No. _____

In The
Supreme Court of the United States

ANTHONY DAVILA,

Petitioner,

v.

ANTHONY HAYNES, WARDEN,
AND DR. BRUCE COX, CHAPLAIN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents the unusual circumstance where an appellate court found a federal prisoner has, in fact, stated a claim that his federally protected rights of religious freedom may have been violated. Yet, what the Eleventh Circuit gave with one hand, it took away with the other. Despite finding that Petitioner has a valid claim under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"), the Panel also found that RFRA does not permit Petitioner to pursue a claim for money damages. This case therefore presents the one issue which this Court has not addressed with respect to a prisoner's statutory rights to religious freedom; specifically, has the federal government waived its own sovereign immunity for claims of money damages under RFRA.

Accordingly, the question presented is:

Given the history of reported decisions in effect at the time RFRA became law, all the appropriate tools of statutory construction, the language used by Congress, and the ability of the federal government to waive its own sovereign immunity without the necessity of "magical" language, did Congress intend to waive the federal government's sovereign immunity with respect to claims for money damages when it permitted a prisoner to recover "appropriate relief" for violation of his or her rights under the Religious Freedom Restoration Act?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner in this Court is Mr. Anthony Davila.

Respondents are Mr. Anthony Haynes and Dr. Bruce Cox. At all times relevant to this proceeding, Mr. Haynes was the warden at the Federal Correctional Institute, Jesup, Georgia, and Dr. Cox was the Chaplain at the same institution. The underlying case asserts claims against Respondents in both their individual capacities and their official capacities as employees of the United States of America.

The original lawsuit also named Robin Gladden and R.E. Holt as defendants. Petitioner did not pursue an appeal against these individuals.

No parties to this Petition are corporations.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Anthony Davila respectfully prays that this Court grant a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 777 F.3d 1198, and is reprinted in the Appendix ("App.") at 1. The two relevant orders of the district court, as well as the recommendations of the Magistrate Judge, are printed in the Appendix. App. 32, 35, 51, 57.

JURISDICTION

The Court of Appeals entered judgment on January 9, 2015. On March 31, 2015, Justice Thomas extended Petitioner's time to file this Petition through and including May 25, 2015. Jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The five sections of the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb through 42 U.S.C. § 2000bb-4, are reproduced in the Appendix. App. 71.

STATEMENT OF THE CASE

This case concerns one of the few, and certainly the most significant, unresolved issues under RFRA. In previous decisions, this Court found RFRA unconstitutional as it relates to states (*City of Boerne v. Flores*, 521 U.S. 507 (1997)); recognized the propriety of injunctive relief under RFRA (*Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430 (2006)); and held the term "appropriate relief" contained in the Religious Land Use and Institutionalized Person's Act, 42 U.S.C. § 2000cc *et seq*. ("RLUIPA") was insufficient for Congress to force a waiver of a state's sovereign immunity for claims seeking money damages. *Sossamon v. Texas*, ___ U.S. ___, 131 S.Ct. 1651, 1659 (2011).

The Court has not, however, addressed whether the federal government waived its own sovereign immunity to permit money damage claims under RFRA. This gap in RFRA jurisprudence creates the potential for confusion and contradictory lower court opinions. Indeed, the absence of guidance creates the risk, on full display in the Court of Appeals' decision at issue, that lower courts will reflexively rely upon *Sossamon* in deciding the separate issue of whether Congress waived federal sovereign immunity simply because RFRA and RLUIPA use the same language.

Respectfully, that analysis is flawed. The questions applicable to the federal government's waiver of its own sovereign immunity differ greatly from the question of whether Congress can require individual states to waive their sovereign immunity. *F.A.A. v.*

Cooper, ___ U.S. ___, 132 S.Ct. 1441 (2012), underscores the point. In *Cooper*, the Court held that the interpretative canon most often applied to sovereign immunity is not a trump, but rather is simply one canon to be applied equally with all others. These other canons, specifically those concerning the state of the law in existence when a statute is enacted, raise legal questions not addressed in *Sossamon*. Moreover, these other interpretive tools reflect that when Congress used the term "appropriate relief" in RFRA it did so knowing that a prisoner whose rights under that statute were violated in fact had a right to pursue money damages.

Moreover, this case presents an appropriate vehicle for the Court to answer the money damages question. The Circuit Court held that Petitioner's claims have merit. The only issue is the relief to which he may be entitled.

Accordingly, the Court should grant a Writ of Certiorari to address whether Congress waived federal sovereign immunity for money damages claims under RFRA.

A. Background

Petitioner Mr. Davila is a practitioner of the Santeria religion, is a Santeria priest, and an initiate

of the Orisha Chango.[1] Santeria is a syncretization of Catholicism and traditional African religions, arising from a history of slavery in Cuba. "The basis of the Santeria religion is the nurture of a personal relation with . . . *orishas*, and one of the principal forms of devotion is an animal sacrifice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993). "Sacrifices are performed . . . for the initiation of new members and priests." *Id*. at 525.

As part of Petitioner's initiation into the Chango Orisha, he underwent an extensive seven-day ceremony. App. 3. During that ceremony, Mr. Davila received a series of Santeria beads and Cowrie shells that were infused with the spiritual presence known as Ache. *Id.* Ache is "the power with which God Almighty – Oloddumare – created the universe. Everything is made of [Ache],[2] and through [Ache] everything is possible . . . All the invocations, propitiations, spells, and rituals of Santeria are conducted to acquire [Ache] from the orishas." MIGENE GONZALEZ-WIPPLER, SANTERIA: THE RELIGION 12 (2d ed. 2014).

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[1] Santeria is the subject of prior reported decisions. *See, Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (holding that Santeria is entitled to First Amendment protections) and *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994) (Sotomayor, J.) (enjoining a state prison from preventing delivery of Santeria beads to prisoners from outside source).

[2] The author's preferred spelling is "Ashe."

As summarized by the Eleventh Circuit:

> Mr. Davila is a long-time practitioner of Santeria. During his seven-day initiation ceremony to become a priest, he received a set of personal Santeria beads and Cowrie shells that were infused with a spiritual force called "Ache," which he believes to be the spiritual presence of an orisha. According to Mr. Davila, Ache is infused into the beads and shells during this ceremony by soaking the beads and shells in animal blood, and then rinsing them in an "elixir" containing dozens of plants and minerals. Mr. Davila states that he now wears these unique beads and shells "for personal protection and spiritual guidnaces [sic] as an essential element of [his] faith." For Mr. Davila, wearing beads and shells that have not been infused with Ache would be useless, if not blasphemous.

App. 3.

When he was incarcerated, Petitioner was denied his personal Santeria beads and Cowrie shells containing Ache. While he was provided replacement beads and shells, they did not contain Ache. Nor could the infusion of Ache be replicated in prison as it requires animal sacrifice. As the Court of Appeals recognized, this required Petitioner to live in a state he equates to blasphemy.[3]

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[3] Inter-religion comparisons are inherently challenging. Petitioner respectfully submits, however, that denying him the

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Petitioner therefore requested, under regulations of the Federal Bureau of Prisons, that he be permitted to have his personal Santeria beads and personal Santeria Cowrie shells, i.e., those containing Ache, delivered to him in prison from his goddaughter.[4] App. 4. Prison officials denied the request, invoking a prohibition on allowing friends or family member to send personal religious items to inmates. Instead, they contended that all religious items must be purchased through authorized vendors using prison-approved catalogues. *Id*. Crucially, Respondents never claimed that the beads and shells available through the prison-approved vendors possessed Ache; they simply "prohibited" Petitioner from receiving his Ache-infused religious objects from friends or family.

One of the key pieces of evidence below is Bureau of Prisons Program Statement 5360.09, *Religious Beliefs and Practices*. FEDERAL BUREAU OF PRISONS, U.S. DEP'T OF JUSTICE, PROGRAM STATEMENT 5360.09, RELIGIOUS BELIEFS AND PRACTICES (2004). Respondents rely on this Program Statement to justify their decision that religious items can be purchased only from authorized vendors through approved prison

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right to wear beads and shells infused with Ache is comparable to denying a communicant the right to receive a consecrated host during a Catholic communion ceremony. Absent consecration, the ceremony involves mere unleavened bread.

[4] The term "goddaughter" refers to a spiritual Santeria family member. Specifically, it means Petitioner was this individual's "godparent" who oversaw her initiation into the Santeria religion and the Orisha of the Almighty Chango.

catalogues. There is no dispute that the Program Statement on its face supports this position.

The Program Statement, however, contains additional language. Specifically, page 21 states:

> Each institution will develop an Institution Supplement for operating religious programs and activities. The Institution Supplement requires the Regional Director's approval prior to issuance **and must include the following** . . . (d) Procedures for acquiring authorized religious items **when no catalog vendor is available** (i.e eagle feathers).

Program Statement 5360.09, p. 21 (emphasis added).[5] The Panel relied on this portion of the Program Statement, at least in part, to hold that there were genuine issues of material fact whether the Respondents' denial of Petitioner's request met the "least restrictive analysis" portion of the RFRA legal analysis. App. 15-16.

The Court of Appeals found that the record currently existing in this case "contains no evidence that [Petitioner] has fabricated his stated need for beads and shells infused with Ache." App. 9. Indeed, the

[5] This page of the Program Statement does not appear in the record on appeal as the entire program statement was not attached to any of the briefs or affidavits in the district court. However, the Panel took judicial notice of the entire Program Statement and quoted the relevant portions in its opinion. App. 15. The entire Program Statement may be found at http://www.bop.gov/policy/progstat/5360_009.pdf.

Panel went further, noting that "the record before us reflects only that [Petitioner's] religious beliefs require him to wear beads and shells infused with Ache." App. 10. The Panel therefore concluded that Respondents' conduct, at least based on the current record, reflects that they "substantially burdened [Petitioner's] religious exercise by flatly preventing him from having his beads and shells." *Id.*

B. Summary of Proceedings Below

Petitioner sued Respondents for denying him access to beads and shells containing Ache. The district court dismissed Petitioner's entire case. His claim for money damages under RFRA was dismissed on the Pleadings (App. 52-55); his claim for injunctive relief under RFRA was denied under Rule 56 (App. 32-34). Petitioner appealed *pro se*. App. 1.

The Eleventh Circuit later appointed undersigned counsel to represent Petitioner *pro bono*. After briefing and oral argument, the Eleventh Circuit affirmed the dismissal of Petitioner's claim for money damages under RFRA,[6] but reversed and remanded concerning his claim for injunctive relief. The court held that there were questions of fact: (i) whether the prison's conduct was a substantial burden on Petitioner's exercise of his religion; (ii) whether prohibiting Petitioner from having his personal beads and

[6] Petitioner has not sought review of any other aspect of the Court of Appeals' decision.

shells infused with Ache furthers a compelling governmental interest; and (iii) whether the Respondents' decision to deny Petitioner access to his personal beads and shells was the least restrictive means to further security and cost management. App. 7-16.

The trial court had Jurisdiction under 28 U.S.C. § 1331. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1). On March 31, 2015, Justice Thomas extended Petitioner's time to file this Petition until May 25, 2015.

REASONS FOR GRANTING REVIEW

I. Whether RFRA Provides a Money Damages Remedy is an Important, Unresolved Issue Warranting Review.

While the Court has acknowledged that injunctive relief is appropriate under RFRA,[7] and while it has held that monetary relief is not available to a state prisoner under RLUIPA,[8] the Court has not decided whether a federal prisoner may recover monetary damages under RFRA. Indeed, the contours of the term "appropriate relief" under RFRA – a statute aimed at protecting federal prisoner's religious rights – is the key unresolved question defining those

[7] *Gonzales*, 546 U.S. at 430.

[8] *Sossamon,* 131 S.Ct. at 1659 (2011).

prisoners' rights. Review is both appropriate and necessary to fill this void in the jurisprudence.

Moreover, the issue has percolated sufficiently in the lower courts. Three circuit courts have held that RFRA does not permit a prisoner to recover money damages.[9] The two post *Sossamon* decisions held without much, if any, analysis that RFRA did not waive sovereign immunity for monetary claims. They rely heavily, if not entirely, on *Sossamon*. Specifically, the courts have held that because "appropriate relief" is insufficiently unambiguous for the federal government to effect a waiver of a state's sovereign immunity, it must also be insufficiently unambiguous for Congress to waive the federal government's sovereign immunity.[10] Respectfully, this over-simplifies the analysis. Whether Congress intended to waive federal sovereign immunity is an inquiry different in kind from whether it has effectively forced an individual state to waive its own sovereign immunity.

Review is also appropriate now because the conclusion that RFRA did not waive sovereign immunity (relying on *Sossamon*) is quickly becoming ingrained in the lower courts. *See* App. 53-54 (District Court setting forth recent opinions holding that money damages are not permitted under RFRA). This

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[9] These decisions are (i) App. 1; (ii) *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 841 (9th Cir. 2012); and (iii) *Webman v. Fed. Bureau of Prisons*, 441 F.3d 1022, 1026 (D.C. Cir. 2006).

[10] App. 20-21; *Oklevueha*, 676 F.3d at 841.

ossification should not occur absent the Court's voice. Just as it was appropriate for this Court to define the scope of the sovereign immunity waiver under RLUIPA, so too should it decide the scope of the waiver under RFRA. Moreover, given the paramount importance of protecting religious rights, the decision whether RFRA permits a money damages remedy should be explicit, not simply an implied extension of a decision interpreting the same language in a different statute.

II. This Case is an Appropriate Vehicle for This Issue to be Determined.

Whether RFRA permits a money damages remedy is a clean legal issue, appropriate for decision not only in light of development in the lower courts, but further appropriate under the particular circumstances of this case. To be sure, additional facts remain for resolution at trial. However, any disputed facts do not play a role in the presentation of the legal issue in this appeal.

Moreover, Petitioner's potential for victory at trial is not abstract. Statistically, his case stands out for its success on appeal. According to USCourts.gov, of the 5,060 appeals terminated in the circuit courts of appeals for the twelve month period ending June 30, 2014 in the category labelled "US Prisoner Petitions,"[11] only 3.2% resulted in a complete reversal.[12] In

[11] *Caseload Statistics Data Tables, Table B-5, U.S. Courts of Appeals – Decisions in Cases Terminated on the Merits, by*

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lower courts, there were more than 22,000 Prisoner Civil Rights cases filed in 2012.[13] Only 11.1% of those lower court cases resulted in a success for the plaintiffs.[14]

This case does not fit neatly into any of these statistical categories. Technically, Petitioner was one of the 88.9% whose cases resulted in a judgment for the prison in the trial court. Moreover, his appeal would be categorized by USCourts.gov as affirmed by the Eleventh Circuit, not reversed, since the Panel affirmed in part and reversed in part the lower court decisions.

Nonetheless, these statistics underscore the point. Petitioner's appeal has already been found to have merit. Statistically, that is not just a rarity, but an extreme rarity. Indeed, it is an unusual enough circumstance to distinguish this case from the vast majority

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Circuit and Nature of the Proceeding, During the 12 Month Period Ending June 30, 2014, USCOURTS.GOV, http://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2014/06/30.

[12] Cases such as this one in which the lower court decision is affirmed in part and reversed in part are included in the number of decisions which are affirmed.

[13] Margo Schlanger, *Trends in Prisoner Litigation, as the PLRA Enters Adulthood*, Public Law and Legal Theory Research Paper Series, Paper No. 427, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2506378, U.C. IRVINE L. REV. (forthcoming 2015); Table 1: Prison and Jail Population and Prisoner Civil Rights Filings in Federal District Court, Fiscal Years 1970-2012.

[14] *Id.*, Table 3: Outcomes in Prisoner Civil Rights Cases in Federal District Court, FY 1995-2012.

of prisoner petitions this Court must address each year. It also makes this case a proper vehicle for the legal question presented. Should the Court ultimately rule in Petitioner's favor, Petitioner will be entitled to pursue his claim for money damages in the trial court.

III. There is a Split Amongst the Circuits on the Issue.

There is a split amongst the circuits on whether RFRA permits a claim for money damages. Including this case, three circuits have overtly held the term "appropriate relief" is insufficient to constitute a waiver of the federal government's sovereign immunity. App. 1; *Oklevueha*, 676 F.3d 829; *Webman*, 441 F.3d 1022. This is clearly the trend post-*Sossamon* in the circuit courts.

However, prior to the ruling in *Sossamon*, the Third Circuit recognized that money damages may be recovered under RFRA. *Jama v. Esmor Corr. Servs., Inc.*, 577 F.3d 169 (3d Cir. 2009). In *Jama*, the court addressed whether attorney's fees could be awarded in support of a *de minimis* award of money damages under RFRA. 577 F.3d at 171. The only reason the issue arose is because a jury had awarded money damages (in the amount of $1) to the plaintiff based on her RFRA claim. The court let that award stand unchallenged. Accordingly, by implication, the Third Circuit recognized the ability to recover money damages under RFRA. Indeed, in dissent, Judge Garth

noted that "RFRA provides that, if a violation is found, **not only may damages be awarded** but reasonable attorney's fees may be assessed." 577 F.3d at 181 (emphasis added).

There is therefore a split amongst the Circuits as to whether RFRA permits a recovery of money damages.

IV. Petitioner's Legal Arguments are Meritorious.

There is no dispute that RFRA constitutes a waiver of some degree of the federal governments' sovereign immunity. The only issue is whether that waiver includes claims for money damages. Undertaking the analysis this Court has recognized as appropriate, that question should be answered in the affirmative. Since the intent of Congress in passing RFRA was to preserve certain rights as they existed in 1990, and since those rights as they then existed included the right to recover money damages from the federal government, it is apparent that Congress intended the term "appropriate relief" to waive sovereign immunity for monetary claims under RFRA.

Under RFRA, a "person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and **obtain appropriate relief against a government**." 42 U.S.C. § 2000bb-1(c) (emphasis added). The "term 'government' includes a branch, department, agency, instrumentality, and official (or

other person acting under color of law) of the United States. . . ." 42 U.S.C. § 2000bb-2(1). Thus, on the face of the statute, RFRA authorizes suit of some sort against both the United States and its employees acting in their official capacities.[15]

In *Sossamon*, the Court held the term "appropriate relief" was "ambiguous" and "context dependent" and therefore an insufficient waiver of the state's sovereign immunity to allow claims for money damages under RLUIPA. 131 S.Ct. at 1659. In so holding, the Court relied on a particular canon of statutory interpretation that in order to find a waiver of sovereign immunity, (i) the waiver must be unambiguous and (ii) the language in the statute will be strictly construed in favor of the sovereign. *Id.* at 1658. The Court's decision was based primarily on this analysis.

The following year, however, this Court issued another opinion clarifying the required approach when issues of sovereign immunity require statutory interpretation. *Cooper*, 132 S.Ct. 1441. In *Cooper*, the Court recognized that "the sovereign immunity canon 'is a tool for interpreting the law' and that it does not 'displac[e] the other traditional tools of statutory construction.'" 132 S.Ct. at 1448 (quoting *Richlin Security Serv. Co. v. Chertoff*, 553 U.S. 571, 589, 128 S.Ct. 2007 (2008)). Moreover, a court's "primary task

[15] The Court of Appeals held that qualified immunity would bar this suit against the Respondents in their individual capacities. App. 22-26. Petitioner has not sought review of that ruling.

in interpreting statutes [is] to determine congressional intent, using traditional tools of statutory construction." *Woods v. Standard Ins. Co.*, 771 F.3d 1257, 1265 (10th Cir. 2014). Canons of statutory interpretation are merely "designed to help judges determine the Legislature's intent as embodied in particular statutory language." *Chickasaw Nation v. United States*, 534 U.S. 84, 94, 122 S.Ct. 528 (2001). *Cooper* therefore requires an analysis applying all appropriate interpretive tools to determine Congressional intent.

Applying all the canons of statutory interpretation to RFRA, it is apparent that Congress did in fact intend to waive the federal government's sovereign immunity when it authorized claims for "appropriate relief." "Among these canons of [statutory] construction are the principles that Congress is presumed to be aware of judicial interpretations of a statute . . . [and] we assume that Congress is aware of existing law when it passes legislation." *Griffith v. United States*, 206 F.3d 1389, 1393 (11th Cir. 2000) (internal citations and quotations omitted). Moreover, Courts "presume that Congress expects its statutes to be read in conformity with the Supreme Court precedents." *United States v. Weaver*, 275 F.3d 1320, 1333 (11th Cir. 2001) (internal citations and quotations omitted).

Congress expressly stated that its intent in passing RFRA was to restore certain constitutional protections that this Court had narrowed. "The purposes of this chapter are (1) to restore the compelling interest

test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened. . . ." 42 U.S.C. § 2000bb. Indeed, "Congress enacted RFRA in direct response to the Court's decision in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)." *City of Boerne*, 521 U.S. at 512. Accordingly, it was clearly Congress's intent to restore religious freedoms to the condition as they existed prior to the *Smith* decision in 1990 and the passage of RFRA in 1993.

The state of the law prior to 1990 will therefore be reflective, if not actually determinative, of congressional intent. In fact, there are several pre-1990 cases that recognized a money damages claim in a suit against the United States and/or its officials for violation of a constitutional right.[16] That would include the rights Congress intended to restore in 1993.

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[16] *See Davis v. Passman*, 442 U.S. 228, 242 (1979) (recognizing right of individual to bring action for money damages against a United States Congressman under the Fifth Amendment); *Scott v. Rosenberg*, 702 F.2d 1263, 1271 (9th Cir. 1983) (while finding the FCC did not in fact violate the First Amendment, Court held that "[w]e assume without holding that [plaintiff] is entitled to recover damages if his first amendment rights have been unjustifiably violated. . . ."); *Paton v. La Prade*, 524 F.2d 862, 870 (3d Cir. 1975) ("we believe the extension of the Bivens rule to violations of first amendment rights to be both justifiable and logical.").

In addition to these general rights, several pre-1990 decisions implicitly recognized the right of a prisoner to seek money damages against the Federal Bureau of Prisons and its officers.[17] Indeed, in *Jihaad*, the Sixth Circuit recognized a money damages remedy because under the pre-1980 version of 28 U.S.C. § 1331(a), a plaintiff had to satisfy a $10,000 amount-in-controversy requirement. The prisoner had asserted claims under the First, Fifth and Eighth Amendments for purported violation of his religious rights. The Sixth Circuit overtly held the $10,000 amount in controversy was satisfied, thus recognizing the right for prisoners to bring suit for money damages. *Jihaad*, 645 F.2d at 561.

Under *Cooper*, all canons of statutory construction must be treated equally to serve the goal of determining Congressional intent. Taking into account

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[17] *See Jihaad v. O'Brien*, 645 F.2d 556 (6th Cir. 1981) (overturned award of damages to plaintiff/prisoner on claims of qualified immunity); *Chapman v. Kleindienst*, 507 F.2d 1246 (7th Cir. 1974) (remands entire case, including claim for money damages, for trial on merits); *Chapman v. Pickett*, 586 F.2d 22 (7th Cir. 1978) (qualified immunity barred prisoner's First Amendment claim for money damages; claim for money damages under Eighth Amendment violation remanded for trial); *Clifton v. Craig*, 1990 WL 80931 (D. Kan. 1990) (plaintiff/prisoner sought damages of $50,000; court denied claim on facts without discussing right of plaintiff to seek damages); *Jihaad v. Carlson*, 410 F. Supp. 1132, 1135 (E.D. Mich. 1976) (held it was futile to require federal prisoner/plaintiff to exhaust administrative remedies as bureau of prisons did not have authority to award money damages during that process).

the state of the law when Congress implemented RFRA's stated intent to restore religious rights to their pre-1990 status, it is apparent Congress intended to waive sovereign immunity to permit the federal government and its officials to be sued for monetary damages. The Panel therefore erred in simply relying on one canon of statutory construction as set forth in a case involving a different statute.[18]

Nor is it likely that a decision by this Court that RFRA waived sovereign immunity will be a pyrrhic victory. Respondents required Petitioner to live in a state of blasphemy for a period of years. Moreover, despite having every legal advantage arising from the security concerns associated with operating a prison,

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[18] The Court's holding in *Sossamon* does not dictate a different result. In *Sossamon*, the Court held that the "phrase 'appropriate relief' in RLUIPA is not so free from ambiguity that we may conclude that the States, by receiving federal funds, have unequivocally expressed intent to waive their sovereign immunity to suits for damages." 131 S.Ct. at 1660. In other words, the analysis in *Sossamon* addressed the federal government's effort to "cram down" a waiver of sovereign immunity onto individual states. Understood in that context, an implied portion of the Court's ruling was that the federal government intended the language "appropriate relief" to constitute a waiver of sovereign immunity. More importantly, the analysis of whether an individual state waived sovereign immunity for all claims set forth in a federal statute simply by accepting federal funds is unrelated to the question of whether Congress intended to waive the federal government's sovereign immunity by inserting the same language into a federal statute. Thus, the context of a term held to be inherently context dependent is very different in this case than in *Sossamon*.

they were unable to provide *any* evidence to support such a deprivation. App. 11-13. Indeed, all Petitioner asked was that his Goddaughter be permitted to deliver his personal Santeria beads and Cowrie shells to him in prison. Respondents simply refused. As this Court has noted, money damages under circumstances such as these "deter individual federal officers from committing constitutional violations." *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61, 71 (2001).

In short, if the Court grants review and reverses, Petitioner is likely to obtain not simply an injunction permitting him to obtain his beads and shells, but also money damages. The Court should therefore grant the Petition in order to permit this important question of federal law to be determined.

CONCLUSION

The Petition should be granted, the decision of the Eleventh Circuit should be vacated in relevant part, and the case should be remanded to the trial court for further consideration.

Dated: May 22, 2015

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-10739

D.C. Docket No. 2:12-cv-00005-LGW-JEG

ANTHONY DAVILA,

Plaintiff-Appellant,

versus

ROBIN GLADDEN,
National Inmate Appeals Coordinator, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(January 9, 2015)

Before MARTIN, JULIE CARNES, and ANDERSON, Circuit Judges. MARTIN, Circuit Judge:

Anthony Davila, a federal prisoner and a Santeria priest, filed a *pro se* complaint against a number

of prison employees (the Defendants[1]) in their official and individual capacities. He alleges violations of the First Amendment and the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, and seeks injunctive and monetary relief. Mr. Davila has alleged that his religious beliefs require him to wear a unique set of beads and shells that are infused with the spiritual force Ache. His lawsuit asserts that the Defendants violated his rights by refusing to allow him to receive his personal beads and shells from his goddaughter. The District Court dismissed Mr. Davila's claims for money damages under RFRA. It also granted summary judgment to the Defendants on Mr. Davila's First Amendment claims and on his claim for injunctive relief under RFRA. Mr. Davila, now counseled, asks us to reverse. After careful consideration, and having the benefit of oral argument, we conclude that the District Court erred in granting summary judgment on Mr. Davila's claim for injunctive relief under RFRA. We affirm the remainder of the District Court's holdings.

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[1] In his amended complaint, Mr. Davila listed a number of people as the Defendants. But he only prosecutes this appeal as to the prison chaplain, Dr. Bruce Cox, and the warden, Anthony Hayes. When we refer to the Defendants, we mean Dr. Cox and Warden Hayes.

I. BACKGROUND AND PROCEDURAL HISTORY

This case involves the Santeria faith, a belief system that has been a recurring subject of litigation in federal courts. Briefly, "[t]he basis of the Santeria religion is the nurture of a personal relation with . . . orishas [spirits], and one of the principal forms of devotion is an animal sacrifice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 524, 113 S. Ct. 2217, 2222 (1993) (emphasis omitted). "According to Santeria teaching, the orishas are powerful but not immortal. They depend for survival on the sacrifice." *Id.* at 525, 113 S. Ct. at 2222. In particular, "[s]acrifices are performed . . . for the initiation of new members and priests." *Id.*

Mr. Davila is a long-time practitioner of Santeria. During his seven-day initiation ceremony to become a priest, he received a set of personal Santeria beads and Cowrie shells that were infused with a spiritual force called "Ache," which he believes to be the spiritual presence of an orisha. According to Mr. Davila, Ache is infused into the beads and shells during this ceremony by soaking the beads and shells in animal blood, and then rinsing them in an "elixir" containing dozens of plants and minerals. Mr. Davila states that he now wears these unique beads and shells "for personal protection and spiritual guidnaces [sic] as an essential element of [his] faith." For Mr. Davila, wearing beads and shells that have not been infused with Ache would be useless, if not blasphemous.

In June 2011, Mr. Davila, then and now a prisoner at the Federal Correctional Institution in Jesup, Georgia, made a request under the Federal Bureau of Prisons (BOP) regulations to have his personal Santeria necklaces and Cowrie shells delivered to him in prison by his goddaughter, who is a Santeria priestess. Dr. Cox, the prison's Supervising Chaplain, denied the request, stating that religious items must be received only from "approved vendors" listed in the prison catalog, and that "[f]or the purpose of security, authorization to grant family members, friends, and acquaintances send in [sic] religious articles for inmates will be prohibited."

Mr. Davila appealed this decision, first to the prison warden, and then to the BOP Regional Director. Both denied his request. The Regional Director cited the BOP's Program Statement concerning Religious Beliefs and Practices, which says that religious items "will be purchased either from commissary stock or through an approved catalog[ ] source using the Special Purpose Order process." BOP Program Statement 5360.09, *Religious Beliefs and Practices,* ¶ 14(a). While the existing catalog offers bead necklaces and Cowrie shells, these items have not been infused with Ache through animal sacrifice.

On January 9, 2012, Mr. Davila filed this suit in federal court. He alleged that the Defendants violated his rights under the First Amendment's Free Exercise

Clause and RFRA.[2] He seeks an injunction and money damages against the Defendants in their individual and official capacities. The Defendants filed a motion to dismiss Mr. Davila's action, and the District Court granted that motion as to his claims for money damages under RFRA against the Defendants in their individual and official capacities. The District Court also dismissed Mr. Davila's First Amendment money damages claim against the Defendants in their official capacities. At that time, the District Court allowed the RFRA claim for injunctive relief and the remaining First Amendment claims to go forward. The Defendants then filed a motion for summary judgment on Mr. Davila's remaining claims, and the District Court granted that motion. We now consider Mr. Davila's appeal of those rulings.

II. STANDARDS OF REVIEW

We review "*de novo* a district court's denial of summary judgment, applying the same legal standards that governed the district court." *Carter v. City of Melbourne, Fla.,* 731 F.3d 1161, 1166 (11th Cir. 2013) (per curiam). A court "shall grant summary

[2] Mr. Davila also challenged the prison's actions under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1. The District Court dismissed that claim in its grant of the Defendants' motion to dismiss because, as the Magistrate Judge correctly noted, "RLUIPA clearly does not create a cause of action against the federal government or its correctional facilities." Mr. Davila does not challenge that decision here.

judgment if the movant shows that 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). We "view the evidence and all factual inferences therefrom in the light most favorable to the non-moving party, and resolve all reasonable doubts about the facts in favor of the non-movant." *Carter,* 731 F.3d at 1166 (quoting *Skop v. City of Atlanta, Ga.,* 485 F.3d 1130, 1143 (11th Cir. 2007)).

Likewise, "[w]e review a district court order granting a motion to dismiss *de novo,* applying the same standard as the district court." *Randall v. Scott,* 610 F.3d 701, 705 (11th Cir. 2010). We "accept as true the facts as set forth in the complaint and draw all reasonable inferences in the plaintiff 's favor." *Id.*

III. RFRA CLAIM FOR INJUNCTIVE RELIEF

We first address Mr. Davila's claim for injunctive relief under RFRA, on which the District Court entered summary judgment in favor of the Defendants. "Congress enacted RFRA . . . in order to provide very broad protection for religious liberty." *Burwell v. Hobby Lobby Stores, Inc.,* ___ U.S. ___, 134 S. Ct. 2751, 2760 (2014). Under the statute, the "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). If the Government takes action that substantially burdens a person's exercise of religion, it must "demonstrate[ ] that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000bb-1(b). We address each part of the test in turn. After careful review of the record in the light most favorable to Mr. Davila, we conclude that the District Court erred in granting summary judgment on Mr. Davila's RFRA claim for injunctive relief.

A. Substantial Burden on Mr. Davila's Religious Exercise

Under RFRA, a plaintiff must first show that the Government has substantially burdened his exercise of religion. In evaluating these claims, a district court must determine whether an inmate's (1) religious exercise is (2) substantially burdened by prison policy. § 2000bb-1(a). No one has seriously disputed that Mr. Davila's beliefs about his religious exercise were sincerely held. However, the Magistrate Judge who first considered this case found that the "Defendants' application of Program Statement 5360.09 [did] not impose a substantial burden on [the] Plaintiff's exercise of his religion." The District Court adopted that finding in full. Because we remand on this RFRA claim, we begin with the standard under RFRA's first prong.

First turning to religious exercise, the Supreme Court recently explained that "it is not for us to say that [a plaintiff's] religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in

this context is to determine' whether the line drawn [between conduct that is and is not permitted under one's religion] reflects an *honest conviction*." *Hobby Lobby,* 573 U.S. at ___, 134 S. Ct. at 2779 (emphasis added) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 716, 101 S. Ct. 1425, 1431 (1981)). This rule minds the Supreme Court's warning that judges "must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." *Emp't Div. v. Smith,* 494 U.S. 872, 887, 110 S. Ct. 1595, 1604 (1990); *see also Thomas,* 450 U.S. at 716, 101 S. Ct. at 1431 (insisting that judges not become "arbiters of scriptural interpretation"). A secular, civil court is a poor forum to litigate the sincerity of a person's religious beliefs, particularly given that faith is, by definition, impossible to justify through reason. *See Hernandez v. Comm'r,* 490 U.S. 680, 699, 109 S. Ct. 2136, 2148 (1989) ("It 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."); *Watts v. Fla. Int'l Univ.,* 495 F.3d 1289, 1297 (11th Cir. 2007) ("It is difficult to gauge the objective reasonableness of a belief that need not be acceptable, logical, consistent, or comprehensible to others."). As our sister circuit noted in the related context of RLUIPA, "Congress made plain that we . . . lack any license to decide the relative value of a particular exercise to a religion." *Yellowbear v. Lampert,* 741 F.3d 48, 54 (10th Cir. 2014). That being the case, we look only to see whether "the claimant is (in essence) seeking to perpetrate a fraud

on the court – whether he actually holds the beliefs he claims to hold." *Id.*

At this stage of the litigation, these Defendants have not argued that Mr. Davila's religious beliefs were not sincerely held. Neither did the Magistrate Judge or the District Court grant summary judgment on the basis of the sincerity of Mr. Davila's religious beliefs. Although the Defendants may contest the issue at trial, the record at summary judgment contains no evidence that Mr. Davila has fabricated his stated need for beads and shells infused with Ache. Summary judgment would therefore not be appropriate on this ground.

Second, the question of whether Mr. Davila's religious exercise was substantially burdened is also straightforward on this summary judgment record. We have "made clear that, in order to constitute a 'substantial burden' on religious practice, the government's action must be 'more than . . . incidental' and 'must place more than an inconvenience on religious exercise.' That is, to constitute a substantial burden [ ], the governmental action must significantly hamper one's religious practice." *Smith v. Allen,* 502 F.3d 1255, 1277 (11th Cir. 2007) (citation omitted) (quoting *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir. 2004)), *abrogated on other grounds by Sossamon v. Texas,* 563 U.S. ___, 131 S. Ct. 1651 (2011). The Supreme Court has observed that the test for whether a person's religious exercise is substantially burdened is not "whether the religious belief asserted in a RFRA case

is reasonable." *Hobby Lobby,* 573 U.S. at ___, 134 S. Ct. at 2778. Instead, we look to "whether the [government's rule] imposes a substantial burden on the ability of the objecting part[y] to conduct [himself] in accordance with [his] religious beliefs." *Id.* (emphasis omitted); *see also Yellowbear,* 741 F.3d at 55 (noting that a burden is substantial when it "prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief").

The record before us reflects only that Mr. Davila's religious beliefs require him to wear beads and shells infused with Ache. The Defendants presented no evidence or argument to support a finding that Mr. Davila's exercise of his religious practices would not be burdened if he is continued to be denied these things. Mr. Davila has therefore shown, at least at this stage of the litigation, that the Defendants substantially burdened his religious exercise by flatly preventing him from having his beads and shells. On this record, the District Court erred in its finding that Mr. Davila's sincerely held religious beliefs were not substantially burdened.

B. In Furtherance of a Compelling Governmental Interest

Once a plaintiff shows that his exercise of religion is substantially burdened, the Government must demonstrate that its challenged actions are in furtherance of a compelling governmental interest. To make this showing, the Defendants tell us that the

compelling governmental interest of security and order justifies keeping inmates from getting religious items from unauthorized sources. Mr. Davila concedes that prison order and security are compelling governmental interests. *See Pell v. Procunier,* 417 U.S. 817, 823, 94 S. Ct. 2800, 2804 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."). However, he argues that the Defendants did not show, for purposes of summary judgment, that the prison policy here actually furthers these interests. *See Rich v. Sec'y, Fla. Dep't of Corr.,* 716 F.3d 525, 533 (11th Cir. 2013) (finding that "[w]hile safety and cost can be compelling governmental interests, the Defendants have not carried their burden to show that [the] policy in fact furthered these two interests" for summary judgment purposes). We agree.

In evaluating whether particular policies are in furtherance of a compelling governmental interest, courts should "look[ ] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[ ] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal,* 546 U.S. 418, 431, 126 S. Ct. 1211, 1220 (2006). As we recently observed, "[w]hile we are mindful of our obligation to give due deference to the experience and expertise of prison and jail administrators, policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not

suffice to meet the act's requirements." *Rich,* 716 F.3d at 533 (citations and quotation marks omitted). For instance, in *Rich,* we overturned a district court's grant of summary judgment rejecting a prisoner's RLUIPA claim, because the prison's evidence of security concerns was "speculative" and the prison's cost projections made assumptions that were not supported by the record. 716 F.3d at 533-34.

There are genuine disputes of material fact in the record before us about whether prohibiting Mr. Davila from having his personal beads and shells furthers a compelling governmental interest. The Defendants argue generally that the BOP has a broad, compelling governmental interest in security and order that justifies preventing inmates from getting religious items from unauthorized outsiders. The Defendants rely on the prison warden's affidavit, which reads: "permitting inmates to obtain personal religious items from unauthorized outsiders such as family and friends would have a major impact on prison staff and inmates, as allowing such would drastically increase an inmate's ability to smuggle contraband and/or weapons into the prison." The Defendants also point to the cost of screening items. For this, they again cite to the warden's affidavit, which states: "allowing prisoners to obtain religious items from unauthorized sources would also have a major impact on prison resources, as prison staff would then be required to spend more time and money screening and examining those items before an inmate would be allowed to take possession of such items."

However, the Defendants' generalized statement of interests, unsupported by specific and reliable evidence, is not sufficient to show that the prison restriction furthered a compelling governmental interest. The Defendants offer little more than a conclusory assertion that if they grant Mr. Davila's request, there will be a significant impact on security interests and cost concerns. On this record, we are left to wonder about the number of prisoners who may similarly request religious objects; any processes the prison currently has for screening objects from outside sources; past incidents of mailed contraband that justify the warden's security fears; and the actual costs and time the prison would need to spend on screening. The only source of information about these crucial questions is the prison warden's terse affidavit. But prison officials cannot simply utter the magic words "security and costs" and as a result receive unlimited deference from those of us charged with resolving these disputes. *See Gonzales,* 546 U.S. at 438, 126 S. Ct. at 1225 ("[U]nder RFRA invocation of such general interests, standing alone, is not enough."). Doing so would ignore RFRA's plain meaning and intent.

We are quite mindful that for prisons, we must afford "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter v. Wilkinson,* 544 U.S. 709, 723, 125 S. Ct. 2113, 2123

(2005) (citation omitted). But here, where the prison has offered no evidence to justify its cost and safety concerns, the requirements of RFRA have not been met. The Defendants have failed, as a matter of law, to meet their burden of demonstrating that their policy furthers a compelling governmental interest. Because there are genuine disputes of material fact about whether prohibiting Mr. Davila from having his personal beads and shells furthers a compelling governmental interest, the District Court erred in granting summary judgment to the Defendants on this ground.

C. Least Restrictive Alternative

Even if the Defendants had shown a compelling governmental interest justifying the burden on Mr. Davila's religious exercise as a matter of law, they have not shown that their wholesale ban on religious items outside the catalog is the least restrictive means for furthering that interest. The Supreme Court recently reminded us that "[t]he least-restrictive-means standard is exceptionally demanding." *Hobby Lobby,* 573 U.S. at ___, 134 S. Ct. at 2780. Although "cost may be an important factor in the least-restrictive-means analysis, . . . RFRA . . . may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs." *Id.* at 2781.

In his response to the Defendants' motion for summary judgment, Mr. Davila argued that the least

restrictive means would have been for Dr. Cox to contact a qualified Santeria priest or priestess, such as his goddaughter, and designate that person as an approved vendor for Ache-infused items. Mr. Davila says this process could be done at a *de minimis* cost to the prison. The Defendants presented no evidence refuting this assertion other than to say that BOP policy prohibits obtaining a religious item from a source other than an approved vendor's catalog. In rebuttal, Mr. Davila responds that, while the Program Statement generally requires prisoners to get religious items through a specified catalog, it also includes a directive that prisons create "[p]rocedures for acquiring authorized religious items when no catalog vendor is available."[3] That the prison's own policy contemplates exemptions from the catalog requirement undercuts the Defendants' argument that a categorical prohibition on non-catalog religious objects is the least restrictive means of achieving their objectives.

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[3] The Defendants argue that this portion of the Program Statement is not contained in the record, and that we therefore should not address it. But we may take judicial notice of a federal prison manual that is readily available to the public. *See, e.g., United States v. Thornton,* 511 F.3d 1221, 1229 n.5 (9th Cir. 2008) (taking judicial notice of a BOP Program Statement regarding organ transplants for prisoners); *Antonelli v. Ralston,* 609 F.2d 340, 341 n.1 (8th Cir. 1979) (taking judicial notice of a Program Statement issued by the BOP relating to prisoners' mail).

Beyond that, the record also reflects that the prison allowed Mr. Davila to receive prescription eyeglasses by mail from a family member. This evidence at least raises important questions about what procedures the prison already has in place to screen items brought in from outside the prison; how effective those existing procedures are; and how burdensome it would be to simply screen religious items through that same established procedure. *See Hobby Lobby,* 573 U.S. at ___, 134 S. Ct. at 2780 (holding that the government had not shown that the contraceptive mandate at issue was the least restrictive alternative to providing contraceptive coverage to women because "HHS ha[d] not provided any estimate of the average cost per employee of providing access to . . . contraceptives."). There are therefore genuine disputes of material fact about whether the BOP's policy decision in this case constituted the least restrictive means to further security and cost management. On this record, the District Court erred in granting the Defendants' summary judgment motion on Mr. Davila's RFRA claim for injunctive relief.[4]

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[4] The Defendants cite *Brunskill v. Boyd,* 141 F. App'x 771 (11th Cir. 2005) (per curiam) (unpublished), in which this Court held that denying a prisoner's request to possess religious materials including "tobacco, sage, cedar, sweetgrass, beads, leather, thread, needles, and feathers" was the "least restrictive means in furthering compelling governmental interests in the security, health, and safety of inmates and staff." *Id.* at 773, 776. However, this case is unpublished and therefore not binding precedent. It

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IV. RFRA CLAIM FOR MONEY DAMAGES

We turn next to the question of whether Mr. Davila would be entitled to money damages if he succeeds on his RFRA claim at trial. RFRA provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain *appropriate relief* against a government." 42 U.S.C. § 2000bb-1(c) (emphasis added). The "term 'government' includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States. . . ." *Id.* § 2000bb-2(1). "[A]ppropriate relief" is not defined by the statute. Though it is uncontroversial that the "appropriate relief" language authorizes injunctive relief, *see, e.g., Gonzales,* 546 U.S. at 423, 126 S. Ct. at 1216 (upholding the issuance of an injunction against the federal government under RFRA), the availability of money damages is a question as yet unanswered by both this Court as well as the Supreme Court.

So we now take up two questions of first impression: whether RFRA authorizes suits for money damages against officers in their (1) official or (2) individual capacities.[5] Our analysis for each type of suit

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was also decided well before the Supreme Court's *Hobby Lobby* decision.

[5] The Defendants argue that we should not address rulings that the District Court made at the motion-to-dismiss stage because Mr. Davila failed to specifically reference the order granting the motion to dismiss in his notice of appeal. We review *de*

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is distinct. *Cf. Allen,* 502 F.3d at 1272 (treating as separate the questions of authorization for suits for

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novo questions concerning our subject-matter jurisdiction. *Elend v. Basham,* 471 F.3d 1199, 1204 (11th Cir. 2006). Federal Rule of Appellate Procedure 3(c)(1)(B) provides that a notice of appeal "must . . . designate the judgment, order, or part thereof being appealed." In his notice of appeal, Mr. Davila specifically referenced "the judgment entered by the Honorable Chief Judge Lisa Godbey Wood on February 6th 2013, to the Eleventh Circuit Court of Appeals in Atlanta, Georgia." He made no reference to the District Court's grant of the Defendants' motion to dismiss. If Mr. Davila cannot challenge the grant of the Defendants' motion to dismiss, the court would lack subject matter jurisdiction to address his claims regarding monetary relief under RFRA.

The Defendants overlook, however, that we always construe *pro se* pleadings liberally. *Tannenbaum v. United States,* 148 F.3d 1262, 1263 (11th Cir. 1998) (per curiam). Mr. Davila was uncounseled at the time he filed his notice of appeal. Beyond that, we have held that "since only a final judgment or order is appealable, the appeal from a final judgment draws in question all prior non-final orders and rulings which produced the judgment." *Barfield v. Brierton,* 883 F.2d 923, 930 (11th Cir. 1989) (footnote omitted). The issues that were dismissed at the motion-to-dismiss stage are "inextricably intertwined" with those the District Court denied at the summary judgment stage, *Hill v. BellSouth Telecomm., Inc.,* 364 F.3d 1308, 1313 (11th Cir. 2004) (citation omitted), because they all have to do with Mr. Davila's religious rights under the same set of facts. In any event, the Defendants have not been "prejudiced," *id.*, because – regardless of the clarity of the notice of appeal – they have argued the money damages questions in their brief before this Court. In short, "[i]t is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of such mere technicalities." *Foman v. Davis,* 371 U.S. 178, 181, 83 S. Ct. 227, 230 (1962). We therefore address the money damages questions dismissed by the District Court.

money damages in officers' individual and official capacities under RLUIPA). While an officer can assert personal-immunity defenses like qualified immunity for suits against him in his individual capacity, the only immunity defenses he can assert in suits against him in his official capacity are forms of sovereign immunity. *Id.* at 1272-73. After careful consideration, we conclude that Congress did not clearly waive sovereign immunity to authorize suits for money damages against officers in their official capacities under RFRA. Also, even if we were to assume the statute authorizes suits for money damages against officers in their individual capacities, we hold that the Defendants here would be entitled to qualified immunity.

A. Suits Against Officers in Their Official Capacities

First, we address whether Congress authorized suits for money damages against officers in their official capacities when it passed RFRA. In order to authorize official-capacity suits, Congress must clearly waive the federal government's sovereign immunity. According to the Supreme Court, "a waiver of sovereign immunity must be unequivocally expressed in statutory text." *FAA v. Cooper,* 566 U.S. ___, ___, 132 S. Ct. 1441, 1448 (2012) (quotation marks omitted). "Any ambiguities in the statutory language are to be construed in favor of immunity, so that the Government's consent to be sued is never enlarged beyond what a fair reading of the text requires." *Id.* (citations

omitted). "Ambiguity exists if there is a plausible interpretation of the statute that would not authorize money damages against the Government." *Id.* At the same time, the Court does not require that Congress use specific language, and the "sovereign immunity canon . . . does not 'displace the other traditional tools of statutory construction.'" *Id.* (quoting *Richlin Sec. Serv. Co. v. Chertoff,* 553 U.S. 571, 589, 128 S. Ct. 2007, 2019 (2008)) (alteration adopted).

In *Sossoman* [sic] *v. Texas,* 563 U.S. ___, ___ 131 S. Ct. 1651, 1658 (2011), the Supreme Court held that identical "appropriate relief" language in the related statute RLUIPA did *not* waive states' sovereign immunity from money damages. *Id.* at 1658.[6] "Appropriate relief," according to the Court, "is open-ended and ambiguous about what types of relief it includes." *Id.* at 1659. It is a "context-dependent" phrase, and "[t]he context here – where the defendant is a sovereign – suggests, if anything, that monetary damages are not suitable or proper." *Id.* (quotation marks omitted). The only two circuit courts to address whether RFRA waived the federal government's sovereign immunity have held that it did not. *See Oklevueha Native Am. Church of Haw., Inc. v. Holder,* 676 F.3d 829, 841 (9th Cir. 2012) (holding that "[a]lthough the Supreme Court in *Sossamon* considered claims against a state,

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[6] *Sossoman* [sic] abrogated our decision in *Allen,* 502 F.3d 1255, to the extent that it allowed a suit for damages against RLUIPA against government officials in their official capacity. *See Sossamon,* 563 U.S. at ___, 131 S. Ct. at 1657.

rather than federal actors, and was therefore guided by the Eleventh Amendment, the Court's interpretation of 'appropriate relief' is also applicable to actions against federal defendants under RFRA" (footnote omitted)); *Webman v. Fed. Bureau of Prisons,* 441 F.3d 1022, 1026 (D.C. Cir. 2006) (holding that it could not find "an unambiguous waiver in language this open-ended and equivocal").

Arguing that Congress waived the Government's sovereign immunity, Mr. Davila asks us to consider the statutory interpretation canon that "Congress is aware of existing law when it passes legislation." *Griffith v. United States,* 206 F.3d 1389, 1393 (11th Cir. 2000) (quotation marks omitted). The purpose of RFRA, according to Mr. Davila, was "to restore the status of an individual's right to sue under the First Amendment which existed prior to 1993." And prior to 1993, a number of cases had recognized a claim for money damages against the United States for violations of a constitutional right. *See* Pet'r's Br. 50 & n.16 (citing cases). Based on this, he argues that Congress intended to waive its sovereign immunity in light of the existing law at the time of RFRA's passage.

We reject Mr. Davila's analysis, and instead follow the lead of our sister circuits. Though Mr. Davila is certainly right about the existence of a canon that "Congress is aware of existing law when it passes legislation," he has pointed to no case holding that such a general interpretive rule overrides the specific rule governing a waiver of sovereign immunity. The

fact remains that "[a]ny ambiguities in the statutory language are to be construed in favor of immunity." *Cooper,* 566 U.S. at ___, 132 S. Ct. at 1448. Also, Mr. Davila's argument is difficult to square with the Supreme Court's reasoning in *Sossamon* – which directly addressed the ambiguity of the phrase "appropriate relief." We recognize that in *Sossamon,* the Court was addressing the sovereign immunity of the states.[7] However, the Court's analysis in addressing the ambiguity of "appropriate relief" applies equally to issues of federal sovereign immunity. Congress did not unequivocally waive its sovereign immunity in passing RFRA. RFRA does not therefore authorize suits for money damages against officers in their official capacities.

B. Qualified Immunity

Second, we decline to address whether RFRA authorizes suits against officers in their individual capacities. Even if RFRA did authorize individual-capacity suits for money damages, these Defendants would be entitled to qualified immunity.[8]

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[7] Congress "enact[ed] RLUIPA pursuant to its Spending Clause and Commerce Clause authority." *Sossamon,* 563 U.S. at ___, 131 S. Ct. at 1656. It targets state and police action that restricts the religious exercise of people who are institutionalized. *Id.* RFRA, on the other hand, was enacted pursuant to Congress' power under Section 5 of the Fourteenth Amendment, and applies only to the federal government. *Id.*

[8] Mr. Davila argues that because the question of qualified immunity was not addressed by the District Court, it is "premature to

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"[Q]ualified immunity offers complete protection for government officials sued in their individual capacities as long as their conduct violates no clearly established statutory or constitutional rights of which a reasonable person would have known." *Oliver v. Fiorino,* 586 F.3d 898, 904 (11th Cir. 2009) (quotation marks omitted). "In analyzing the applicability of qualified immunity, the Court has at its disposal a two-step process. Traditionally, a court first determines whether the officer's conduct amounted to a constitutional violation. Second, the court analyzes whether the right violated was 'clearly established' at the time of the violation." *Lewis v. City of W. Palm Beach, Fla.,* 561 F.3d 1288, 1291 (11th Cir. 2009) (citations omitted), *cert. denied,* 559 U.S. 936, 130 S. Ct. 1503 (2010). However, under *Pearson v. Callahan,* 555 U.S. 223, 129 S. Ct. 808 (2009), courts are no longer required to conduct the qualified immunity analysis in this order. We may "exercise [our] sound discretion" in deciding which prong of the inquiry to address first. *Id.* at 236, 129 S. Ct. at 818. Here, we begin and end our qualified immunity analysis with the second question – whether it was clearly established at the time of the incident that the Defendants

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look at the issue in this Court." However, "[w]e may affirm a decision on any adequate grounds, including grounds other than the grounds upon which the district court actually relied." *Rowe v. Schreiber,* 139 F.3d 1381, 1382 & n.2 (11th Cir. 1998) (affirming summary judgment dismissal on qualified immunity grounds even when the district court granted summary judgment on absolute immunity grounds).

violated Mr. Davila's constitutional rights. We hold that it was not.

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz,* 533 U.S. 194, 202, 121 S. Ct. 2151, 2156 (2001). This Court has observed that "[a] government-officer defendant is entitled to qualified immunity unless, at the time of the incident, the preexisting law dictates, that is, truly compels, the conclusion for all reasonable similarly situated public officials that what [a] Defendant was doing violated [a] Plaintiff 's federal rights in the circumstances." *Marsh v. Butler Cnty., Ala.,* 268 F.3d 1014, 1030-31 (11th Cir. 2001) (en banc) (alteration adopted) (quotation marks omitted), *abrogated on other grounds by Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 127 S. Ct. 1955 (2007).

Whether or not the District Court concludes that the Defendants violated Mr. Davila's rights under RFRA at trial, the law preexisting the Defendants' conduct did not *compel the conclusion* that their actions violated RFRA. Mr. Davila offers three reasons why his right to obtain his beads and shells infused with Ache was clearly established. First, he argues that the BOP's Program Statement required the prison to supplement its ordinary procedures for obtaining religious items when Mr. Davila could not get the items he needed from the prison catalog. He says the Defendants knowingly ignored that Statement. Second, he points out that the Supreme Court has

affirmed Santeria as a religion entitled to free exercise rights. And third, he argues that "the issue of whether a prison could prevent members of the Santeria religion from having their personal religious items mailed to them has already been litigated, and the outcome was in favor of the prisoners practicing Santeria." Pet'r's Br. 55 (citing *Campos v. Coughlin,* 854 F. Supp. 194, 214 (S.D.N.Y. 1994)).

None of these reasons demonstrates a clearly established rule that Mr. Davila is entitled to his beads and shells. First, the fact that the Program Statement requires the Defendants to enact reasonable supplements to the ordinary processes for obtaining religious items does not clearly establish what types of religious accommodations are *mandated* by RFRA. Second, the fact that the Supreme Court in *Church of Lukumi Babalu Aye, Inc.,* 508 U.S. 520, 113 S. Ct. 2217, recognized that Santeria is a religion generally entitled to protections does not clearly establish the precise types of protections its followers are statutorily entitled to receive. Officers are entitled to clear notice about how their actions violate federal rights. In order to do away with qualified immunity for these offices, it must have been clearly established under RFRA that a prisoner can get religious property from outside sources when the religious items available through authorized means are not sufficient to meet the prisoner's religious needs. Mr. Davila has offered no prior case clearly establishing that proposition. Finally, the *Campos* case Mr. Davila cites is distinguishable because it held that a

Department of Correctional Services directive that "prohibit[ed] prisoners from *wearing* certain religious artifacts, including plaintiffs' religious beads" violated the First Amendment. *Campos,* 854 F. Supp. at 197 (emphasis added). Regardless, that case is from a district court in another jurisdiction and does not interpret RFRA. *See Thomas ex rel. Thomas v. Roberts,* 323 F.3d 950, 955 (11th Cir. 2003) ("[O]nly Supreme Court cases, Eleventh Circuit caselaw, and Georgia Supreme Court caselaw can 'clearly establish' law in this circuit."). *Campos* does not therefore clearly establish a right under RFRA in the Eleventh Circuit. For those reasons, these Defendants are entitled to qualified immunity. So even if Mr. Davila is successful at trial in proving a RFRA violation, these Defendants would be protected from paying money damages in their individual capacities.

V. FIRST AMENDMENT CLAIM

Finally, we turn to Mr. Davila's First Amendment claim. The Supreme Court has noted two principles that affect religious rights of prisoners under the First Amendment: first, that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution," *Turner v. Safley,* 482 U.S. 78, 84, 107 S. Ct. 2254, 2259 (1987), and second, that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," *Procunier v. Martinez,* 416 U.S. 396, 405, 94 S. Ct. 1800, 1807 (1974). With these principles in mind, courts require that prison rules which fail to

accommodate sincerely held religious beliefs be "reasonably related to legitimate penological interests." *Turner,* 482 U.S. at 89, 107 S. Ct. at 2261. The standard divides into four factors: (1) whether there is a "valid, rational connection" between the regulation and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the asserted constitutional rights that remain open to the inmates; (3) whether and the extent to which accommodation of the asserted rights will have an impact on prison staff, inmates, and the allocation of prison resources generally; and (4) whether there are "obvious, easy alternatives" to the prison's policy that would accommodate the prisoner's religious beliefs. *Turner,* 482 U.S. at 89-90, 107 S. Ct. at 2261-62.[9]

Our review of a prison restriction under the First Amendment is different from our review of that same restriction under RFRA. While the First Amendment requires only that prison restrictions be reasonably related to legitimate penological interests, RFRA requires restrictions to be the least restrictive

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[9] It has not been established whether the Supreme Court's sweeping decision in *Smith,* which held that neutral laws of general applicability are usually constitutional under the Free Exercise Clause, overruled the more rigorous test from *Turner.* But since the parties have not raised it, we need not address that tension here. *See Hakim v. Hicks,* 223 F.3d 1244, 1247 n.3 (11th Cir. 2000) ("The DOC has not argued in this case that the Supreme Court's decision in *[Smith]* requires application of a different standard. Accordingly, we do not decide the issue.").

alternatives to furthering compelling governmental interests. That RFRA may offer an avenue of relief where the First Amendment does not is no surprise. Congress said when it passed RFRA that "the intent of the act [was] to restore the traditional protection afforded to prisoners to observe their religions which was weakened by the [Supreme Court's] decision in *O'Lone v. Estate of Shabazz*[*,* 482 U.S. 342, 107 S. Ct. 2400 (1987)]." S. Rep. 103-111, at 9 (1993), *as reprinted in* 1993 U.S.C.C.A.N. 1892, 1899; *see also Lawson v. Singletary,* 85 F.3d 502, 509 (11th Cir. 1996) (per curiam) (comparing the "unadorned rational basis test" from *O'Lone* with the compelling interest test that RFRA reintroduced). Notably, in the recent *Hobby Lobby* decision, the Supreme Court recognized that RFRA today represents "a complete separation from First Amendment case law." 573 U.S. at ___, 134 S. Ct. at 2762.

Applying the First Amendment's "unadorned rational basis standard" to the record before us, we conclude that the District Court properly granted summary judgment to the Defendants on this claim. Because, at this stage of the proceedings, the Defendants have not challenged the sincerity of Mr. Davila's claim that his beliefs require him to wear beads and shells infused with Ache, *see supra* Part III.A, we turn directly to the four-part test.

First, there is no genuine dispute about whether there is a "valid, rational connection" between the Defendants' prohibition of all mailed religious items and a legitimate governmental interest. This Court's

standard for the government to pass the first prong is exceedingly low in the First Amendment context. For instance, in *Pope v. Hightower,* 101 F.3d 1382, 1385 (11th Cir. 1996), we easily held that a prison's restriction on telephone access had a rational connection to a legitimate governmental objective. The general goal of "[r]eduction of criminal activity and harassment" was a sufficient legitimate governmental objective, and "[t]he connection between that objective and the use of a ten-person calling list [was] valid and rational because *it [was] not so remote as to render the prison telephone policy arbitrary or irrational.*" *Id.* (emphasis added). Likewise, despite the lack of evidence the Defendants offered here, prohibiting prisoners from receiving items from outside the prison does not have so remote a connection to the concerns about safety and resource allocation as to render the policy arbitrary or irrational.

Second, there is no genuine dispute about whether Mr. Davila has alternative means of practicing Santeria. In *O'Lone,* the Supreme Court rejected a prisoner's First Amendment challenge to a prison's restriction of his ability to attend Jumu'ah, a Muslim service at a specific time of day and day of the week, even though it admitted that there were "no alternative means of attending Jumu'ah." 482 U.S. at 351, 107 S. Ct. at 2406. The Court went on to hold: "While we in no way minimize the central importance of Jumu'ah to respondents, we are unwilling to hold that prison officials are required by the Constitution to sacrifice legitimate penological objectives to that

end." *Id.* at 351-52, 107 S. Ct. at 2406. Here, even though Mr. Davila has no alternative means of obtaining beads and shells with Ache, this showing is not enough for relief under the First Amendment.

Third, there is no genuine dispute that allowing prisoners to receive religious items from outside the prison would impact prison staff, other inmates, and the allocation of prison resources. Again, in the First Amendment context, a prison need not show the extent to which a particular accommodation would impact resources, but instead only that it would have an impact. As the Supreme Court has observed "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications on the liberty of others or on the use of the prison's limited resources for preserving institutional order." *Turner,* 482 U.S. at 90, 107 S. Ct. at 2262. Thus, regardless of whether the prison here has an existing system of processing items from outside the prison, allowing more items through that process would indisputably impact the use of the prison's resources. Unlike RFRA, such a meager showing is all the First Amendment requires.

Finally, there is no genuine dispute about whether there are obvious, easy alternatives to the prison's policy prohibiting receipt of religious items from outside the prison. As the Court noted, "prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Id.* at 90-91, 107 S. Ct. at 2262. And any alternative must "fully

accommodate[ ] the prisoner's rights at *de minimis* cost to valid penological interests." *Id.* at 91, 107 S. Ct. at 2262. The only alternative that would allow Mr. Davila to obtain his beads and shells is to permit prisoners to receive religious items from outside the prison, which would result in a more than "*de minimis*" cost to the prison's interests.

In short, the District Court correctly granted summary judgment to the Defendants on Mr. Davila's First Amendment claims. Since Mr. Davila has not established a First Amendment violation, we do not address his claims for money damages on that claim.

VI. CONCLUSION

This Term, we expect to hear from the Supreme Court in a case similar to this one addressing the religious rights of prisoners under RLUIPA. *See Holt v. Hobbs,* No. 13-6827 (argued Oct. 7, 2014). Even in light of the ongoing developments in this area of the law, however, on this record – where the Defendants have failed to offer any evidence justifying their concerns about prison safety and costs – a grant of summary judgment to the Defendants was in error. We therefore **REVERSE** the District Court's grant of summary judgment on Mr. Davila's claim for injunctive relief under RFRA, and **AFFIRM** the remainder of the District Court's rulings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

ANTHONY DAVILLA, Plaintiff, vs. NATIONAL INMATE APPEALS COORDINATOR, ROBIN GLADDEN, General Counsel; REGIONAL ADMINISTRATIVE REMEDIES COORDINATOR, R. E. HOLT, General Counsel; ANTHONY HAYNES, and DR. BRUCE COX, Chaplin, Defendants.	:	CIVIL ACTION NO.: CV212-005

ORDER

After an independent and *de novo* review of the entire record, the undersigned concurs with the Magistrate Judge's Report and Recommendation, to which Objections have been filed. Plaintiff contends that, if the Court were to order the Bureau of Prisons to allow a qualified member of his religion to come to the prison to perform animal sacrifices and other portions of his religious rituals, he would have no objection. The undersigned notes that the Magistrate Judge opined that a qualified member of Plaintiff's religion could come into the prison to perform the rituals necessary to infuse spiritual presence into his

requested items. However, the Magistrate Judge likely made this suggestion to show that there are other possible alternatives available to Plaintiff to obtain cowrie shells and bead necklaces containing "ache", or spiritual presence. In other words, and contrary to Plaintiff's assertions, Program Statement 5630.09 and the Defendants' reliance on this Program Statement do not deprive Plaintiff of the only manner in which to practice his religion.

Plaintiff also contends that Program Statement 5630.09 requires that the chaplain verify the religious significance of his requests prior to denying his requests. This is Plaintiff's interpretation of the Program Statement, not what this Program Statement requires. Rather, this Program Statement proscribes that, before the warden approves inmate religious property, a chaplain will verify the religious significance of the religious property *if necessary.* (Doc. No. 72-4, p. 2, ¶ 14(a)).

Plaintiff's Objections are **overruled**. The Magistrate Judge's Report and Recommendation, as supplemented by this Order, is adopted as the opinion of the Court.

Defendants' Motion for Summary Judgment is **GRANTED**. Plaintiff's Complaint is **DISMISSED**. The Clerk of Court is directed to enter the appropriate judgment of dismissal.

SO ORDERED, this 6 day of February, 2013.

/s/ Lisa Godbey Wood
LISA GODBEY WOOD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF GEORGIA

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

ANTHONY DAVILLA, Plaintiff, vs. NATIONAL INMATE APPEALS COORDINATOR, ROBIN GLADDEN, General Counsel; REGIONAL ADMINISTRATIVE REMEDIES COORDINATOR, R. E. HOLT, General Counsel; ANTHONY HAYNES, and DR. BRUCE COX, Chaplin, Defendants.	:	CIVIL ACTION NO.: CV212-005

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

Plaintiff Anthony Davila ("Plaintiff"), who is currently incarcerated at the McDuffie County Detention Center in Thomson, Georgia, filed a cause of action pursuant to 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), contesting certain conditions of his confinement while he was housed at the Federal Correctional Institution in Jesup, Georgia ("FCI Jesup"). Defendants filed a Motion for Summary Judgment. Plaintiff filed a Response, and Defendants

filed a Reply. For the reasons which follow, Defendants' Motion should be **GRANTED**.

STATEMENT OF THE CASE

Plaintiff alleges that he was denied access to Santeria beads and cowrie divination shells that contain "ache". Plaintiff claims these items are necessary to the practice of his religion, Santeria. Plaintiff asserts that he explained to prison officials that these religious items are not available for purchase from approved prison sources. Plaintiff alleges that he has filed administrative remedies in accordance with Bureau of Prisons' policies, and he has sued each person who denied his administrative remedies asserting that they contributed to the alleged deprivation of his freedom of religion.

Defendants assert that they are entitled to summary judgment on Plaintiff's remaining First Amendment claims and claim for injunctive relief under the Religious Freedom and Reformation [sic] Act of 1993, 42 U.S.C. § 2000bb, *et seq.* ("RFRA").[1]

[1] Plaintiff concurs with Defendants' assertion that Defendants Holt and Gladden were not involved in any alleged unconstitutional conduct, (Doc. No. 72, pp. 18-21; Doc. No. 77, p. 38). The undersigned's Report shall focus on Plaintiff's claims relating to Defendants Haynes and Cox but will use "Defendants" collectively. Regardless of the undersigned's recommended disposition of this Motion, Plaintiff's claims against Defendants Holt and Gladden should be **DISMISSED** in their entirety.

Defendants also assert that they are entitled to qualified immunity.

STANDARD OF REVIEW

Summary judgment "shall" be granted if "the movant[s] show[ ] that there is no genuine dispute as to any material fact and that the movant[s are] entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). "A dispute about a material fact is genuine and summary judgment is inappropriate if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. However, there must exist a conflict in substantial evidence to pose a jury question." *Hall v. Sunjoy Indus. Grp., Inc.,* 764 F. Supp.2d 1297, 1301 (M.D. Fla. 2011) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986)), and (*Verbraeken v. Westinghouse Elec. Corp.,* 881 F.2d 1041, 1045 (11th Cir. 1989)).

The moving parties bear the burden of establishing that there is no genuine dispute as to any material fact and that they are entitled to judgment as a matter of law. *See Williamson Oil Co., Inc. v. Philip Morris USA,* 346 F.3d 1287, 1298 (11th Cir. 2003). Specifically, the moving parties must identify the portions of the record which establish that there are no "genuine dispute[s] as to any material fact and the movant[s are] entitled to judgment as a matter of law." *Moton v. Cowart,* 631 F.3d 1337, 1341 (11th Cir. 2011). When the nonmoving party would have the burden of proof at trial, the moving parties may

discharge their burden by showing that the record lacks evidence to support the nonmoving party's case or that the nonmoving party would be unable to prove his case at trial. *See id.* (citing *Celotex v. Catrett,* 477 U.S. 317, 322-23 (1986)). In determining whether a summary judgment motion should be granted, a court must view the record and all reasonable inferences that can be drawn from the record in a light most favorable to the nonmoving party. *Peek-A-Boo Lounge of Bradenton, Inc. v. Manatee Co., Fla.,* 630 F.3d 1346, 1353 (11th Cir. 2011).

DISCUSSION AND CITATION TO AUTHORITY

I. First Amendment Claims

Defendants contend that each of the *Turner v. Safley,* 482 U.S. 78 (1987), factors warrants a finding that the Bureau of Prisons' ("BOP") policy in place did not violate Plaintiff's First Amendment rights. Plaintiff contends that Defendants' application of the BOP's policy to his requests violated his rights.

The Free Exercise Clause of the First Amendment "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson,* 544 U.S. 709, 719 (2005). Prisoners retain their First Amendment rights, including rights under the free exercise of religion clause; however, "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

Brunskill v. Boyd, 141 F. App'x 771, 774 (11th Cir. 2005) (quoting *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348 (1987)). Deference is given to prison officials, and, as a result, courts employ a "reasonableness" test to determine whether a regulation infringes constitutional rights. *Id*. The Supreme Court has outlined four factors to be considered in determining the reasonableness of a regulation: (1) "whether the regulation has a valid, rational connection to a legitimate governmental interest;" (2) "whether alternative means are open to inmates to exercise the asserted right;" (3) "what impact an accommodation of the right would have on guards and inmates and prison resources;" and (4) "whether there are ready alternatives to the regulation." *Turner,* 482 U.S. at 89-91. The fourth factor asks whether "a prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a de minimis cost to the valid penological goal." *Overton v. Bazzetta,* 539 U.S. 126, 136 (2003).

A. Valid, Rational Connection to Legitimate Governmental Interest

Defendants assert that Defendants Cox and Haynes relied on BOP Program Statement 5360.09 in denying Plaintiff's requests for personal beads and shells. Defendants assert that this Program Statement requires that all personal religious property be purchased from the commissary inventory or through an approved catalogue source. Defendants also assert

that the purpose and scope of this Program Statement is to provide "inmates of all faith[s] with reasonable and equitable opportunities to pursue religious beliefs and practices, within the constraints of budgetary limitations and consistent with the *security and orderly running* of the institution[.]" (Doc. No. 72, p. 8) (quoting Program Statement 5360.09) (emphasis in original). Defendants aver that Plaintiff was informed during the administrative remedies process that religious items had to be purchased from authorized vendors through a catalogue, order forms are available through the prison chapel, and family members could not send religious items to inmates, primarily for prison security reasons.

Plaintiff asserts that he does not dispute that the safety and security of a federal prison are legitimate governmental interests. However, Plaintiff also asserts, these legitimate governmental interests cannot automatically serve to consider actions taken as a result to be constitutionally permissible.

B. Alternative Means

Defendants assert that the question under this prong is whether Plaintiff had alternative means of practicing his rights. Defendants also assert that Program Statement 5360.09 satisfies this factor because inmates are allowed to buy personal religious items through authorized means. Defendants allege that Plaintiff was informed of the alternative means on no less than three (3) occasions. In fact, Defendants

allege, Plaintiff could have purchased cowrie shells and beads through these authorized means.

Plaintiff contends that Defendants have ignored the fact that he informed them, under oath, that the Santeria bead necklaces and cowrie divination shells must contain "ache" and that these items are to be provided only by qualified priests of his religion. Plaintiff alleges that he must wear these items, and these items must contain spiritual presence (or "ache") given by a qualified priest, which is in contravention of Program Statement 5360.09. Plaintiff also alleges that he has no alternative means to exercise his religion, as purchasing these items through authorized vendors does not meet the requirement of his sincerely held religious beliefs.

C. Impact on Prison Staff, Inmates, and the Allocation of Prison Resources

Defendants contend that Program Statement 5360.09 does not prohibit a prisoner from exercising his First Amendment right; rather, this Statement governs the procedure a prisoner must follow to obtain personal religious items from authorized sources. Defendants contend that allowing unauthorized people to get religious items for inmates would impact prison staff and the other inmates, as allowing this would increase an inmate's ability to smuggle contraband into the prison. Defendants also contend that allowing this practice would require prison staff to spend

more time and money screening and examining these items before allowing inmates to have these items.

Plaintiff avers that Defendant Cox could monitor, evaluate, and approve a qualified priest of the Santeria religion to provide the beads and shells containing "ache" just as Defendant Cox's already approved vendors are monitored and evaluated. Plaintiff contends that this would not result in any costs to prison officials.

D. Regulation an "Exaggerated Response"

Defendants assert that, even though the BOP is not required to narrowly tailor its regulations, Program Statement 5360.09 is the least restrictive means to achieve the BOP's stated goals. Defendants contend that the only alternative would be to allow inmates to obtain items from any source, which would increase security and time concerns. Because of this, Defendants maintain, this "alternative" cannot be considered reasonable under the fourth *Turner* factor.

Plaintiff asserts that Defendant Cox should have verified the religious significance of his requests for the shells and beads. Plaintiff also asserts that his goddaughter is a qualified priestess. In the alternative, Plaintiff alleges that Defendant Cox could have contacted a qualified priest or priestess who could become an approved source in order for Plaintiff to be able to receive his requested religious materials. Plaintiff contends that the religious items would be

sent to Defendant Cox, just as would happen with any catalogue order.

E. Application

Program Statement 5630.09, which concerns religious beliefs and practices, was promulgated to "provide[ ] inmates of all faith groups with reasonable and equitable opportunities to pursue religious beliefs and practices, within the constraints of budgetary limitations and consistent with the security and orderly running of the institution and the [BOP]." (Doc. No. 72-4, p. 1). According to this Program Statement, inmate "religious property", which "includes but is not limited to rosaries and prayer beads, oils, prayer rugs, phylacteries, medicine pouches, and religious medallions[,]" is "subject to normal considerations of safety and security." (*Id*. at p. 2). This Program Statement requires that all "personal religious property" "be purchased either from commissary stock or through an approved [c]atalogue source using the Special Purpose Order process." (*Id*. at p. 3).

The BOP's regulation requiring personal religious property to be purchased from the commissary stock or approved catalogue sources is reasonably related to the stated goals of budgetary limitations, security concerns, and the orderly running of institutions. Thus, the first *Turner* factor is met.

Contrary to Plaintiff's assertion, it does not appear that the Program Statement or the Defendants' reliance on this Program Statement, (Doc. No.

72-3, p. 1; Doc. No. 72-7, p. 1), deprives him of the only manner in which to practice his religion. This Program Statement simply restricts *how* Plaintiff can obtain his cowrie shells and bead necklace. There is no evidence that Plaintiff could not obtain these items through an authorized source and then have a qualified member of the Santeria church come to the prison to perform the necessary ceremony or ritual to have these items properly blessed with "ache". Likewise, there is no evidence that Plaintiff's requested shells and beads (i.e., coming from a qualified member of the Santeria church) automatically contained "ache". Plaintiff's assertions point to the importance of the ceremony or ritual involved in infusing "ache" into the beads and shells, not the actual items themselves. (Doc. No. 77, pp. 5-6, 12-20). The second *Turner* factor has been met.

In addition, the third *Turner* factor has been met. While Plaintiff makes a valid point that Defendant Cox could provide an accommodation in this case, Plaintiff overlooks that this accommodation would have a tremendous impact on prison personnel, as well as other inmates. If Defendants or the BOP were to provide an accommodation to Plaintiff, every other inmate potentially would want an accommodation, as well. This would increase the time prison personnel have to take to inspect incoming packages, for instance.

Finally, the undersigned cannot determine that there are alternatives available to the BOP which would be easier to regulate than this Program Statement. This Program Statement appears to apply to

inmates of all religions and only limits the sources of religious items for inmates of the many faiths or sects represented by the inmate population.

The limitation of purchasing religious items through pre-approved sources is reasonably related to valid correctional goals. The Program Statement is neutral, advances the stated goals of budgetary and safety concerns, and is not an exaggerated response to those objectives. The Program Statement does not unconstitutionally abridge Plaintiff's (or any other inmate's) right to exercise his religion. As a matter of law, Defendants should be entitled to summary judgment on Plaintiff's First Amendment claims.

II. RFRA Claim

A. Mootness

Defendants contend that Plaintiff's remaining injunctive relief claim under the RFRA is moot because Plaintiff is no longer incarcerated at FCI Jesup. Plaintiff asserts that, while he is not housed at FCI Jesup at the moment, his injunctive relief claims under the RFRA are not moot.

Under Article Ill of the Constitution, federal courts may only hear "cases or controversies." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 559-60 (1992). "A [claim] is moot when it no longer presents a live controversy with respect to which the court can give meaningful relief." *See Ethredge v. Hail*, 996 F.2d 1173, 1175 (11th Cir. 1993). A claim can still be

considered if a court lacks "assurance that there is no reasonable expectation that the alleged violation will recur," or, as it is commonly stated, the situation is "capable of repetition, yet evading review[.]" *DiMaio v. Democratic Nat'l Committee,* 555 F.3d 1343, 1345 (11th Cir. 2009); *Turner v. Rogers,* ___ U.S. ___, 131 S. Ct. 2507, 2515 (June 20, 2011). "However, once a prisoner has been transferred, injunctive relief with respect to his confinement at his former place of incarceration is no longer available." *Hampton v. Federal Correctional Institution,* No. 1:09-CV-00854-RWS, 2009 WL 1703221, *3 (N.D. Ga. June 18, 2009) (citing *McKinnon v. Talladega Cnty.,* 745 F.2d 1360, 1363 (11th Cir. 1984)); *Hailey v. Kaiser,* 201 F.3d 447, *3 (10th Cir. 1999) (Table).

Plaintiff is currently housed at McDuffie County Detention Center and is not currently in BOP custody.[2] However, there is nothing before the Court which indicates Plaintiff has been released from federal custody entirely. Rather, Plaintiff is housed at McDuffie pursuant to a federal writ. (Doc. No. 72-12, p. 2). Thus, Plaintiff could be transferred back to FCI Jesup. Plaintiff's claims are capable of repetition and are not moot.

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[2] http://www.bop.gov/iloc2/InmateFinderServlet?Transaction=IDSearch&needingMoreList=false&IDType=IRN&IDNumber=50963-018.

B. Injunctive Relief Claims Under RFRA

Defendants assert that their actions did not violate the RFRA, and, accordingly, Plaintiff's claims for injunctive relief under this Act must fail. Defendants aver that the BOP has a compelling interest in security and order at its prisons, and Program Statement 5360.09 is the least restrictive means to furthering that compelling interest.

Plaintiff concedes that prison security and institutional safety goals are compelling governmental interests. (Doc. No. 77, pp. 28, 34). However, Plaintiff contends, Program Statement 5360.09 is not the least restrictive means of furthering these governmental interests.

The RFRA, 42 U.S.C. §§ 2000bb to 2000bb-4, forbids the government from "substantially burden[ing] a person's exercise of religion"[3] unless the government can "demonstrate[ ] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Although the Supreme Court has declared RFRA unconstitutional as applied to the states, the RFRA still applies to acts of the federal government and its officials. *Gonzalez v. O Centro Espirita Beneficente Uniao do*

[3] "Exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

Vegetal, 546 U.S. 418 (2006) (stating that, pursuant to RFRA, the federal government must demonstrate a compelling interest when substantially burdening the exercise of religion). The "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Id*. at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)). "A 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1227 (11th Cir. 2004). "[I]n order to constitute a 'substantial burden' on religious practice, the government's action must be 'more than incidental' and 'must place more than an inconvenience on religious exercise.'" *Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007) (quoting *Midrash Sephardi,* 366 F.3d at 1227). "That is, to constitute a substantial burden, the governmental action must significantly hamper one's religious practice." *Id*. However, in the context of prisons, "courts [should] afford deference to the judgment of prison officials." *Lawson v. Singletary,* 85 F.3d 502, 509 (11th Cir. 1996). Once a plaintiff establishes that a regulation imposes a substantial burden on the exercise of his religion under RFRA, the "burden shifts to the government to demonstrate that 'application of the burden' to the claimant 'is in

furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest." *Kikumura v. Hurley,* 242 F.3d 950, 961-62 (10th Cir. 2001) (quoting 42 U.S.C. § 2000bb-1(b)).

The undersigned accepts Plaintiff's assertion that having cowrie shells and beads containing "ache" is a sincerely held religious belief.[4] However, Defendants' application of Program Statement 5360.09 does not impose a substantial burden on Plaintiff's exercise of his religion. Even assuming this to be the case, however, Plaintiff presents nothing which creates a genuine dispute so that his claims for injunctive relief under the RFRA can survive this Motion. Plaintiff concedes that the stated purposes of the Program Statement are compelling governmental interests. This Program Statement appears to be the least restrictive means of furthering those compelling governmental interests.[5] In addition, this Program Statement does not prohibit Plaintiff's possession of the shells and beads; it only limits the manner in which Plaintiff can purchase these items. Defendants should be entitled to summary judgment on Plaintiff's claims for injunctive relief under the RFRA.

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[4] The only evidence that "ache" must be contained in shells and beads is from Plaintiff's handwritten declaration. (Doc. No. 77, pp. 42-49).

[5] Although the burden on the government is higher under the RFRA than the First Amendment, the undersigned's discussion in Section I of this Report is relevant under the RFRA, too.

It is unnecessary to address Defendants' assertion that they are entitled to qualified immunity.

CONCLUSION

Based on the foregoing, it is my **RECOMMENDATION** that Defendants' Motion for Summary Judgment be **GRANTED**. It is also my **RECOMMENDATION** that Plaintiff's Complaint be **DISMISSED**.

SO REPORTED and **RECOMMENDED**, this 22nd day of January, 2013.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

ANTHONY DAVILLA, Plaintiff, vs. NATIONAL INMATE APPEALS COORDINATOR, ROBIN GLADDEN, General Counsel; REGIONAL ADMINISTRATIVE REMEDIES COORDINATOR, R. E. HOLT, General Counsel; ANTHONY HAYNES, and DR. BRUCE COX, Chaplin, Defendants.	:	CIVIL ACTION NO.: CV212-005

ORDER

After an independent and *de novo* review of the entire record, the undersigned concurs, in part, with the Magistrate Judge's Report and Recommendation, to which Defendants filed Objections. Plaintiff responded to Defendants' Objections.

In their Objections, Defendants assert that Plaintiff has failed to allege a plausible First Amendment violation, and, even if he did, his First Amendment claims should be dismissed because Defendants are entitled to qualified immunity. Defendants allege that the proper inquiry is not whether Plaintiff generally has a clearly established right to the free exercise of religion, but rather, whether he has the clearly

established right to receive religious items through unauthorized, unsecured vendors. Defendants also allege that Bureau of Prisons' officials relied on governing policy in good faith, and they are not liable for any resulting constitutional or statutory violation.

In analyzing a motion to dismiss, it is often not possible for a court to judge the reasonableness of a policy or actions done in reliance on that policy. As Defendants note, the Magistrate Judge recognized Defendants' assertion that the Bureau of Prisons' ("BOP") policy they relied upon to deny Plaintiff's requests for items had a valid, rational connection to ensuring institutional security under *Turner v. Safely* [sic], 482 U.S. 78 (1987). However, the Magistrate Judge merely recognized Defendants' *assertion* that they relied upon a BOP policy and that the particular policy satisfies at least a portion of the *Turner* holding. This is not to say the Magistrate Judge necessarily agreed with that assertion and then recommended that Defendants' Motion be denied. Defendants' Motion reads very much like a strong motion for summary judgment. However, at this stage, given the status of the Plaintiff and the pleadings, it would be improper for the Court to enter judgment in Defendants' favor regarding Plaintiff's First Amendment claims. These portions of Defendants' Objections are **overruled**.

However, the Court sustains Defendants' objections to the Magistrate Judge's conclusion regarding the Religious Freedom Restoration Act ("RFRA") claim. The RFRA states that "[a] person whose religious

exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." 42 U.S.C. § 2000bb-1(c). Before the United States can be sued, the United States must consent to suit. *United States v. Mitchell,* 463 U.S. 206, 212 (1983). The federal government may waive its sovereign immunity by statute, but that waiver "must be unequivocally expressed in statutory text." *Lane v. Peña*, 518 U.S. 187, 192 (1996). The RFRA's reference to "appropriate relief" is not the sort of unequivocal waiver necessary because this broad term is susceptible to more than one interpretation. *Webman v. Fed. Bureau of Prisons,* 441 F.3d 1022, 1026 (D.C. 2006) (internal cites and quotes omitted). "'[A]ppropriate relief might include damages[, . . . but] another plausible reading is that 'appropriate relief covers equitable relief[. G]iven Congress's awareness of the importance of sovereign immunity and its silence in the statute on the subject of damages," the RFRA does not waive the United States' sovereign immunity from claims for damages. *Id.*

As Defendants note, there is no binding precedent which addresses whether the RFRA bars claims against individual defendants for monetary damages. However, several courts have addressed this question and have determined that the RFRA does not allow for the recovery of monetary damages. *Oklevueha Native American Church of Hawaii, Inc. v. Holder,* 676 F.3d 829 (9th Cir. 2012) (the "appropriate relief" provision does not allow suits for monetary damages

under the RFRA); *Burke v. Lappin,* 821 F. Supp.2d 244 (D.C. 2011) (the RFRA did not waive the federal government's sovereign immunity for damages); *Jean-Pierre v. Bureau of Prisons*, No. 09-266, 2010 WL 3852338 (W.D. Pa. July 30, 2010) (the RFRA does not waive sovereign immunity for monetary damages); *Bloch v. Thompson,* No. 1:03-CV-1352, 2007 WL 60930 (E.D. Tex. Jan. 5, 2007) (the RFRA does not waive immunity for damages); and *Gilmore-Bey v. Coughlin,* 929 F. Supp. 146 (S.D. N.Y. 1996) (the RFRA did not abrogate Eleventh Amendment bar to actions for monetary damages); *but see*, *Agrawal v. Briley,* No. 02C6807, 2006 WL 3523750 (N.D. Ill. Dec. 6, 2006) (the RFRA does not bar monetary damages).

The Eleventh Circuit Court of Appeals has not determined whether the RFRA bars monetary damages claims against individual defendants. However, the United States Supreme Court determined in *Sossamon v. Texas*, ___ U.S. ___, 131 S. Ct. 1651, 1659-60 (Apr. 20, 2011), that the "appropriate relief" provision of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-2(a), is not "the unequivocal expression" of consent for states to "waive their sovereign immunity to suits for damages." In *Smith v. Allen,* the Eleventh Circuit concluded that § 2000cc-2(a) "cannot be construed as creating a private cause of action against individual defendants for monetary damages." 502 F.3d 1255, 1275 (11th Cir. 2007), *abrogated on other grounds by Sossoman* [sic]. The "appropriate relief" section contained in the RFRA is identical to that contained

in the RLUIPA. 42 U.S.C. §§ 2000bb-1(c) and 2000cc-2(a).

The undersigned has no reason to believe that the Eleventh Circuit's reasoning in a case pertaining to the RFRA would be any different than that court's reasoning in Smith, which concerned the RLUIPA and which is a statute of very similar construct as the RFRA. Accordingly, the undersigned agrees with Defendants that Plaintiff's monetary damages claims under the RFRA against Defendants are barred. *See Cardinal v. Metrish,* 564 F.3d 794, 799-801 (6th Cir. 2009) (noting the RLUIPA's "appropriate relief" provision is not a clear and unequivocal waiver of sovereign immunity and monetary damages claims are barred), and (citing *Webman,* 441 F.3d 1022, with seeming approval, that the RFRA does not authorize monetary damages claims). This portion of Defendants' Objections is **sustained**. This determination does not bar any claims for injunctive relief Plaintiff may have set forth against Defendants, and the undersigned adopts the Magistrate Judge's finding that Plaintiff's remaining claims under the RFRA are not subject to dismissal at this time.

Defendants' Motion to Dismiss is **GRANTED** in part and **DENIED** in part. Plaintiff's claims made pursuant to *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), against Defendants in their official capacities, Plaintiff's claims pursuant to the RLUIPA, and Plaintiff's monetary damages claims pursuant to the RFRA are **DISMISSED**. Plaintiff's First Amendment

and injunctive relief claims under the RFRA shall remain pending, for now.

SO ORDERED, this 31 day of August, 2012.

/s/ Lisa Godbey Wood
LISA GODBEY WOOD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

ANTHONY DAVILLA, Plaintiff, vs. NATIONAL INMATE APPEALS COORDINATOR, ROBIN GLADDEN, General Counsel; REGIONAL ADMINISTRATIVE REMEDIES COORDINATOR, R. E. HOLT, General Counsel; ANTHONY HAYNES, and DR. BRUCE COX, Chaplin, Defendants.	:	CIVIL ACTION NO.: CV212-005

MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION

Plaintiff Anthony Davila ("Plaintiff"), who is currently incarcerated at the McDuffie County Jail in Thomson, Georgia, filed a cause of action pursuant to 28 U.S.C. § 1331 and *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971), contesting certain conditions of his confinement while he was housed at the Federal Correctional Institution in Jesup, Georgia. Defendants filed a Motion to Dismiss. Plaintiff filed a Response, and Defendants filed a Reply. Plaintiff filed a Surreply. For the reasons which follow, Defendants' Motion to

Dismiss should be **GRANTED** in part and **DENIED** in part.

STATEMENT OF THE CASE

Plaintiff alleges that he has been denied access to Santeria Beads and Cowrie Divination Shells that contain Ache, which he claims are necessary to the practice of his religion, Santeria. Plaintiff asserts that he has explained to prison officials that these religious items are not available for purchase from approved prison sources. Plaintiff alleges that he has filed administrative remedies in accordance with Bureau of Prisons' policies, and he has sued each person who denied his administrative remedies asserting that they contributed to the alleged deprivation of his freedom of religion. Plaintiff names as Defendants: Dr. Cox, Chaplain at FCI Jesup; Anthony Haynes, Warden at FCI Jesup; R.E. Holt, Regional Administrative Remedies Coordinator; and Robin Gladden, National Inmate Appeals Coordinator. Plaintiff 's Complaint was served based on *Bivens,* the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-1, *et seq*. ("RLUIPA"), and the Religious Freedom and Reformation [sic] Act of 1993, 42 U.S.C. § 2000bb, *et seq*. ("RFRA").

Defendants contend that Plaintiff's *Bivens* claims against them in their official capacities should be dismissed. Defendants also contend that Plaintiff 's claims against them in their individual capacities

should be dismissed because they are entitled to qualified immunity.

STANDARD OF REVIEW

Under a Rule 12(b)(6) motion to dismiss, a court must "accept[ ] the allegations in the complaint as true and construe[] them in the light most favorable to the plaintiff." *Belanger v. Salvation Army,* 556 F.3d 1153, 1155 (11th Cir. 2009). "A complaint must state a facially plausible claim for relief, and '[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Wooten v. Quicken Loans. Inc.*, 626 F.3d 1187, 1196 (11th Cir. 2010) (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)). "A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action" does not suffice. *Ashcroft,* 556 U.S. at 678.

"The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* (internal punctuation and citation omitted). While a court must accept all factual allegations in a complaint as true, this tenet "is inapplicable to legal conclusions. Threadbare recitals of

the elements of a cause of action, supported by mere conclusory statements," are insufficient. *Id.*

DISCUSSION AND CITATION TO AUTHORITY

I. Official Capacity Claims Under *Bivens*

While a plaintiff may bring a *Bivens* action against a federal officer in his individual capacity, a plaintiff may not bring a *Bivens* action against a federal agency or a federal officer acting in his official capacity. *Solliday v. Federal Officers,* 413 F. App'x 206, 209 (11th Cir. 2011) (citing *Corr. Servs. Corp. v. Malesko,* 534 U.S. 61, 71 (2001), for the holding that *Bivens* is "solely concerned with deterring the unconstitutional acts of individual officers."); and *FDIC v. Meyer,* 510 U.S. 471, 486 (1994) (declining to permit a damages remedy under *Bivens* against federal agencies). Accordingly, this portion of Defendants' Motion should be granted and Plaintiff's *Bivens* claims against Defendants in their official capacities should be dismissed.

II. Qualified Immunity

Defendants contend that Plaintiff's remaining claims against them are barred pursuant to qualified immunity, because his Complaint, as amended, fails to allege a "plausible violation of his clearly established constitutional or statutory rights." (Doc. No. 39, p. 5). Specifically, Defendants allege that Plaintiff's First Amendment claims and his claims under the RLUIPA and RFRA should be dismissed.

Qualified immunity protects government officials performing discretionary functions from suit in their individual capacities, so long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Gonzalez v. Reno,* 325 F.3d 1228, 1232 (11th Cir. 2003) (quoting *Hope v. Pelzer,* 536 U.S. 730, 739 (2002)). Government officials must first prove that they were acting within their discretionary authority. *Id.* at 1233; *Ray v. Foltz,* 370 F.3d 1079, 1081-82 (11th Cir. 2004). "A government official acts within his or her discretionary authority if objective circumstances compel the conclusion that challenged actions occurred in the performance of the official's duties and within the scope of this authority." *Hill v. DeKalb Reg'l Youth Det. Ctr.,* 40 F.3d 1176, 1185 n. 17 (11th Cir.1994). Once the government official has shown he was acting within his discretionary authority, the burden shifts to the Plaintiff to show that the Defendant is not entitled to qualified immunity. The Supreme Court has established a two-part test to determine the applicability of qualified immunity: the court must determine whether plaintiff 's allegations, if true, establish a constitutional violation, and whether the right was clearly established." *Saucier v. Katz,* 533 U.S. 194, 201 (2001)[1]; *Holloman ex rel.*

[1] In *Pearson v. Callahan,* 555 U.S. 223, 236 (2009), the Supreme Court held that courts can exercise discretion in deciding which of the two *Saucier* prongs should be addressed first in light of the particular case at hand.

Holloman v. Harland, 370 F.3d 1252, 1264 (11th Cir. 2004).

A. First Amendment Claims

Defendants contend that the four (4) factors of *Turner v. Safley,* 482 U.S. 78 (1987), favor a finding that Program Statement 5360.09, as implemented, did not violate Plaintiff's First Amendment right to free exercise of religion.

The Free Exercise Clause of the First Amendment "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people." *Cutter v. Wilkinson,* 544 U.S. 709, 719 (2005). Prisoners retain their First Amendment rights, including rights under the free exercise of religion clause; however, "lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." *Brunskill v. Boyd,* 141 F. App'x 771, 774 (11th Cir. 2005) (quoting *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348 (1987)). Deference is given to prison officials, and, as a result, courts employ a "reasonableness" test to determine whether a regulation infringes constitutional rights. *Id.* The Supreme Court has outlined four factors to be considered in determining the reasonableness of a regulation: (1) "whether the regulation has a valid, rational connection to a legitimate governmental interest;" (2) "whether alternative means are open to inmates to exercise the asserted right;"

(3) "what impact an accommodation of the right would have on guards and inmates and prison resources;" and (4) "whether there are ready alternatives to the regulation." *Turner,* 482 U.S. at 89-91. The fourth factor asks whether "a prisoner has pointed to some obvious regulatory alternative that fully accommodates the asserted right while not imposing more than a de minimis cost to the valid penological goal." *Overton v. Bazzetta,* 539 U.S. 126, 136 (2003).

The undersigned recognizes Defendants' assertion that the Bureau of Prisons' ("BOP") Program Statement 5360.09, which governs religious beliefs and practices at its penal institutions, has a valid, rational connection to ensuring institutional security. However, the undersigned also recognizes that Plaintiff, who is proceeding *pro se,* should have an opportunity to present evidence that this Program Statement does not meet the "reasonableness" test factors set forth in *Turner* as to his religious beliefs and practices. The pleadings before the Court do not reveal that Plaintiff's contention that Defendants violated his First Amendment rights are beyond plausibility. This portion of Defendants' Motion should be denied.

B. RLUIPA Claims

Defendants contend that Plaintiff's RLUIPA claims should be dismissed because this Act does not permit monetary damages claims against individual defendants.

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of [Title 42], even if the burden results from a rule of general applicability, unless the government demonstrates that 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 government interest.

42 U.S.C. § 2000cc-1(a). "Section 1997 defines an institution as a facility or institution that, among other things, 'is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State.'" *Ish Yerushalayim v. United* States, 374 F.3d 89, 92 (2d Cir. 2004) (quoting 42 U.S.C. § 1997(1)(A)). A "'State' means 'any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, or any of the territories and possessions of the United States.'" *Id.* (quoting 42 U.S.C. § 1997(4)). Because the RLUIPA clearly does not create a cause of action against the federal government or its correctional facilities, *id.*, the RLUIPA offers no cause of action against federal employees. *Deville v. Crowell,* No. 08-3076-SAC, 2011 WL 4526772, at *6 n.6 (D. Kan. Sept. 28, 2011) (dismissing plaintiff's claims under the RLUIPA because plaintiff was a federal inmate with no cause of action under that Act); *Jean-Pierre v. Bureau of Prisons,* No.

09-266, 2010 WL 3852338, at *5 & n.4 (W.D. Pa. July 30, 2010) (stating the RLUIPA does not create a cause of action against the federal government or its correctional facilities and collecting cases for the proposition that neither the RLUIPA nor the RFRA support damage claims against government officials in their individual capacities); *Doyon v. United States,* No. A-07-CA-977-SS, 2008 WL 2626837, at *4 (W.D. Tex. June 26, 2008) (finding no viable claim under the RLUIPA because it does not apply to the federal government); and *Jackson v. Federal Bureau of Prisons,* No. 06-592(GK), 2006 WL 2434938, at *3 (D. D.C. Aug. 22, 2006) (noting that the conclusion that the only sensible construction of the RLUIPA is that it does not create a cause of action against the federal government, as this Act was passed in response to *City of Boerne v. Flores,* 521 U.S. 507 (1997), which did not allow the application of the RFRA to the states). Accordingly, this portion of Defendants' Motion should be granted and Plaintiff 's RLUIPA claims against Defendants should be dismissed.

C. RFRA Claims

Defendants contend that, because the RLUIPA does not permit an award of monetary damages, it follows that the Religious Freedom Restoration Act ("RFRA") does not permit an award of monetary damages either. In the alternative, Defendants maintain, Plaintiff does not state a viable claim under the RFRA.

The RFRA, 42 U.S.C. §§ 2000bb to 2000bb-4, forbids the government from "substantially burden[ing] a person's exercise of religion"[2] unless the government can "demonstrate[ ] that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). Although the Supreme Court has declared RFRA unconstitutional as applied to the states, the RFRA still applies to acts of the federal government and its officials. *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006) (stating that pursuant to RFRA, the federal government must demonstrate a compelling interest when substantially burdening the exercise of religion). The "RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-31 (quoting 42 U.S.C. § 2000bb-1(b)). "A 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct." *Midrash*

[2] "Exercise of religion" is defined to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §2000cc-5(7)(A).

Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004). "[I]n order to constitute a 'substantial burden' on religious practice, the government's action must be 'more than incidental' and 'must place more than an inconvenience on religious exercise.'" *Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007) (quoting *Midrash Sephardi,* 366 F.3d at 1227). "That is, to constitute a substantial burden, the governmental action must significantly hamper one's religious practice." *Id.* However, in the context of prisons, "courts [should] afford deference to the judgment of prison officials." *Lawson v. Singletary,* 85 F.3d 502, 509 (11th Cir. 1996). Once a plaintiff establishes that a regulation imposes a substantial burden on the exercise of his religion under RFRA, the "burden shifts to the government to demonstrate that 'application of the burden' to the claimant 'is in furtherance of a compelling governmental interest' and 'is the least restrictive means of furthering that compelling governmental interest.'" *Kikumura v. Hurley,* 242 F.3d 950, 961-62 (10th Cir. 2001) (quoting 42 U.S.C. § 2000bb-1(b)).

It is not clear at this point whether requiring Plaintiff to purchase Santeria bead and Cowrie shells through the prison's commissary or an approved catalog source imposes a substantial burden on Plaintiff's exercise of his religion under the RFRA. Again, Plaintiff is proceeding *pro se* in this case, and the pleading standards for prisoner-plaintiffs are somewhat lower than those applicable to attorneys. While the undersigned makes no determination at this time

whether Plaintiff 's exercise of religion has been substantially burdened, Plaintiff should have the opportunity to present evidence in support of this contention. Plaintiff 's claims under the RFRA are arguably plausible, even if those claims may not prevail ultimately. This portion of Defendants' Motion should be denied.

CONCLUSION

Based on the foregoing, it is my **RECOMMENDATION** that Defendants' Motion to Dismiss be **GRANTED** in part and **DENIED** in part. Plaintiff 's *Bivens* claims for monetary damages against Defendants in their official capacities and his RLUIPA claims should be **DISMISSED**. Plaintiff's First Amendment claims and his claims under the RFRA should remain pending at this time.

SO REPORTED and **RECOMMENDED**, this 15th day of June, 2012.

/s/ James E. Graham
JAMES E. GRAHAM
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA BRUNSWICK DIVISION

ANTHONY DAVILLA, Plaintiff, vs. NATIONAL INMATE APPEALS COORDINATOR, JOHN DOE; REGIONAL ADMINISTRATIVE REMEDIES COORDINATOR, JOHN DOE; ANTHONY HAYNES, and DR. COX, Chaplin, Defendants.	:	CIVIL ACTION NO.: CV212-005

ORDER

Plaintiff has filed a Motion for Preliminary Injunctive Relief. He requests that the Court issue such an Order directing Defendants: (1) to permit Plaintiff to have his "Santeria necklaces beads" and "Cowrie divination shells" containing "Ache" sent to him in order to practice his religion; (2) from transferring Plaintiff to another facility in order to moot this issue; and (3) to not retaliate against Plaintiff for filing this action. In the absence of a showing of an exceptional circumstance wherein there is the possibility of irreparable injury, the Court is not inclined to issue a Preliminary Injunction. Plaintiff has not met his burden of persuasion to obtain injunctive relief

nor has he made any showing of the likelihood of irreparable injury so as to suggest the necessity for the entry of such an order at this time. Accordingly, Plaintiff's Motion for Preliminary Injunctive Relief is **DENIED**.

SO ORDERED, this 11 day of January, 2012.

/s/ Lisa Godbey Wood
LISA GODBEY WOOD,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT
OF GEORGIA

42 U.S.C.A. § 2000bb

§ 2000bb. Congressional findings and declaration of purposes

(a) Findings

The Congress finds that –

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are –

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and

to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C.A. § 2000bb-1

§ 2000bb-1. Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person –

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government.

Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution.

42 U.S.C.A. § 2000bb-2

§ 2000bb-2. Definitions

As used in this chapter –

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C.A. § 2000bb-3

§ 2000bb-3. Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or

otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993 is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C.A. § 2000bb-4

§ 2000bb-4. Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.