who sincerely hold protected beliefs. *Id.* at 866–67
13 (noting that if prison officials suspect inmates are using
14 accommodations in bad faith “prison officials may appropriately
15 question whether a prisoner’s religiosity, asserted as the basis for a
16 requested accommodation, is authentic”); *see also Fla. Dep’t of Corr.*,

⁵ This is not to say that we would hold against a prison the efforts that it makes to accommodate inmates. In fact, RLUIPA provides a safe harbor for prisons that remediate infringing policies. *See* 42 U.S.C. § 2000cc-3(e). But where a facility has demonstrated a capability to accommodate inmates but chooses not to do so, we are well within bounds to consider that capability when determining how burdensome accommodating the plaintiff would actually be. *See Sec’y, Fla. Dep’t of Corr.*, 828 F.3d at 1347–48 (considering fact that department had previously provided kosher meals statewide relevant to whether current policy denying kosher food furthered state’s compelling interest in cost containment).

1 828 F.3d at 1349 (rejecting argument that cutting statewide kosher
2 food service furthered state's compelling interest in cost containment
3 where record included evidence that the department was not
4 enforcing the rules of participation or screening out insincere
5 applicants).

6 In sum, we conclude that the DOC failed to meet its burden of
7 showing with particularity that it had a compelling interest in not
8 accommodating Williams.

9 **B. Least Restrictive Means**

10 The government has also failed to show that its policy of not
11 accommodating Williams is the least restrictive means of achieving
12 its stated goal of running a cost-efficient food service program.

13 "The least-restrictive-means standard is exceptionally
14 demanding, and it requires the government to show that it lacks other
15 means of achieving its desired goal without imposing a substantial
16 burden on the exercise of religion by the objecting party." *Holt*, 135 S.
17 Ct. at 864 (internal quotation marks and alterations omitted). "If a less
18 restrictive means is available for the Government to achieve its goals,
19 the Government must use it." *Id.* (internal alteration omitted).
20 Whether a proffered alternative is the least restrictive means is a fact-
21 intensive inquiry. *See Jova*, 582 F.3d at 417 (remanding because further
22 factfinding was required to determine whether the chosen policy was

1 the least restrictive means); *Robinson v. Superintendent Houtzdale SCI*,
2 693 F. App'x 111, 117 (3d Cir. 2017).

3 To establish that its chosen policy is the least restrictive means,
4 the DOC must prove that each of the inmate's proffered alternatives
5 is too burdensome. *See Holt*, 135 S. Ct. at 864–65 (holding that
6 defendants “fail[ed] to prove that [inmate's] proposed alternatives
7 would not sufficiently serve its . . . interests”). For example, in *Jova*,
8 the Tulukeesh-inmate plaintiff challenged the government's refusal
9 to provide him specific foods, on particular days, prepared only by
10 Tulukeesh adherents. 582 F.3d at 417. Although we held that the
11 government was not required under RLUIPA to grant the defendant's
12 full dietary request, we remanded because “there [was] no indication
13 that the Defendants discussed, let alone demonstrated, why they
14 [could not] provide an entirely vegetarian menu to inmates who
15 request it” and therefore they “did not demonstrate that the
16 religious/meatless alternative menu was the least restrictive means of
17 furthering their compelling administrative interests.” *Id.*

18 To show that the chosen policy is the least restrictive means of
19 furthering the government's compelling interest, the government
20 must again account for a policy's underinclusiveness. *See Holt*, 135 S.
21 Ct. at 864–66. For example, in *Holt*, the government failed to show that
22 its policy preventing inmates from growing a half-inch beard was the
23 least restrictive means where it already searched the quarter-inch

1 beards of inmates with dermatological conditions and “[i]t ha[d]
2 offered no sound reason why hair, clothing, and ¼-inch beards can
3 be searched but ½-inch beards cannot.” *Id.* at 864; *see also Knight*, 797
4 F.3d at 944–45, 947 (upholding district court’s judgment for the
5 department in case challenging department’s policy requiring only
6 male inmates to have short hair where department introduced
7 evidence of specific incidents where male, but not female, inmates
8 had used long hair to conceal contraband and infections, cut hair to
9 conceal identity, and grabbed hair during fights).

10 The DOC here has not made this difficult showing. First, the
11 policy’s underinclusiveness suggests, as it did in *Holt*, that a more
12 tailored policy, less burdensome to Williams, is possible. 135 S. Ct. at
13 866. Specifically, the DOC has not explained how the religious
14 exception Williams has asked for (swapping out religiously forbidden
15 foods) is any more administratively burdensome than the medical
16 exception he already receives (swapping out allergy-producing
17 foods). Such unexplained disparate treatment of “analogous
18 nonreligious conduct” leads us to suspect that a narrower policy that
19 burdens Williams to a lesser degree is in fact possible. *See id.*

20 Second, the DOC has not shown that Williams’s proposed
21 alternatives are not viable. *See id.* at 864–65. Construing Williams’s *pro*
22 *se* district court submissions liberally, as we must, *Triestman*, 470 F.3d
23 at 474, he has identified three ways the DOC could accommodate him,

1 each of which is potentially less restrictive than its current policy: the
2 DOC could (1) serve Williams a kosher vegetarian meal—whether by
3 establishing a kosher vegetarian line at the facility level or shipping
4 in prepackaged kosher food; (2) provide Williams with a modified
5 version of the CAD menu, replacing items Williams cannot eat with
6 high-protein foods or with other CAD items; or (3) refrain from
7 putting forbidden foods on Williams’s tray. Like the department in
8 *Jova*, the DOC here did not discuss, much less demonstrate, why it
9 could not, at least, give Williams more of the acceptable food it
10 already prepares or stop serving him foods he cannot eat. *See* 582 F.3d
11 at 417. Moreover, it seems that Williams’s request that he be served a
12 full kosher vegetarian meal could be no more than minimally
13 burdensome given the DOC’s new ability to make kosher-compliant
14 substitutions. Just how restrictive these alternatives are, however, is a
15 fact question that is better left for the district court to consider in the
16 first instance. *See id.*

17 For these reasons, the DOC has not satisfied its burden under
18 RLUIPA, and the district court erred in granting it summary
19 judgment. Because fact questions remain as to whether the DOC’s
20 interest is compelling and its means are the least restrictive, in light of
21 Williams’s suggested alternatives, we remand for further factfinding.
22 *See id.*

