IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-13124

D.C. Docket No. 1:12-cv-02018-MHC

MICHAEL LESLIE LAKE,

Plaintiff-Appellee,

versus

MICHAEL SKELTON,

Defendant-Appellant.

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

(November 3, 2016)

Before WILLIAM PRYOR, BLACK, and PARKER,* Circuit Judges.

WILLIAM PRYOR, Circuit Judge:

This interlocutory appeal requires us to decide whether sovereign immunity bars a complaint for damages against a deputy sheriff who failed to accommodate a dietary request from an inmate in a county

---

* Honorable Barrington D. Parker, Jr., United States Circuit Judge for the Second Circuit, sitting by designation.

jail in Georgia. Michael Leslie Lake requested a vegetarian diet for religious reasons during his pretrial detention. After his jailers denied the request, Lake sued Major Michael Skelton in his official capacity as a deputy sheriff of Cobb County. Lake sought declaratory relief, damages, fees, and costs for violations of the First and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act. 42 U.S.C. §§ 1983, 2000cc *et seq*. The district court denied Major Skelton's motion for summary judgment against Lake's claims for damages, and Skelton filed an interlocutory appeal. We conclude that the sovereign immunity of Georgia extends to a deputy sheriff who denies a dietary request of an inmate in a county jail. We reverse the denial of summary judgment against Lake's claims for damages and remand with an instruction to enter judgment for Skelton on those claims.

I. BACKGROUND

Lake, a Christian, alleges that he made a religious vow in 1997 to abstain from eating meat, animal fats, or gelatin. He also refuses to eat any part of a meal that contains those items or to trade those items for acceptable food. Lake took the vow because he thought it would gain him the friendship of a woman named Leslie.

On November 28, 2011, Lake was arrested for contacting Leslie, allegedly in violation of a stalking protective order. He was held without bond at the Cobb

County Adult Detention Center, which is operated by the sheriff of Cobb County. Major Skelton served as operational support commander at the Detention Center.

Lake requested a special diet to accommodate his religious vow, but the jailers denied that request. In May 2012, Lake sued Major Skelton. The jailers accommodated Lake's request on November 29, 2012. Lake was released on July 15, 2013, after the Cobb County Superior Court dismissed all charges against him.

Lake sued Major Skelton in his official and individual capacities. He alleged that Skelton violated the First and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act. Lake sought declaratory relief, damages, fees, and costs.

Major Skelton moved for summary judgment. The district court granted summary judgment for Skelton in his individual capacity, but it denied summary judgment for him in his official capacity on the ground that the sovereign immunity of Georgia did not extend to him. Skelton filed an interlocutory appeal, and we have jurisdiction limited to the issue of his immunity, *see Black v. Wigington*, 811 F.3d 1259, 1270 (11th Cir. 2016).

II. STANDARD OF REVIEW

We review *de novo* a summary judgment, including the issue whether the sovereign immunity of a state extends to an official. *Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313, 1324 n.26 (11th

Cir. 2005). We draw all reasonable inferences in favor of the nonmoving party, *Black*, 811 F.3d at 1265, and summary judgment is appropriate "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).

III. DISCUSSION

A state is immune from a suit for damages in federal court by one of its own citizens, *Hans v. Louisiana*, 134 U.S. 1, 14-17 (1890), and this sovereign immunity extends to an official when he acts as an "arm of the State," *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc) (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977)). Before our en banc decision in *Manders*, we applied different tests to determine whether the sovereign immunity of a state extended to an officer. One test had four factors, *see Miccosukee Tribe of Indians of Fla. v. Fla. State Athletic Comm'n*, 226 F.3d 1226, 1231 (11th Cir. 2000), and another had three factors, *see Shands Teaching Hosp. & Clinics, Inc. v. Beech St. Corp.*, 208 F.3d 1308, 1311 (11th Cir. 2000). A third test specifically addressed deputy sheriffs and jailers. *See Lancaster v. Monroe County*, 116 F.3d 1419, 1429 (11th Cir. 1997). In *Manders*, we established a single test to determine when an official or entity acts as an arm of the state. We first determine "the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Manders*, 338 F.3d at 1308. We then determine whether the defendant is

an "arm of the State" in his performance of the function by considering four factors: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Id.* at 1309. In applying these four factors, we evaluate both the "governmental structure of [the] office vis-à-vis the State" and the "functions in issue." *Id.*

Manders applied the four-factor test to decide whether the sheriff of Clinch County, Georgia, was acting as an arm of the state in "establishing force policy at the jail and in training and disciplining his deputies in that regard." *Id.* at 1319. The first factor "weigh[ed] heavily in favor of immunity" because "[t]he sheriff's authority to use force or the tools of violence . . . and the sheriff's obligation to administer the jail are directly derived from the State" and because "use of force and creating force policy are quintessential policing functions." *Id.* The second factor also "weigh[ed] heavily in favor of immunity," *id.* at 1322, because, "[i]n addition to mandating and controlling sheriffs' specific duties . . . , only the State possesses control over sheriffs' force policy and that control is direct and significant in many areas, including training and discipline," *id.* at 1320. The third factor "tilt[ed] . . . toward immunity," *id.* at 1324, because the state partially funded the sheriff's office and the financial contributions of the county were required by state law, *id.* at 1323-24. The fourth factor "d[id] not defeat immunity," *id.* at 1329, because although neither the state nor the county was

required to pay an adverse judgment, the sheriff apparently would have to pay out of his budget and "both county and state funds are implicated," *id.* at 1327. The Court also stated that "the State's sovereignty and thus its integrity remain directly affected when federal court lawsuits interfere with a state program or function." *Id.* at 1329. We concluded that the sheriff of Clinch County, Georgia, was immune from a suit for damages that challenged his policy on the use of force. *Id.* at 1328.

A. Governmental Structure

We must apply the four-part test from *Manders* to the function performed by Major Skelton as a deputy sheriff. Whether a deputy sheriff in Georgia is an arm of the state is complicated. On the one hand, the offices of sheriff and deputy are created by state law, *see* Ga. Const. Art. IX, § I, ¶ III (sheriff); Ga. Code Ann. § 15-16-23 (deputy), sheriffs sometimes function as an arm of the state, *see, e.g.*, *Manders*, 338 F.3d at 1305-06, and the office is independent from Cobb County and its governing body, *see* Ga. Const. Art. IX, § II, ¶ I(c)(1). On the other hand, the Constitution of Georgia refers to sheriffs as "County officers," *see id.* Art. IX, § I, ¶ III, sheriffs are elected by the voters of their counties, *see Manders*, 338 F.3d at 1312, and sheriffs largely exercise their authority within their counties, *see id.*

Georgia exerts significant control over the Cobb County Sheriff. The office of the sheriff, although independent, is not a "body corporate" like Georgia

counties are. *See* Ga. Const. Art. IX, § I, ¶ I; Ga. Code Ann. §§ 36-1-3 and 1-3-3(7). Instead, the State legislature establishes the powers and duties of sheriffs. *See* Ga. Const. Art. IX, § I, ¶ III. These duties fall into two broad categories: (1) the common-law duty of "enforc[ing] the law and preserv[ing] the peace on behalf of the sovereign State"; and (2) "specific statutory duties, directly assigned by the State, in law enforcement, in state courts, and in corrections." *Manders*, 338 F.3d at 1319. "Most of those duties are an integral part of the State's criminal justice system and are state functions." *Id.*

Georgia uses county jails to incarcerate its state offenders, and it requires sheriffs to take custody of all inmates in the jail in their counties and to administer the jails. *Manders*, 338 F.3d at 1315-18. Sheriffs are responsible for transferring detainees to and from state court, *id.* at 1315-16, and sheriffs have discretion to transfer inmates between counties, *id.* at 1317. "In contrast, counties have no authority over what corrections duties sheriffs perform, or which state offenders serve time in county jails, or who is in charge of the inmates in the county jails." *Id.* at 1318.

The Georgia Constitution prohibits counties from taking actions "affecting" the office of the sheriff, including "the salaries . . . [and] the personnel thereof." Ga. Const. Art. IX, § II, ¶ I(c)(1). Counties do not delegate their governmental or police powers to their sheriffs. *See Manders*, 338 F.3d at 1319. "Although the State requires the county to fund the sheriff's budget, Georgia's Constitution precludes the county from

exercising any authority over the sheriff, including how the sheriff spends that budget." *Id.* at 1311; *see also Chaffin v. Calhoun*, 415 S.E.2d 906, 907 (Ga. 1992) ("[A]lthough the county commission has the power and the duty to issue a budget, the county commission may not dictate to the sheriff how that budget will be spent in the exercise of his duties.").

The independence of sheriffs from the county is underscored by the treatment of sheriffs' employees. The office of the sheriff has sole authority to appoint and discharge its employees, including deputies. *Manders*, 338 F.3d at 1311. Both the sheriff and the state can discipline deputy sheriffs for misconduct, *see Pellitteri v. Prine*, 776 F.3d 777, 781 (11th Cir. 2015), but the county has no such authority, *see Grech v. Clayton Cty.*, 335 F.3d 1326, 1347 (11th Cir. 2003) (en banc). Georgia caselaw recognizes that deputies are employees of the sheriff and not the county. *See id.* at 1336.

The Cobb County Sheriff derives his powers from the State and, with the exception of funding, is largely independent of the county. Although this framework informs our analysis by providing evidence of "the governmental structure of [the sheriff's] office vis-à-vis the State," *id.* at 1309, all we need to decide today is whether Major Skelton acted as an arm of the State in the function of providing food to inmates.

B. The Factors from Manders

The factors from *Manders* weigh in favor of immunity for Major Skelton. The first three factors –

definition in state law, control under state law, and the source of funds – favor immunity. And the fourth factor – responsibility for judgments – "does not defeat immunity." *Id.* at 1329.

1. How State Law Defines the Function

We explained in *Manders* that "the essential governmental nature of [a sheriff's] office" includes "perform[ing] specific statutory duties, directly assigned by the State, in law enforcement, in state courts, and in corrections." *Id.* at 1319. One of those duties is taking custody of inmates in the county jail. *See id.* at 1315; Ga. Code Ann. § 42-4-4(a)(1) ("It shall be the duty of the sheriff . . . [t]o take from the outgoing sheriff custody of the jail and the bodies of such persons as are confined therein. . . ."). The duty to take custody of inmates entails certain custodial responsibilities over the bodies of inmates. For instance, it is "the duty of the sheriff" to furnish "medical aid, heat, and blankets, to be reimbursed if necessary from the county treasury." *Id.* § 42-4-4(a)(2). Georgia courts have interpreted this provision as giving sheriffs exclusive control vis-à-vis the county over choosing vendors for medical care. *See Bd. of Comm'rs of Spalding Cty. v. Stewart*, 668 S.E.2d 644, 645 (Ga. 2008) ("[T]he sheriff necessarily is vested with authority to enter into contracts with medical care providers. The [county] board cannot control the sheriff's choice [of provider]." (citation omitted)).

Another such responsibility is the function of providing food to inmates, which title 42 of the Georgia

Code imposes directly on the sheriff. *See* Ga. Code Ann. §§ 42-4-32, 42-5-2. We first discuss sections 42-4-32 and 42-5-2 individually. We then consider sections 42-4-32 and 42-5-2 in the broader context of Georgia law. Finally, we address the office of deputy sheriff, concluding that a deputy sheriff wears a "state hat," *Manders*, 338 F.3d at 1319, when determining whether to provide an inmate with his requested diet.

a. Section 42-4-32

Chapter 4 of title 42 governs "municipal [and] county jail[s] used for the detention of persons charged with or convicted of either a felony, a misdemeanor, or a municipal offense." Ga. Code Ann. § 42-4-30(1). Section 32 of that chapter governs the provision of food. It provides that all inmates in the county jail shall receive "not less than two substantial and wholesome meals daily." *Id.* § 42-4-32(b). It also requires that "[a]ll aspects of food preparation and food service shall conform to the applicable standards of the Department of Public Health." *Id.* § 42-4-32(a).

Section 42-4-32 imposes duties on the "officer[s] in charge" of municipal and county jails, *id.* § 42-4-32(d), which the statute defines primarily as "the sheriff" of a county jail, *id.* § 42-4-30(3). That section 42-4-32 imposes duties directly on the sheriff, a constitutional officer of the state of Georgia, *see* Ga. Const. Art. IX, § I, ¶ I, and not on the county in which the jail is located, is evidence that the provision of food is a state function under Georgia law.

b. Section 42-5-2

Chapter 5 of title 42 also supports our conclusion that the provision of food is a state function. Although chapter 5 regulates "correctional institutions of state and counties," Ga. Code Ann. tit. 42, ch. 5, its provisions are devoted in part to allocating responsibilities between correctional institutions and jails, *see, e.g.*, *id.* §§ 42-5-51; 42-5-2; *see also City of Atlanta v. Mitcham*, 769 S.E.2d 320, 325 (Ga. 2015) (discussing the provision of medical treatment by a municipal corporation under section 42-5-2(a)); *Graham v. Cobb Cty.*, 730 S.E.2d 439, 443-44 (Ga. 2012) (distinguishing the obligation of a county to pay for medical care under section 42-5-2 and the duty of the sheriff and his deputies to provide it). Section 42-5-2 makes it "the responsibility of the governmental unit, subdivision, or agency having the physical custody of an inmate to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention." Ga. Code Ann. § 42-5-2. Lake argues that because counties are the governmental unit with custody under section 42-5-2, the provision of food is a county function. But Georgia law clearly requires the sheriff to "take . . . custody of the jail and the bodies of such persons as are confined therein." *Id.* § 42-4-4(a)(1). The sheriff, not the county, is the "governmental unit, subdivision, or agency" having custody of inmates in county jails. Section 42-5-2 supports our conclusion that Georgia imposes food-service responsibilities directly on the sheriff as part of his custodial duties.

c. Sections 42-4-32 and 42-5-2 in Context

To the extent that doubt remains about the source of the sheriff's responsibility under sections 42-4-32 and 42-5-2, we look to the broader context and structure of Georgia law. *See Manders*, 338 F.3d at 1310-12, 1319. As a general matter, the sheriff holds a constitutional office independent of Cobb County and its governing body, *see* Ga. Const. Art. IX, § II, ¶ I(c)(1), and subject to control by the Georgia legislature, *see id.* Art. IX, § I, ¶ III(a)-(b). Counties do not delegate power to sheriffs, *see Manders*, 338 F.3d at 1319, and "Georgia's Constitution precludes the county from exercising any authority over . . . how the sheriff spends [his] budget," *id.* at 1311; *see also* Ga. Const. Art. IX, § II, ¶ I(c)(1); *Chaffin*, 415 S.E.2d at 907.

Caselaw interpreting section 42-5-2 in the context of medical care suggests that the statute operates differently depending on whether the jail in question was a municipal or county jail. Section 42-5-2 imposes a unified duty on municipalities to pay for and ensure that inmates are provided with medical care. *See Mitcham*, 769 S.E.2d at 325 & n.5 (explaining that municipalities are responsible under section 42-5-2 for the failure of municipal police to provide "needed medical and hospital attention" to inmates in pretrial detention (quoting Ga. Code Ann. § 42-5-2(a))). And municipal jails are run by the chief of police, who is appointed and supervised by the municipality. *See* Ga. Code Ann. § 42-4-1(b) ("[C]hiefs of police are the jailers of the municipal corporations and have the authority to appoint

other jailers, subject to the supervision of the municipal governing authority, as prescribed by law."). But counties lack supervisory authority and "delegate no powers or duties to sheriffs." *Manders*, 338 F.3d at 1319. With respect to county jails, section 42-5-2 imposes two separate duties: the county must fund the provision of medical care, and the sheriff must select an appropriate provider and ensure that inmates receive care when necessary. *See Stewart*, 668 S.E.2d at 645 (holding that sheriffs enjoy exclusive control over the provision of medical care).

Our dissenting colleague argues that the Georgia Court of Appeals has long construed section 42-5-2 to impose a duty on counties, not sheriffs, to provide medical care. Diss. Op. at 1345, 1345-48. He reads sections 42-5-2 and 42-4-32 "harmoniously" to mean that "the sheriff acts on behalf of the county" when providing food to inmates. *Id.* at 1347. We respectfully disagree.

The Georgia Court of Appeals has never construed section 42-5-2 to mean that a sheriff acts on behalf of the county when he provides medical care. Instead, the Georgia Court of Appeals, like we do, distinguishes between the duty imposed by section 42-5-2 on a county to fund medical care and the duty of a sheriff to provide medical care. *See Tattnall Cty. v. Armstrong*, 775 S.E.2d 573, 577 (Ga. 2015) (en banc) (explaining that section 42-4-4(a)(2) "places certain duties on a sheriff to provide an inmate with medical care," whereas section "42-5-2(a) imposes upon the county the duty and cost of medical care for inmates" (quoting *Graham*, 730 S.E.2d at 443)), *overruled on other grounds by Rivera*

v. Washington, 784 S.E.2d 775 (Ga. 2016). And none of the other decisions cited by our dissenting colleague hold that section 42-5-2 imposes a non-fiscal duty on counties in particular. *See Epps v. Gwinnett Cty.*, 499 S.E.2d 657, 663 (Ga. 1998) (failing to distinguish between the duty imposed on counties by section 42-5-2 and the duty imposed on sheriffs); *Cherokee Cty. v. N. Cobb Surgical Assocs., P.C.*, 471 S.E.2d 561, 564 (Ga. Ct. App. 1996) (citing *Macon-Bibb Cty. Hosp. Auth. v. Houston Cty.*, 428 S.E.2d 374, 376 (Ga. Ct. App.1993)) (explaining that 42-5-2 imposes cost of inmate medical care on the county).

Section 42-5-2 regulates both the furnishing of "food" and the furnishing of "needed medical and hospital attention," Ga. Code Ann. § 42-5-2, and we draw the same distinction regarding food that the Georgia Supreme Court and the Georgia Court of Appeals have drawn regarding medical care. Although the Georgia Code may not be a model of clarity when it comes to allocating responsibility in the context of corrections, we conclude that the duty to feed inmates – including the denial of an inmate's dietary request – is not delegated by the county but instead is "directly assigned by the state." *Manders*, 338 F.3d at 1319; *see also Boswell v. Bramlett*, 549 S.E.2d 100, 102 (Ga. 2001) ("[T]he '[p]owers of county commissioners are strictly limited by law, and . . . '[i]f there is reasonable doubt of the existence of a particular power, the doubt is to be resolved in the negative.'" (second and fourth alterations in original) (quoting *Mobley v. Polk County*, 251 S.E.2d 538, 541 (Ga. 1979))).

d. Deputy Sheriffs

A deputy's functions are derived from the sheriff's functions, so the deputy's performance of this function is also a state function. Georgia law allows sheriffs "in their discretion to appoint one or more deputies." Ga. Code Ann. § 15-16-23. Deputies are employees of the sheriff, and only the sheriff can hire deputies. *Pellitteri*, 776 F.3d at 780. Although the sheriff may place his deputies under a county civil-service system, it is his choice whether to do so. *See Grech*, 335 F.3d at 1338. And the sheriff trains and supervises deputies. *See id.* at 1336. Because the sheriff wears a "state hat," *Manders*, 338 F.3d at 1312, when he denies an inmate's dietary request, and because a deputy receives all of his powers and obligations with respect to feeding inmates from the sheriff, we conclude that a deputy also wears a "state hat" when he denies an inmate's dietary request.

2. Where State Law Vests Control

Georgia law vests control over the denial of Lake's dietary request in the state through the law on feeding inmates in county jails and the law on training and disciplining deputies. State law regulates food preparation and food service in the jail. It guarantees inmates "not less than two substantial and wholesome meals daily," Ga. Code Ann. § 42-4-32(b), and provides that "[a]ll aspects of food preparation and food service shall conform to the applicable standards of the Department of Public Health," *id.* § 42-4-32(a). As we

explained in *Manders*, this regulation of "the preparation, service, and number of meals" is "evidence of how the duties of sheriffs in Georgia are governed by the State and not by county governing bodies." 338 F.3d at 1317 n.30. This statute establishes state control over the feeding of Lake and, by extension, over Major Skelton's denial of Lake's dietary request.

Lake dismisses section 42-4-32 as a law of general application that cannot establish control, but we disagree. Although Lake is correct that *Manders* distinguished "laws of general application" that do not establish control from "specific statutes" that do, *id.* at 1321, Lake is wrong that section 42-4-32 is a law of general application. Section 42-4-32 applies only to jails. The section uses the term "officer in charge," Ga. Code Ann. § 42-4-32(d), which the statute defines as "the sheriff, if the detention facility is under his supervision, or the warden, captain, or superintendent having the supervision of any other detention facility," *id.* § 42-4-30(3). Because section 42-4-32 contemplates county jails run by sheriffs or his appointees, it is not a law of general application.

That section 42-4-32 governs both municipal and county jails does not affect this conclusion. As we discussed in connection with the first factor from *Manders*, Georgia law makes municipalities responsible for complying with section 42-4-32 in municipal jails. *See* Ga. Code Ann. 42-4-30 (referring to municipal jails). But the responsibility of sheriffs to comply with section 42-4-32 is direct and subject only to state control. *Cf. Manders*, 338 F.3d at 1319; *Stewart*, 668 S.E.2d at 645.

Lake also argues that the county controls the function of feeding inmates because it pays for the food, but this funding does not establish control. As we have explained, "The Georgia Supreme Court has held that counties 'must provide reasonably sufficient funds to allow the sheriff to discharge his legal duties,' and that 'the county commission may not dictate to the sheriff how that budget will be spent in the exercise of his duties.'" *Manders*, 338 F.3d at 1323 (quoting *Chaffin*, 415 S.E.2d at 907-08). The state, not the county, has legal control over the preparation and service of food in county jails.

Lake next argues that the food-service contracts signed by the county, the sheriff, and the food vendors appear to give the county some control, but these contracts do not affect our analysis of where state *law* vests control. We acknowledge that *Manders* referred vaguely to the "degree of control the State maintains over the entity," *id.* at 1309, and to counties not having control, *see id.* at 1321, 1322, 1328. But the en banc Court specifically defined the factor as "examin[ing] where Georgia *law* vests control," *id.* at 1320 (emphasis added), and we applied it consistent with that definition, *see id.* at 1320-22. For the reasons already discussed, Georgia law vests control over feeding inmates in the state.

The training and discipline of deputies provides further evidence of control by the state. The Peace Officer Standards and Training Council, a state entity, can discipline deputy sheriffs for misconduct by reprimanding them or by limiting, suspending, or revoking

their certification as peace officers. *Pellitteri*, 776 F.3d at 781. Moreover, the state trains and disciplines sheriffs, *Manders*, 338 F.3d at 1320-21, and sheriffs train and discipline deputies, *Grech*, 335 F.3d at 1336. This disciplinary power includes the obligation to ensure that sheriffs do not "[v]iolat[e] or attempt[ ] to violate a law . . . of [Georgia] . . . [or] the United States," Ga. Code Ann. § 35-8-7.1(a)(7), including the First Amendment, the Religious Land Use and Institutionalized Persons Act, and sections 42-4-32 and 42-5-2 of the Georgia Code. Cobb County, in contrast, has no power over training or discipline. *See Manders*, 338 F.3d at 1320-22. We conclude that, under Georgia law, the state controls the denial of an inmate's dietary request.

3. Source of Funds

The third factor is the source of funding for the function at issue. We concluded in *Manders* that when the county is required to pay by state law and the state provides some funding, this factor "tilt[s] . . . toward immunity." *Id.* at 1324. The application of this factor in this appeal is indistinguishable from the application in *Manders*, so we are bound to reach the same conclusion. The state pays for some of the operations of the sheriff's office, and the county "bears the major burden of funding [the sheriff's] office . . . because the State so mandates." *Id.* at 1323. Under *Manders*, this factor slightly favors immunity.

4. Responsibility for Adverse Judgments

The fourth factor looks to "the source of the funds that will pay any adverse judgment." *Id.* at 1324. In Georgia, counties are not liable for judgments against the sheriff in his official capacity, *id.* at 1326, and no law requires the state to pay an adverse judgment against a sheriff in his official capacity, *id.* at 1327. Instead, the sheriff "apparently would have to pay any adverse federal court judgment against him in his official capacity out of the budget of the sheriff's office," which "implicate[s]" "both county and state funds." *Id.* But as we explained in *Manders*, the Supreme Court has "[n]ever . . . required an actual drain on the state treasury as a per se condition" of sovereign immunity. *Id.* And "the State's sovereignty and thus its integrity remain directly affected when federal court lawsuits interfere with a state program or function." *Id.* at 1329. For these reasons, we concluded that, "[a]t a minimum, this final factor does not defeat immunity." *Id.*

As with the third factor, the application of the fourth factor in this appeal is resolved by *Manders*. The sheriff apparently would pay for an adverse judgment against Major Skelton out of the sheriff's budget, but regardless of the effect on state finances, "an actual drain on the state treasury" is not required for immunity to apply under *Manders*. *Id.* at 1327. Under *Manders*, "this final factor does not defeat immunity." *Id.* at 1329.

C. Skelton Is Entitled to Sovereign Immunity.

Overall, the factors from *Manders* favor immunity. The first two factors strongly favor immunity: a deputy sheriff derives his powers and obligations from the sheriff, and "[s]heriffs' duties and functions are derived directly from the State, performed for the State, and controlled by the State." *Id.* at 1328. The third factor slightly favors immunity for the reasons stated in *Manders*, *see id.* and the fourth factor "does not defeat immunity" for the reasons stated in *Manders*, *id.* at 1329.

We acknowledge that we reserved judgment in *Manders* about a "case of feeding . . . inmates, which necessarily occur[s] within the jail." *Id.* at 1319. But we also observed that Georgia law "regulates the preparation, service, and number of meals," which we called "evidence of how the duties of sheriffs in Georgia are governed by the State and not by county governing bodies." *Id.* at 1317 n.30. To the extent that our dissenting colleague suggests that this appeal should be decided based on "the Eleventh Amendment's twin reasons for being," Diss. Op. at 34 (quoting *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 47 (1994)), we can only say that we are bound by the test of the en banc majority in *Manders*, not the dissent. *See Manders*, 338 F.3d at 1329-32 (Anderson, J., dissenting) (arguing for an approach based on the "Eleventh Amendment's twin reasons for being" (quoting *Hess*, 513 U.S. at 47)). And under the test announced in *Manders*, Major Skelton is entitled to immunity.

IV. CONCLUSION

We **REVERSE** the denial of summary judgment against Lake's claims for damages and **REMAND** for further proceedings with an instruction to enter judgment in favor of Skelton on the claims for damages.

PARKER, Circuit Judge, dissenting:

In *Manders v. Lee*, this Court, applying a four part test, held that a Georgia sheriff acts as an arm of the State and is therefore entitled to Eleventh Amendment immunity when he establishes use-of-force policy at the county jail and trains and disciplines his deputies in that regard. 338 F.3d 1304 (11th Cir. 2003) (en banc) (6-5 decision). The Court was careful to qualify, however, that it was not resolving whether a sheriff acts on behalf of the State for all purposes vis-à-vis the county jail, and it clearly distinguished the provision of food, clothing, and medical care to inmates on the ground that O.C.G.A. § 42-5-2 places the responsibility to furnish such necessities on the counties. *See id.* at 1319, 1322-23 & n.43.

Notwithstanding those admonitions, the majority holds that a Georgia deputy sheriff acts on behalf of the State and is thus immune from liability for failing to provide food to inmates in the county jail. The majority reaches that conclusion based largely on its view that § 42-5-2 does not impose a duty on the counties, even though, as *Manders* recognized, the Georgia Court of Appeals has construed the statute to do just

that. The majority then proceeds to an inappropriate application of the *Manders* factors while losing sight of the principal purpose behind the Eleventh Amendment – not implicated here – of protecting the State's purse from federal-court judgments absent consent to suit. The result is a decision that significantly expands the reach of sovereign immunity and will leave Georgia counties unanswerable for constitutional violations predicated on their failure to provide food or any of the other necessities required by § 42-5-2. Because I believe that such an outcome is neither correct as a matter of law nor wise, I respectfully dissent.

The first factor under *Manders* asks how state law defines the entity with respect to the particular function. *Id.* at 1319. In *Manders*, the Court concluded that Georgia law defines the sheriff as a state actor with respect to force policy in the county jail because his authority to use force and his obligation to administer the jail "are directly derived from the state and not delegated through the county entity." *Id.* "While we must consider context," the Court continued, the fact that the actions took place within the county jail did not "automatically transmute" them into county functions because they involved "quintessential policing function[s]" that extended beyond the jail:

> [I]n administering the jail, the sheriff does not check his arrest powers or force authority at the door. Instead, he and his deputies bring them into the jail and exercise them in the jail setting. *This case is not a case of feeding, clothing, or providing medical care to inmates,*

> *which necessarily occur within the jail.* Instead, it involves Sheriff Peterson's force policy, which happens to be at issue in the jail context in this particular case.

Id. (emphasis added). The first factor thus weighed heavily in favor of immunity. *Id.*

Here, the particular function is the provision of food to inmates in the county jail. As noted, that function is addressed in § 42-5-2, which provides that "it shall be the responsibility of the governmental unit, subdivision, or agency having the physical custody of an inmate to maintain the inmate, furnishing him with food, clothing, and any needed medical and hospital attention." The Georgia Court of Appeals has long understood this section to require counties, as the governmental units having physical custody of inmates in the county jail, to ensure that they are provided with those necessities. *See, e.g.*, *Tattnall County v. Armstrong*, 775 S.E.2d 573, 577 (2015) (en banc), *overruled on other grounds by Rivera v. Washington*, 784 S.E.2d 775 (Ga. 2016) ("OCGA § 42-5-2(a) imposes upon the county the duty and cost of medical care for inmates in its custody" at the county jail); *Epps v. Gwinnett County*, 499 S.E.2d 657, 663 (1998); *Cherokee County v. North Cobb Surgical Assocs., P.C.*, 471 S.E.2d 561, 563-64 (1996); *Macon-Bibb Cty. Hosp. Auth. v. Houston County*, 428 S.E.2d 374, 375-76 (1993). Indeed, the Court of Appeals has specifically held that § 42-5-2 imposed a duty on Cobb County to provide medical care to inmates at the Cobb County Adult Detention Center. *Graham v. Cobb County*, 730 S.E.2d

439, 440-41 (2012). Relying on such decisions, the *Manders* court "stress[ed]" that it was not dealing with a case involving the denial of medical care, "which counties have a statutory obligation to provide to inmates in county jails." 338 F.3d at 1323 n.43; *see also Manders*, 338 F.3d at 1337 n.6 (Barkett, J., dissenting) ("The majority recognizes that counties may be liable for constitutional deprivations arising out of certain aspects of jail administration.") (citing 338 F.3d at 1322, 1323 & n.43).

Although the *Manders* court had no occasion to resolve whether Georgia law defines the sheriff as a state or county actor with respect to the provision of food to county jail inmates, the answer is apparent from its focus on delegation and context. Unlike the force policy, the responsibility of providing food falls directly on the county as the entity having physical custody over the inmates. While the sheriff is responsible for carrying that function out, he does so on the county's behalf as the county jailer, pursuant to a delegation of its responsibilities. *See* O.C.G.A. § 42-4-4 ("By virtue of their offices, sheriffs are jailers of the counties. . . ."). That is, after all, why the Georgia courts have held counties responsible under § 42-5-2 for the actions of the sheriff and his deputies in the county jail.[1] Further, unlike the

[1] In each of the cases cited to show that § 42-5-2 imposes a duty on the counties to furnish medical care to inmates in their physical custody, the allegations involved wrongdoing by the sheriff, his deputies, or both. Those decisions rest on the premise that inmates in county jails, while in one sense in the physical custody of the sheriff as the county jailer, *see* Maj. Op. at 12, are also in the physical custody of the county such that the county can be

force policy, which happened to be at issue in the jail context in *Manders* but commonly arises in other circumstances, the provision of food to inmates takes place almost exclusively within the jail.[2] These two factors strongly suggest that state law defines the provision of food to inmates in the county jail as a county function. They also explain why the Court in *Manders* was so insistent on distinguishing the provision of the necessities described in § 42-5-2 from the force policy, and why the Georgia federal district courts have overwhelmingly held that a sheriff performs a county function and is thus not entitled to immunity from liability for failing to provide medical care to inmates in the county jail. *See Robinson v. Integrative Detention Health Servs., Inc.*, 2014 WL 1314947, at *12 & n.148 (M.D. Ga. Mar. 28, 2014) (collecting cases).

The majority appears to recognize that § 42-5-2, so read, presents a substantial obstacle to immunity. But it concludes that because § 42-4-4(a)(1) "requires the

---

held responsible for the actions of the sheriff as its agent, *see Macon-Bibb Cty. Hosp. Auth. v. Reece*, 492 S.E.2d 292, 293 (Ga. Ct. App. 1997) (where plaintiffs sued county for medical expenses based on § 42-5-2, county's liability turned on "whether these detainees were in the physical custody of the county sheriff's department"). *Cf. Manders*, 338 F.3d at 1335 (Barkett, J., dissenting) ("As governmental units charged with the custody of persons accused of crimes, counties maintain their jails through the efforts of their sheriffs.").

[2] I say almost exclusively because the Georgia courts have held that a person may be an "inmate" in the physical custody of the county even though he was not physically in the jail at the time of his injury. *See, e.g.*, *North Cobb Surgical Assocs.*, 471 S.E.2d at 563-64.

sheriff to 'take . . . physical custody of the jail and the bodies of such persons as are confined therein,'" the sheriff is the "governmental unit" having physical custody of the inmates under § 42-5-2. Maj. Op. at 12. But this conclusion is foreclosed by Georgia law: The Georgia Court of Appeals has construed § 42-5-2 to impose a responsibility on counties to provide food, clothing, and medical care to inmates in the county jail, which makes sense only if the counties are the "governmental units" upon whom that responsibility falls. Because I see no basis to conclude that the Georgia Supreme Court would interpret the statute differently, we are bound by the Court of Appeals's construction. *See Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1348 (11th Cir. 2011).

The majority offers two additional grounds for concluding that the first factor favors immunity, neither of which, in my view, is sufficient to overcome the force of the text of § 42-5-2. First, the majority cites § 42-4-32, which requires the sheriff to feed inmates and ensure that food preparation and service conform to state standards, and reasons that the imposition of such duties "directly on the sheriff . . . and not on the county in which the jail is located" is "evidence that the provision of food is a state function." Maj. Op. at 11. While I agree that § 42-4-32 places a duty on the sheriff to furnish food to inmates in his care, that does not tell us whether the sheriff acts on behalf of the State or the county when doing so. Section 42-5-2 does. Instead of construing § 42-4-32's silence to mean that the sheriff acts on behalf of the State, I would read the

sections harmoniously to provide that the sheriff acts on behalf of the county. To the extent that doubt remains, context is again instructive: Because the function, with limited exceptions, occurs within the jail, the sheriff is best understood as acting on behalf of the county.

The majority also observes that "counties lack supervisory authority and 'delegate no powers or duties to sheriffs,'" and that Georgia courts have interpreted § 42-5-2 to require counties to fund the provision of medical care but give the sheriff exclusive control over selecting a provider. Maj. Op. at 13 (quoting *Manders*, 338 F.3d at 1319). Control, however, is addressed by the second factor: the first asks how state law defines the function, and under *Manders* that question is answered by considering delegation and context. *Cf. Manders*, 338 F.3d at 1319 n.35 ("The key question is not what arrest and force powers sheriffs have, but *for whom* sheriffs exercise that power."). The two factors should not be collapsed.[3] And while the *Manders* court did state that counties "delegate *no* powers or duties to sheriffs," the particular issue was whether they "delegate any *law enforcement* powers or duties to sheriffs," as the functions related to force policy. 338 F.3d at 1313 (emphases added). Outside of that specific context, *Manders* offers no guidance, and I would not read its

[3] For the same reason, I fail to see the relevance of the principle of Georgia law that the powers of county commissioners are to be strictly limited and construed. *See* Maj. Op. at 15. The question for purposes of the first factor is not whether the county has authority or control over the sheriff's actions, but whether it bears responsibility for them.

dictum in a manner that conflicts with Georgia case law providing that § 42-5-2 imposes a duty on the counties that is carried out by sheriffs on their behalf.

In sum, because the task of providing food to inmates in the county's physical custody is assigned by statute to the county and is generally limited to the county jail, and because the alternative sources of state law do not clearly indicate that the sheriff acts for the State, I would hold that state law defines the function of providing food to inmates in the county's custody as a county function. Accordingly, I would find that the first factor weighs heavily against immunity.

Turning to the second factor – where state law vests control with respect to the particular function – I agree with the majority that the State's requirement in § 42-4-32(a) that food preparation and service conform to the Department of Public Health's standards, coupled with the counties' apparent lack of control, weighs in favor of immunity. Maj. Op. at 16-17. But control is of limited relevance to the Eleventh Amendment analysis where, as here, "[i]ndicators of immunity or the absence thereof do not . . . all point the same way," since "ultimate control of every state-created entity resides with the State" and "rendering control dispositive does not home in on the impetus for the Eleventh Amendment: the prevention of federal-court judgments that must be paid out of the State's treasury." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44, 47-48 (1994). That issue is instead addressed by the third and fourth *Manders* factors and the dual purposes underlying immunity, each of which, as I explain

below, weighs against or at least does not favor immunity.

The third factor is the source of funding for the particular function at issue. In *Manders*, the Court observed that "[t]he State funds the annual training of sheriffs" and it was "reasonable to assume that such training includes instruction on force policy and hiring and training deputies." 338 F.3d at 1320, 1323. The State also funded "the Governor's disciplinary procedure over sheriffs for use of excessive force" and paid "for certain state offenders assigned to the county jails under the sheriff's supervision." *Id.* at 1323. The Court went on to note that although the county bore the "major burden of funding [the sheriff's office] and the jail, it [was] because the State so mandates," and the county lacked control over how the sheriff spent his budget. *Id.* Because the county did not exercise any power of the purse with respect to the particular functions and because "both state and county funds [were] involved" in those functions, the Court concluded that the State's involvement was "sufficient to tilt the third factor . . . toward immunity." *Id.* at 1324.

The majority determines that the application of the third factor is "indistinguishable from the application in *Manders*" because "[t]he state pays for some of the operations of the sheriff's office and the county bears the major burden of funding [the sheriff's] office . . . because the State so mandates." Maj. Op. at 19. I disagree. Under the majority's formulation, it is hard to imagine when this factor would not favor immunity, as the State always pays for some of a sheriff's

operations. The *Manders* court took a more nuanced approach, focusing on the involvement of state funds in the particular functions relating to force policy, and found that the State's contributions to annual training, disciplinary procedure, and the housing of certain state offenders were enough to tilt the factor toward immunity. Here, the State, through § 42-5-2, has expressly delegated to the counties the responsibility providing – by paying for – food to inmates. The absence of state funds for the particular function disfavors immunity. *See, e.g.*, *Abusaid v. Hillsborough Cty. Bd. of Cty. Com'rs*, 405 F.3d 1298, 1310 (11th Cir. 2005). It is presumably for this reason that in analyzing the third factor, the *Manders* court qualified that Manders "had not allege[d] that Sheriff Peterson denied him necessities in § 42-5-2" but rather had "challenged only Sheriff Peterson's force policy at the jail and the training and disciplining of his deputies." 338 F.3d at 1323 & n.43.[4] Unlike Manders, Lake alleges precisely that. I would therefore find that this factor tilts against immunity.

---

[4] I acknowledge that here, as in *Manders*, the State pays "for certain state offenders assigned to county jails under the sheriff's supervision." 338 F.3d at 1323. However, because the Court rejected as too broad the dissent's characterization of the function as "jail operation," *id.* at 1309 n.9, the fact that the State also funded training and disciplining related to force policy was critical to the Court's analysis of the third factor, and comparable funding is absent in this case. Were the State's mere payment for certain offenders assigned to the county jail enough to shift this factor toward immunity, the instruction that we assess the particular function – *the provision of food* to inmates in the county jail – would be rendered hollow.

The fourth factor asks what is the source of the funds that would pay for an adverse judgment. The majority, following *Manders*, concludes that "[a]t a minimum, this final factor does not defeat immunity," because although the State is not directly responsible for a judgment against the sheriff, any decrease in the sheriff's budget would indirectly impact both state and county funds, and "the State's sovereignty and thus its integrity remain directly affected when federal court lawsuits interfere with a state program or function." Maj. Op. at 20 (quoting *Manders*, 338 F.3d at 1329). Since *Manders*, however, the Court has twice rejected the theory that an indirect impact on the State treasury favors immunity and has instead held that "the fact that a judgment against the Sheriff in this case would *not* be paid out of the state treasury is, in itself, a clear marker that the Sheriff is not an arm of the state." *Abusaid*, 405 F.3d at 1313; *see also Pellitteri v. Prine*, 776 F.3d 777, 783 (11th Cir. 2015) ("[T]o the extent that the state treasury will be spared here from paying any adverse judgment, this factor weighs in favor of denying immunity.") (citing *Abusaid*, 405 F.3d at 1313).

Moreover, the *Manders* court itself ultimately relied not on the indirect-impact theory, but on the fact that lawsuits based on the sheriff's force policy would offend the State's dignity by interfering with what was, according to the remaining factors, a state function. *See* 338 F.3d at 1327-28 & n.51 (observing that "the United States Supreme Court has never said that the absence of a treasury factor alone defeats immunity

and precludes consideration of other factors, such as how state law defines the entity or what degree of control the State has over the entity," and that "[t]he State's 'integrity' is not limited to who foots the bill"). *Manders* is best read, therefore, to stand for the proposition that the absence of a direct impact on the State treasury does not preclude immunity where the remaining factors indicate that a state function is at issue. Here, because two of the remaining factors indicate that we are dealing with a county function and the other is of minimal relevance, this factor arguably tilts against immunity. In any event, as the majority acknowledges, this factor cannot support immunity. *See* Maj. Op. at 19-20.

To recapitulate, the first *Manders* factor weighs heavily against immunity. The third and possibly fourth point in the same direction. And while the second factor favors immunity, it is of limited relevance where the factors conflict. I would accordingly hold that a Georgia deputy sheriff is not entitled to immunity for failing to provide food to inmates in the county jail. This should come as little surprise, given the *Manders* court's repeated observation that the provision of food, clothing, and medical care are materially different for purposes of immunity from the force policy functions.[5]

---

[5] The extent of the majority's discussion on these statements is to "acknowledge that we reserved judgment in *Manders* about a 'case of feeding inmates, which necessarily occurs within the jail," but note that "we also observed that Georgia law 'regulates the preparation, service, and number of meals,' which we called

To the extent that the *Manders* factors are not conclusive, however, "the Eleventh Amendment's twin reasons for being remain our prime guide," *Hess*, 513 U.S. at 47, and they too weigh against immunity. The first factor is to ensure that we do not offend Georgia's dignity as a sovereign by allowing sheriffs to be sued in federal courts. *Id.* As noted, the Georgia Court of Appeals has held that a county is responsible for the sheriff's failure to comply with § 42-5-2 because the sheriff acts on the county's behalf, *i.e.*, as an arm of the county. *See supra* at 23-24. Indeed, while the Georgia courts have said that a county cannot be held liable for violating § 42-5-2 because the statute does not waive sovereign immunity as a matter of *state* law, they have added that "this does not mean that plaintiffs seeking recourse based on allegations that a government denied or provided inadequate medical treatment to an inmate are necessarily without recourse because such claims may in some circumstances state a cause of action under 42 U.S.C. § 1983." *Armstrong*, 775 S.E.2d at

---

'evidence of how the duties of sheriffs in Georgia are governed by the State and not by county governing bodies.' " Maj. Op. at 21 (quoting *Manders*, 338 F.3d at 1317 n.30, 1319) (alterations adopted). That statement, however, appeared in the Court's preliminary overview of Georgia law and was followed by the caveat that "[w]e do not contend that these statutory jail duties, by themselves, transform sheriffs into state officials." 338 F.3d at 1317 n.30. Regardless, while § 42-4-32(a) shows that the State *controls* the function at issue, that is a quite different question from how the State *defines* the function, which is answered by § 42-5-2 and the context in which the function occurs. That is likely why, despite this single reference to § 42-4-32(a), the *Manders* court noted on four separate occasions that the case did not involve food, clothing, or medical care and thus did not implicate § 42-5-2.

578 n.10. Thus, not only do we *not* offend Georgia's dignity by permitting suit in these circumstances, Georgia *expects* that § 1983 liability would be available to hold sheriffs and counties accountable. "It would be every bit as much an affront to [Georgia's] dignity" to ignore those decisions and conclude that the sheriff and his deputies act for the State and are immune from liability for such actions. *See Fresenius Medical Care Cardiovascular Res., Inc. v. Puerto Rico & Caribbean Cardiovascular Ctr. Corp.*, 322 F.3d 56, 63-66 (1st Cir. 2003).

The second purpose of immunity, which is the "most important," is to prevent federal-court judgments that would necessarily be paid out of the State's treasury absent consent to suit. *Hess*, 513 U.S. at 47-48. As *Manders* recognized, a federal judgment would have no direct impact on Georgia's treasury because it would be paid out of the budget of the sheriff's office, which as previously noted, comes from the county funds. 338 F.3d at 1327. While this fact does not necessarily defeat immunity, *e.g.*, *Pellitteri*, 776 F.3d at 782 n.2, it certainly weighs against it, *see Hess*, 513 U.S. at 51 (observing that "the Eleventh Amendment's core concern is not implicated" when "both legally and practically" the State is not "*in fact* obligated to bear and pay the resulting indebtedness of the enterprise") (emphasis added). And even if an indirect impact on the State treasury could theoretically support immunity, which is questionable, *see Abusaid*, 405 F.3d at 1312, that impact is too remote and speculative here because it is the counties who ultimately bear the

responsibility for ensuring that the sheriff is adequately funded to perform his duties. *E.g.*, *Chaffin v. Calhoun*, 415 S.E.2d 906, 907-08 (Ga. 1992). Both purposes, then, weigh against immunity.

For all of these reasons, I would hold that a Georgia deputy sheriff is not entitled to immunity from liability for failing to provide food to inmates at the county jail, and I would affirm the decision of the district court. I therefore respectfully dissent.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MICHAEL LESLIE LAKE, Plaintiff, v. DAVID HOWELL, MICHAEL SKELTON, Defendants.	: : : : : : : :	CIVIL ACTION NO. 1:12-CV-02018-MHC-JSA PRISONER CIVIL RIGHTS 42 U.S.C. § 1983

MAGISTRATE JUDGE'S ORDER AND FINAL REPORT AND RECOMMENDATION

(Filed May 27, 2015)

Plaintiff, a former prisoner at the Cobb County Adult Detention Center ("CCADC"), sues David Howell in his individual capacity and Michael Skelton in his individual and official capacities for denying him, from November 28, 2011 until November 29, 2012, a restrictive diet allegedly required by his religious vow and beliefs (*see* Doc. 113 ¶ 15), in violation of the First and Fourteenth Amendments to the United States Constitution and of the Religious Land Use and Institutionalized Persons Act (42 U.S.C. § 2000cc-1(a)) ("RLUIPA"). (*See* Doc. 1 (Compl.), Doc. 50 (1st Amended Compl.), Doc. 101 (2d Amended Compl.)). During the relevant time period, "Skelton was a Major working at the . . . CCADC as Operational Support Commander" (Doc. 109-1 ¶ 2), and was "the Director of Health Services at the CCADC infirmary" (*id.* ¶ 3).

The Court previously denied Howell's original and renewed motions to dismiss Plaintiff's complaint on qualified immunity grounds (Docs. 26, 52) and Skelton's motion for judgment on the pleadings (Doc. 54). (*See* Docs. 42, 49, 58, 67).

Howell and Skelton have now filed a joint motion for summary judgment (Doc. 109); Plaintiff has responded (Doc. 112); and Defendants have replied (Doc. 117). Also on file are Defendants' statement of material facts ("Defs. SMF") (Doc. 109-1); Plaintiff's statement of material facts ("Pl. SMF") (Doc. 113) and response to Defs. SMF ("Pl. Resp. Defs. SMF") (Doc. 114); Defendants' response to Pl. SMF ("Defs. Resp. Pl. SMF") (Doc. 118); the transcripts of the depositions of Plaintiff (Doc. 109-6), (Doc. 109-7) and Skelton (Doc. 109-8); and supporting declarations and exhibits filed by Defendants (Docs. 109-2 through 109-5 (Craig, Prince, Skelton and Decls.), Docs. 109-9 through 109-14 (Dep. Exs.)) and by Plaintiff (Docs. 113-1 through 113-7 (Exs. in support of Pl. SMF), Doc. 115-1 (Pl. Decl.), and Doc. 116-1(Pl. Dep. errata sheet)).

I. Factual and Procedural Background

A. Factual Background

Plaintiff was taken into custody at the CCADC on November 28, 2011. At that time he weighed approximately 178 pounds. (*See* Doc. 109-9 at 85). On November 29, 2012, a year and a day later, the CCADC first provided Plaintiff with a vegetarian meal option that he found acceptable. (*See* Lake Dep. at 81:3-6).

1. Plaintiff's Medical and Related Requests and His Diet Options

On December 4, 2011, Plaintiff submitted an Inmate Medical Request Form stating that he is a "religious vegetarian"; requesting a "vegetarian diet"; and stating that he had been at the CCADC for 7 days, had been refusing all food trays with meat, and in the last 4 days had eaten only two peanut butter sandwiches and a few cookies. (Doc. 109-12 at 15). Plaintiff also stated that he "take[s his] vow very seriously. No meat, no [gelatin], no products from Pepsi [] nor products from Kraft []" because these companies test flavor enhancers using embryonic stem cells. (*Id.*).

On or about December 10, 2011, Plaintiff wrote a letter to Lt. Col. Janet Prince, assistant commander of the CCADC Detention Services Division (*see* Prince Decl. ¶¶ 1-2), stating in part:

> Today is my 12th day here and I have rejected every meal that has meat on it. During these 12 days I have had 6 meals, during the last 9 days only 3. I have been requesting a vegetarian diet because of my personal religious vow not to be responsible for the death of any animal. I take this 14 year old vow seriously.
>
> To remedy this matter, *I am not asking for much, just for my meal trays to be prepared without meat*. . . . I am trusting that you will intervene and help provide me a diet that matches my vow – it's nothing complex.

(Doc. 109-11 at 3; *see* Pl. SMF ¶ 25).

On December 15, 2011, Plaintiff "request[ed] the lunch option – healthy snack with peanut butter sandwich." (Doc. 109-12 at 18). On December 19, 2011, his Integrated Progress Notes indicated that he had reported not eating anything for 3 days. (*Id.* at 19).

On or about December 20, 2011, Plaintiff began to receive a 3,000-calorie-per-day diabetic diet, which still included meat, and he still refused to eat from any tray that was served with meat. (Doc. 109-13 at 2-5). During the ensuing months, Plaintiff continued to submit requests for a vegetarian diet (*id.* at 7-11; Doc. 109-14 at 2); and on June 30 or July 30, 2012, he requested a diet limited to nutritional supplements for supper and peanut butter sandwiches for lunch, with no breakfast (Doc. 109-14 at 3).

On August 2, 2012, Plaintiff was placed on suicide watch due to his weight loss and refusal to eat. (*Id.* at 4-5). On August 17, he weighed 145 pounds. (*Id.* at 11). On August 29, 2012, he was taken to Georgia Regional Hospital for observation regarding his mental competency to stand trial, and he remained there until November 13, 2012, during which time he received a vegetarian diet. (Defs. SMF ¶ 27; *see* Lake Dep. at 156:15-18).

On November 20, 2012, Plaintiff again "request[ed] a vegetarian diet per [his] religious vow made 15 years ago. No meat, no [gelatin], no Kraft, no Pepsi." (Doc. 109-14 at 15). He began to receive a vegetarian diet acceptable to him on November 29, 2012. (Lake Dep. at 81:3-6).

Plaintiff states that "CCADC's '**food service agreement provide[d] for a vegetarian diet** – typically ordered through Facility Admin or the Chaplains,' and '[t]he cost of a dietary tray and a regular tray [we]re the same to [CCADC] from the vendor.'" (Pl. SMF ¶ 38 (citing Skelton Dep. 66-69, 84-85; Pl. Dep. Ex. 22 (Doc. 109-11 at 4); Pl. Dep. Ex. 31 (Doc. 109-12 at 2-3))). Defendants respond to this statement by acknowledging that the Court "may properly consider [Plaintiff's] evidence on summary judgment." (Defs. Resp. Pl. SMF ¶ 38).

During the time period that is relevant here, approximately 1,800 CCADC inmates received approximately 5,400 meals per day. (*See* Defs. SMF ¶ 37). In a memo that Chuck Stoetzer, Law Enforcement Planner for the Cobb County Sheriff's Office, prepared for a February 22, 2012 meeting regarding Food Service Operations at the CCADC – which memo he sent to, among others – Stoetzer noted that "a typical daily count" of special-diet food trays distributed to CCADC inmates included 16 different types, distributed to a total of 332 inmates. (Doc. 109-11 at 13-14). Stoetzer noted that the "only religious diet is Ramadan and the meals are served prior to sunrise and after sunset." (*Id.* at 14). "Until February 1, 2012, Aramark Correctional Services, LLC provided food service for inmates at the CCADC [and thereafter] A'viands, LLC" did so. (Defs. SMF ¶ 38). Skelton testified that "A'viands actually had, [] within what they offered companies, a vegetarian meal," which cost the same as a standard meal, but he did not learn of the availability of that vegetarian

diet option until he received a memo from Col. Donald Bartlett, as forwarded by Col. Milton Beck on October 8, 2012. (Skelton Dep. at 69:15-21, 84:14-85:20; *see* Doc. 109-12 at 2).

2. Plaintiff's Grievances

On December 1, 2011, Plaintiff filed his first of several grievances regarding his diet, stating in part:

> 14 years ago I made a religious pact not to be responsible for the death of any of God's (animal) creations for appeasement after losing my friend after we parted for college. . . . I am a Lacto-ovo-Vegetarian. I also do not eat food from Pepsi (Frito Lays, Doritos, Quaker Oats, Tropicana) nor Kraft (Cad[bury], Nabisco) because of their development with Senomyx of flavor enhancers tested with embryonic stem cells. [I] request meals [t]hat match my religious convictions. [N]o meat, no [gelatin], no Kraft brand, no Pepsi brand.

(Doc. 109-10 at 21; *see* Pl. SMF ¶ 25). On December 7, Plaintiff appealed the denial of this grievance, stating, "I am a religious vegetarian. . . . In the last 7 days I have had only 2 meals because the medical team will not simply write no meat, no [gelatin], no Pepsi company products, no Kraft brand products." (Doc. 109-10 at 23; *see* Pl. SMF ¶ 25). Howell responded to the appeal on December 15, stating, "We will need to know specifically what religion you are referring to. We will need to research the doctrine of that religion to ensure

we can [r]e[me]dy all rest[raint]s." (Doc. 109-10 at 23; *see* Pl. SMF ¶ 30).

On December 18, 2011, Plaintiff filed a second appeal, stating in part:

> I am a Christian who has taken a religious vow not to be responsible for the death of any animals. As a Christian, it is doctrine that life begins at conception, [and] since Pepsi (Pepsi, Frito Lays, Tropicana, Quaker Oats, etc.) and Kraft (Kraft, Nabisco, Cadbury) contract[] Senomyx to develop flavor enhancers using human embryonic stem cells[,] I do not and cannot eat their foods. It has been documented now that for 21 days I have been refusing all trays with meat. . . . It is pure negligence on your part [that] someone has to wait 3 week[s] to obtain [his] legal right to a meal that meet[s his] religious obligations when nothing special is being asked to be provided – only omitted. . . . Let me reiterate "NO MEAT, NO GELITIN [sic], No PEPSI, No chips, No Kraft." Since the Colonel, Major, and Lieutenant have been told and now I would have exhausted all administrative remedies, subsequent denials of my religious diet will be heard in the US Federal Court! There is no excuse to let the religious starve due to YOUR negligence.

(Doc. 109-10 at 24; *see* Pl. SMF ¶ 25). Plaintiff grieved the same matter again on May 15, 2012. (Doc. 109-10 at 8).

On August 7, 2012, Plaintiff filed another grievance, stating in part:

> I need a vegetarian diet (no meat at all) on a medical basis. Over these last 8 months I have lost up to 40 pounds of body mass and now weigh 146 lbs, losing an average of 5 lbs/ month. After a false suicide watch over my diet, I was also observed to be malnourished [by] a blood test. I request a vegetarian diet, even if it is just peanut butter sandwiches & multivitamins. Instead, your infirmary keeps me on a 3000 cal[orie] diabetic diet which I cannot accept due to my religious vow – which YOUR Major Skelton does not recognize & has no authority to be judge over my religious beliefs.

(Doc. 109-11 at 9; *see* Pl. SMF ¶ 25).

Howell responded to this grievance on August 13, 2012, stating, "Mr. Lake, you have not made it known as to the subgroup of Christianity that would validate specific food restrictions. You are [getting a] 3000 cal[orie] diet to allow you more vegetarian choices for your diet." (Doc. 109-11 at 9; *see* Pl. SMF ¶ 30; Pl. Resp. Defs. SMF ¶ 17; Defs. Resp. Pl. SMF ¶ 30).

3. Plaintiff's Interactions With Defendants

a. Skelton

On December 20, 2011, Plaintiff met with Skelton. Plaintiff attempted to explain the religious basis for

his diet. Skelton responded with the following memorandum: "As we discussed this morning, a special diet is only provided for documented medical and recognizable and established religion reasons. Personal choice is not a consideration for special diets. You have not provided information or documentation fitting the criteria for a special diet therefore one will not be provided." (Doc. 109-11 at 2). Skelton testified that it was not clear to him from his December 20 conversation with Plaintiff that the request for food trays with no meat allocated to them was based on a vow Plaintiff had made and that the request that he not be served the products of certain companies was based on his belief that life begins at conception. (Skelton Dep. at 45:7-53:16, 57:15-23). Skelton also testified that although Plaintiff insisted that his requests were religious in nature, he did not specify the religion or sect that required the specific dietary restrictions he was requesting, other than making vague references to his being a Christian and to the practices of Hellenistic Jews. (*Id.* at 47:2-23, 49:1-13). Skelton "explained to [Plaintiff] at that time that [the CCADC does not] offer a vegetarian diet, that the minimum caloric count required federally is met with the fact that we serve three meals a day and that if the meat was avoided or removed, [] that still met the calorie count." (*Id.* at 46:16-21). Skelton understood that Plaintiff would not accept "a tray containing meat products allocated for his benefit." (*Id.* at 57:18-23). Skelton testified that it was during Plaintiff's deposition testimony in this case that he first heard of Plaintiff's "vow not to eat from a tray containing meat products allocated for his benefit" and of

Plaintiff's refusal to "eat food from specified companies that use stem cells in [their] food's creation or content because he believed life begins at conception." (*Id.* at 60:25-61:19).

On January 29, 2012, in response to Plaintiff's "business proposal" to use colored trays to distinguish vegetarian meals from other meals (*see* Doc. 109-9 at 88-90), Skelton wrote to Lt. Col. Prince, recommending that the CCADC "maintain [its] practices of only offering diets supported by documented medical need and/or established recognized religious doctrine. Th[ese are] the established procedures of our surrounding counties[, which are] supported by case law within our District." (Doc. 109-11 at 4). Skelton testified that he made this recommendation to Lt. Col. Prince in part because creating "a procedure or policy to say that special diet number – whatever it is, that there's no meat, no Pepsi products, no Kraft products, nothing of this sort, . . . *that in itself creates an administrative chaotic nightmare to try to be able to accommodate that.*" (Skelton Dep. at 68:6-14 (emphasis added)).

> A lot of consideration[ ] would have to be given [ ]to [ ] vendor services and [ ] things of this sort. I don't know where the vendor gets [its] macaroni. I don't know if it's a Kraft product. I don't know [ ] what type product. And [ ] with 2,000 individuals in there, if we try to meet those individual needs, that would create an administrative nightmare to try . . . to do this.

(*Id.* at 68:15-23).

b. Howell

As noted above, on December 15, 2011, Howell responded to Plaintiff's December 7 grievance appeal, stating, "We will need to know specifically what religion you are referring to. We will need to research the doctrine of that religion to ensure we can [r]e[me]dy all rest[raint]s." (Doc. 109-10 at 23). On August 13, 2012, Howell responded to Plaintiff's August 7 grievance, stating, "Mr. Lake, you have not made it known as to the subgroup of Christianity that would validate specific food restrictions. You are [given a] 3000 cal[orie] diet to allow you more vegetarian choices for your diet." (Doc. 109-11 at 9).

Although Howell's official role at the CCADC was generally restricted to the handling of medical issues and concerns, he was asked to consider Plaintiff's request for a vegetarian diet because Howell's wife and son are vegans. (Howell Dep. at 17:19-25:25). "The only religious accommodation [Howell] remember[ed] is for the – Ramadan," which changed the time of day for food service, although not the content of the meals. (*Id.* at 18:1-11). Howell testified that "one of the things we had used in the past with the Rastafarians and other vegetarians and vegans was – the only option we had available was really a 3,000-calorie diabetic diet, which gave them more vegetables and fruit options." (*Id.* at 25:16-20). "And it allowed them to trade off [their] meat if they wanted to for other vegetables. But we didn't have a vegetarian, vegan diet." (*Id.* at 31:9-11).

Howell testified that he asked for more information from Plaintiff "[b]ecause [he] needed to know, [] when [Plaintiff] was talking about he didn't want to harm the animals, different products have, a lot of time, animal pectin in them. So [Howell] didn't know how specific [Plaintiff] wanted to go with this." (*Id.* at 36:13-37:18). In response to Plaintiff's December 2011 grievance appeal and his August 2012 grievance, Howell "took no further actions" because he "was waiting for a response" from Plaintiff, but apparently never got one. (*Id.* at 38:5-9). Howell denied ever saying, as Plaintiff contends, that he "opposes vegetarian diets, even at the detriment of the patient's health." (*Id.* at 49:1-15). Howell summarized his interactions with Plaintiff as follows:

> "I tried to help you. I gave you options to give you more vegetable and fruit options. I educated you on what was available in the commissary. And my education had helped [] other people in similar circumstances in the past." My stand is I was trying to help the [Plaintiff].

(*Id.* at 92:18-23).

Howell stated that he was told "at that time," i.e., when he recommended the 3,000 calorie diet for Plaintiff in December 2011, that there was "no vegetarian, vegan agreement with the . . . food services," and that he became aware of such an option only "*after* all of [his] encounters with" Plaintiff, and the provision of which, in any event, would not have been a medical problem and thus would not have involved his area of

authority. (*Id.* at 93:4-21 (emphasis added); *see id.* at 88:24-94:1; *see also* Howell Aff. (Doc. 109-10 at 3), stating that Howell, in his "capacity as the Director of Health Services at the [CCADC] infirmary, [is] not responsible for food service" (*id.* ¶ 4); "for selecting diets for inmates" (*id.* ¶ 5); "for ordering food or setting food menus [for] inmates" (*id.* ¶ 6); or for "establishing, setting, or drafting policies regarding the feeding of inmates in any manner at the" CCADC (*id.* ¶ 7)). Howell acknowledged that on January 4, 2012, a nurse practitioner requested that the CCADC food service not put meat on Plaintiff's tray, but that request, which "would be up to dietary," was not honored. (Howell Dep. at 94:21-98:12).

Plaintiff testified that during his December 20 conversation with Howell, he informed Howell that he is a Christian, or he at least believes that he did so, and he also informed Howell of his religious vow, but Howell "didn't care." (Lake Dep. at 208:1-19, 209:9-12). Plaintiff testified that Howell "forced" the 3,000 calorie diabetic diet on him, although he would have accepted that diet had the kitchen simply not put any meat on his tray – "As long as there was no meat. Well, I should specify, no animal fats besides milk or gelatin and the other restrictions regarding the brands, the core issue. What was most important here wasn't so much the brands but the vegetarian diet." (*Id.* at 208:21-24, 211:14-212:5). But Plaintiff also testified that he did not "want the jail to just simply remove the meat from [his] tray and just give that to [him]." (*Id.* at 203:7-9). Instead, he "wanted the meal without meat having

ever been allocated to [him], and even the process of removing the meat would still be allocating it." (*Id.* at 203:12-14 (emphasis added)).

B. Procedural Background

1. Howell's First Motion to Dismiss

In denying Howell's first motion to dismiss, U.S. District Judge Amy Totenberg adopted the undersigned's findings that Howell is a state actor for purposes of this lawsuit and that "Plaintiff sufficiently alleged conduct on [Howell's] part . . . in denying Plaintiff a vegetarian diet." (Doc. 49 at 4-5).[1] The undersigned initially recommended granting the motion to dismiss, but Judge Totenberg declined to adopt that recommendation, finding instead that Plaintiff should be afforded at least an opportunity to amend. Judge Totenberg further found that Plaintiff's sincerity could be inferred from his significant weight loss due to his refusal to accept much of the food offered to him at the CCADC, and she noted that "in any case, Howell d[id] not appear to argue that he is entitled to qualified immunity based on the lack of sincerity of Plaintiff's beliefs. Instead, the focus of [that] defense appears to be that Plaintiff's vow is not religiously-motivated simply because Plaintiff says it is." (*Id.* at 6). The Court noted that "Plaintiff's vegetarian religious belief, as alleged, is constitutionally protected as a religious belief under the First Amendment[,] . . . [a]lthough to ultimately

---

[1] The case has since been re-assigned to the Honorable Mark H. Cohen, U.S. District Judge.

prevail on his claim, he will still need to produce sufficient evidence that his vegetarianism is sincerely held and subjectively religious in nature." (*Id.* at 7). The Court concluded that Plaintiff's "[c]omplaint is sufficient to plausibly infer that his belief system is constitutionally protected." (*Id.*).

The Court thus denied the motion to dismiss and granted Plaintiff leave to file an amended complaint to remedy the deficiencies in his original complaint (*id.* at 13-14), noting with respect to Howell's qualified immunity defense that Plaintiff's pleadings to date were insufficient to enable the Court to determine

> precisely how Howell's alleged decision regarding Plaintiff's diet resulted in [a] cognizable constitutional claim [and thus] . . . whether Howell's conduct obviously violated existing federal law. At the time of the allegations, it was clearly established that prison officials, like Howell, had to reasonably accommodate the sincerely-held, religious dietary restrictions of inmates, and his failure to do so would only be justified if he can point to a legitimate penological interest. It is more appropriate for the Court to consider [the] penological interests of Howell's decisions, if they exist, on summary judgment. But Plaintiff should be capable of alleging sufficient facts for the Court to assess whether and when Howell became aware of Plaintiff's sincerely-held, religiously-motivated objection to eating meat. It may very well turn out that Plaintiff's actual communications to Howell were insufficient to put him on notice that

> Plaintiff's "vow" was religious, rather than personal in nature, entitling Howell to qualified immunity, or the opposite.

(*Id.* at 11-12 (citations omitted)).

2. Howell's Second Motion to Dismiss

After Plaintiff filed his first amended complaint (Doc. 50), the undersigned recommended denying Howell's second motion to dismiss, also urged on qualified immunity grounds, wherein Howell raised arguments similar to those in his first motion, namely, that Plaintiff's vow to avoid meat was personal in nature and not a sincere religious belief. (Doc. 58 at 9; *see id.* at 5-6). The undersigned concluded that Plaintiff had cured the deficiencies in his original complaint by alleging that (1) "he informed Howell shortly after December 20, 2011, as part of [his] request for vegetarian meals, that [he] was a [C]hristian, and that he had taken a religious vow not to be responsible for the deaths of any animals" (*id.* at 7 (internal quotations omitted)); and (2) after Howell offered him a diabetic diet that included meat, "he made Howell aware that he would still refuse all meals with meat because of his vow" (*id.* at 8 (internal quotations omitted)). The District Court adopted this recommendation without objection from Howell. (*See* Doc. 67).

3. Skelton's Motion for Judgment on the Pleadings

In recommending the denial of Skelton's motion for judgment on the pleadings, the undersigned noted that it was reasonable to infer from Plaintiff's original complaint "that Skelton knew about Plaintiff's religious objection to eating meat and played a role in denying him a vegetarian diet." (Doc. 58 at 10). The Court adopted this recommendation over Skelton's objections (Doc. 67 at 4), noting in the process that "while the Magistrate Judge characterized the Court's prior Order as having already concluded that the Plaintiff's religious expression of his vegetarian belief *was* constitutionally protected (Doc. 58, R&R at 7), the Court simply found on a motion to dismiss standard that the claim was plausibly pled" (Doc. 67 at 3 n.1).

II. Summary Judgment Review

Summary judgment is proper "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). "[Former] Rule 56(c) [now Rule 56(a)] mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). When considering a summary judgment motion, a court must "view the evidence and all factual inferences therefrom in the light

most favorable" to the non-movant. *Burton v. City of Belle Glade*, 178 F.3d 1175, 1187 (11th Cir. 1999). "A court need not permit a case to go to a jury, however, when the inferences that are drawn from the evidence, and upon which the non-movant relies, are implausible." *Cuesta v. Sch. Bd. of Miami-Dade Cnty.*, 285 F.3d 962, 970 (11th Cir. 2002) (internal quotations omitted). And "the mere existence *of some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal quotations omitted).

The movant bears the initial burden of demonstrating that summary judgment is warranted. *Apcoa, Inc. v. Fidelity Nat'l Bank*, 906 F.2d 610, 611 (11th Cir. 1990). The movant may do so by showing "that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. Once the movant has properly supported the summary judgment motion, the non-movant then must "come forward with specific facts showing that there is a *genuine issue for trial*," i.e., that the evidence is sufficient to support a jury verdict in the non-movant's favor. *Bailey v. Allgas, Inc.*, 284 F.3d 1237, 1243 (11th Cir. 2002) (internal quotations omitted); *see also Chanel, Inc. v. Italian Activewear of Fla., Inc.*, 931 F.2d 1472, 1477 (11th Cir. 1991)

(stating that "non-moving party must come forward with *significant, probative evidence*" (emphasis added)). "[C]onclusory assertions . . . [without] supporting evidence are insufficient to withstand summary judgment." *Holifield v. Reno*, 115 F.3d 1555, 1564 n.6 (11th Cir. 1997).

III. The Matters In Dispute on Summary Judgment

A. *The RLUIPA Claim*

1. Does Eleventh Amendment Immunity Bar Official Capacity Claims For Damages Against Skelton?[2]

Plaintiff brings a claim under RLUIPA, which provides in pertinent part as follows: "No government

[2] The parties agree that Defendants may not be held liable in their individual capacities under RLUIPA. (*See* Doc. 109 at 12-14 (citing *Smith*, 502 F.3d at 1275, to the effect that "section 3 of RLUIPA – a provision that derives from Congress' Spending Power – cannot be construed as creating a private action against individual defendants for monetary damages")); Doc. 112 at 5 (Plaintiff's acknowledgement that "while [he] may proceed with individual capacity claims under the First Amendment . . . , RLUIPA claims against Skelton and Howell individually should be dismissed.")). And although prospective relief is available under RLUIPA, Plaintiff's release from confinement at the CCADC moots any claim he may have had for such relief. *See McKinnon v. Talladega County*, 745 F.2d 1360, 1363 (11th Cir. 1984) ("The general rule is that a prisoner's transfer or release from a jail moots his individual claim for declaratory and injunctive relief."); *see also Mann v. McNeil*, 360 Fed. Appx. 31, 32 (11th Cir. 2010) (same); *Hathcock v. Cohen*, 287 Fed. Appx. 793, 798-99 (11th Cir. 2008) ("To the extent [plaintiff] seeks injunctive or declaratory relief, his RLUIPA claims are moot because he was transferred. . . .").

shall impose a substantial burden on the religious exercise of [a prisoner] . . . unless the government demonstrates that imposition of the burden . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest." 42 U.S.C.A. § 2000cc-1(a)). "This section applies in any case in which [ ] the substantial burden is imposed in a program or activity that receives Federal financial assistance. . . ." *Id.* § 2000cc-1(b)(1). It is undisputed that Clayton County received federal financial assistance for the operations of the CCADC during the time period that is relevant here. (*See* Defs. SMF ¶ 4).

Compared to the First Amendment, discussed below, RLUIPA gives inmates "a heightened protection from government-imposed burdens, by requiring that the government demonstrate that the substantial burden on the prisoner's religious exercise is justified by a compelling, rather than merely a legitimate, governmental interest." *Smith v. Allen*, 502 F.3d 1255, 1266 (11th Cir. 2007) (internal quotations omitted), *abrogated on other grounds by Sossamon v. Texas*, 131 S. Ct. 1651, 1657 n.3 (2011). Under RLUIPA, "a substantial burden is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. [It] . . . 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) (internal quotations omitted).

It is well established, however, that states enjoy Eleventh Amendment immunity under RLUIPA, and therefore only political subdivisions of states such as counties or municipalities can be liable for monetary damages. As the Fifth Circuit explained:

> [M]oney damages are available under RLUIPA against political subdivisions of states, such as municipalities and counties. *See, e.g.*, *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163, 1168-69 (9th Cir. 2011) (holding that municipalities and counties may be liable for money damages under RLUIPA); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 260-61 (3d Cir. 2007) (same); *see also Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280-81 (1977) (recognizing that political subdivisions of states do not enjoy Eleventh Amendment immunity). Under Supreme Court precedent, money damages are available against municipal entities unless "Congress has given clear direction that it intends to exclude a damages remedy" from a cognizable cause of action. *Sossamon*, 131 S. Ct. at 1660 (citing *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 70-71 (1992)). RLUIPA contains no indication, much less clear direction, that it intends to exclude a money damages remedy. Thus, municipalities and counties may be held liable for money damages under RLUIPA, but states may not.

Opulent Life Church v. City of Holly Springs Miss., 697 F.3d 279, 290 (5th Cir. 2012).

As discussed further below, Defendants do not argue in their principal brief for summary judgment that Plaintiff fails to show material issues of fact requiring a trial as to his RLUIPA claim. Rather, Defendants' principal argument with regard to the RLUIPA claim is that it fails on Eleventh Amendment immunity grounds, because Skelton was allegedly acting as a state official, and not a county official, in administering the jail. In sum, Defendants argue:

> In effect, by attempting to sue Skelton in an official capacity, [Plaintiff] seeks to hold Cobb County or the State of Georgia liable for decisions and actions of the Cobb County Sheriff. But, under applicable law, the county is not liable for the sheriff's decisions and actions at issue because the sheriff was acting as a state official in responding to [Plaintiff's] alleged request for a religious accommodation. And, to the extent that [Plaintiff] seeks liability against the state, it is protected by Eleventh Amendment immunity.

(*Id.* at 9); *see Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985) (stating that an official-capacity suit generally is "only another way of pleading an action against an entity of which [the] officer is an agent," and that "an official-capacity suit is, in all respects other than name, to be treated as a suit against the [governmental] entity"). Cobb County may be held liable for an alleged violation of Plaintiff's RLUIPA or First Amendment rights, but only if it "had a custom or policy" that "caused [a] violation" of those rights. *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004); *see also*

Graham, 473 U.S. at 166 (stating that "in an official-capacity suit the entity's 'policy or custom' must have played a part in the violation of federal law"); *Grech v. Clayton County*, 335 F.3d 1326, 1329 (11th Cir. 2003) (*en banc*) (noting that a § 1983 plaintiff may establish an unconstitutional policy by identifying "either (1) an officially promulgated . . . policy or (2) an unofficial custom or practice . . . shown through the repeated acts of a final policymaker").

Defendants argue that there is no Cobb County custom or policy at issue here because "[i]n accommodating or responding to a prisoner's purported exercise of religious rights, a Georgia sheriff is acting as a state official." (Doc. 109 at 11 (citing *Scott v. Brown*, 2012 U.S. Dist. LEXIS 44669, 2013 U.S. Dist. Lexis 141170 (N.D. Ga. 2012)); *see also Hall v. Fries*, No. 7:13-CV-105 (HL), 2014 U.S. Dist. LEXIS 48679, at *16-17 (M.D. Ga. Apr. 9, 2014) ("Although the Eleventh Circuit has not confirmed that deputy sheriffs in Georgia are immune from suit under Eleventh Amendment principles, a line of district court cases has determined that when a sheriff is acting as an arm of the state, his deputies are also entitled to Eleventh Amendment Immunity." (internal quotations omitted)).

Plaintiff responds that Skelton was a county employee when fulfilling his function of resolving disputes about the type of diet a CCADC inmate may receive. (Doc. 112 at 3-5). Plaintiff argues that "this Circuit has [] held that not all functions of a sheriff are state functions and that some are considered county functions exposing the county to liability." (*Id.* at 3

(citing *Abusaid v. Hillsborough Cty. Bd. of Comm'rs*, 405 F.3d 1298, 1303-04 (11th Cir. 2005), to the effect that a "court must 'tailor[ ] its analysis to the particular function involved,' "; and asserting that "[t]he provision of food services to inmates in the [CCADC] is just such a county function under Georgia law"). Plaintiff notes that in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (*en banc*), cited by Defendants, the Eleventh Circuit "specifically carve[d] out provision of food services as a county function under Georgia law." (Doc. 112 at 4; citing *Manders*, 338 F.3d at 1322-23); *see also Robinson v. Integrative Det. Health Servs.*, No. 3:12-CV-20 (CAR), 2014 U.S. Dist. LEXIS 41688, at *43 (M.D. Ga. Mar. 28, 2014) (noting that "every district court that has addressed th[e] issue has held that a Georgia sheriff acts as an arm of the county when providing medical care"); *Trammell v. Paxton*, No. 2:06-CV-193-WCO, 2008 U.S. Dist. LEXIS 108528, at *49 (N.D. Ga. Sept. 29, 2008) (explaining that the decisions in *Dukes v. Georgia*, 428 F. Supp. 2d 1298, 1318 (N.D. Ga. 2006), and *Manders*, 338 F.3d at 1319, 1322, " 'suggest that in providing medical care for jail inmates, a sheriff acts as an arm of the county' " (quoting *Hooks v. Brogdon*, No. 07-42, 2007 U.S. Dist. LEXIS 72585, at *4 (M.D. Ga. Sept. 29, 2007)), and finding that "to the extent plaintiff asserts claims against [the] Sheriff [ ] for failure to provide medical care to inmates, [the Sheriff] is not entitled to the protections provided to state actors under the Eleventh Amendment"), *aff'd*, 322 Fed. Appx. 907 (11th Cir. 2009).

Defendants reply that Plaintiff has misclassified the function at issue here, which is not food service, for which the county is responsible, but rather "responding to a request for a religious accommodation," which is a state function. (Doc. 117 at 8). Defendants argue that "the issue that brings [the parties] to this Court is not failing to provide food (adequate calories were always made available to [Plaintiff]), but rather accommodating his allegedly religious practice, which in this case happened to be a request for a vegetarian diet that excluded certain brands and for which no animal products had been allocated." (*Id.*). Defendants argue that Plaintiff "fallaciously minimizes and distorts *Scott*," 2012 U.S. Dist. LEXIS 44669, 2013 U.S. Dist. Lexis 141170, which stands in part for the proposition that "Plaintiff's RLUIPA based damage claims fail because the only possible Defendant, [the] Sheriff [], is not liable for damages in his official capacity (acting for the state) or in his individual capacity." (Doc. 117 at 9-10 (internal quotations omitted)). "The response by Skelton in his official capacity to [Plaintiff's] request, on purported religious grounds, for a vegetarian diet . . . was the exercise of a state function, not a county function. Thus, [Plaintiff's] RLUIPA claim is barred by Eleventh Amendment immunity." (*Id.* at 11).

The undersigned concludes on the basis of this record that Skelton in all relevant respects acted as an arm of Cobb County, not the State of Georgia. Therefore, the Eleventh Amendment does not bar this suit. While, generally speaking, a Sheriff acts as a state official in administering a jail, the Court is required to

make a more detailed function-by-function assessment to determine whether a particular function is a county or state responsibility. *Abusaid*, 405 F.3d at 1303-04. In this regard, it is critical that state law places the responsibility "to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention," squarely in the county's hands, not the state's. *See* O.C.G.A. § 42-5-2(a); *Manders*, 338 F.3d at 1323. As a result, it is well-established that a Georgia county is potentially liable for damages caused by the failure of an inmate at its jail to receive constitutionally adequate medical care. It follows that a county may also be liable for denying adequate nutrition to an inmate, including when that failure arose from a custom or policy that violated Plaintiff's RLUIPA or First Amendment rights.

Defendants' attempt to define the relevant "function" as "responding to a request for religious accommodation," as opposed to furnishing Plaintiff with food, is unconvincing. Plaintiff's request for a religious accommodation related directly to the county's practices and policies with regard to providing food. In other words, while the reason for his request may have been a religious belief, the county function implicated by Plaintiff's request was the furnishing of food. If the issue was whether Defendants supplied enough food, safely-prepared food, or adequately nutritious food, it would be obvious that these questions would implicate county responsibilities under O.C.G.A. § 42-5-2(a). That the reason a particular inmate may not be receiving enough food or adequate nutritional content is a

religious objection does not change the basic function at issue, which is the county's general obligation to feed the prisoner.

The Court is also not persuaded by Defendants' citation to the unpublished result in *Scott v. Brown*. In that *pro se* case, the plaintiff alleged numerous RLUIPA violations based on a wide variety of jail practices, including the lack of any Muslim chaplain, restrictions on Muslim head attire, and lack of a place for daily prayers required in the Muslim faith. *See* 2012 U.S. Dist. LEXIS 44669, at *4-5. As one issue in the laundry-list of violations, Plaintiff also included "not providing a special end-of-Ramadan meal although special meals are provided for other religious holidays." *Id.* at 5.

In a Report and Recommendation, a Magistrate Judge concluded that "the County [] cannot be held liable based on [the] Sheriff['s] policy making because [the] Sheriff [] does not act for the County in administering the [] Jail. Rather, he acts for the State." *Id.* at *9-10; *see id.* at * 11 ("Plaintiff's RLUIPA based damage claims fail because the only possible Defendant, [the] Sheriff [], is not liable for damages in his official capacity (acting for the state). . . ."). The *pro se* plaintiff never objected and the recommendation was thus adopted without comment. There is no indication that the *pro se* inmate-plaintiff in that case made the argument asserted here, or that either the Magistrate or District Judge was alerted to the legal distinction between the county's obligation to supply food and medical care and the state's obligation to otherwise

adminster the jail. Moreover, it is unclear whether the *Scott* court squarely addressed the issue here, namely, whether a sheriff or deputy sheriff acts for the state or the county in failing to provide adequate nutrition to the jail's inmates. The Ramadan claim, as discussed above, involves only the timing of the meals offered, not the adequacy of the nutrition contained in those meals. This distinction may be significant, because one could argue that the timing of meal service has more to do with general jail administration than the decisions as to what food to serve. In any event, for all of these reasons, the Court finds little guidance in *Scott*.

The Court therefore finds, based on the summary judgment record, that Defendant Skelton was wearing his county "hat" with regard to the conduct implicated by Plaintiff's complaint. There is no Eleventh Amendment immunity, which disposes of the principal if not sole argument asserted vis-a-vis the RLUIPA claim.

2. Whether Plaintiff's RLUIPA Rights Were Violated

As explained above, in their initial summary judgment brief, Defendants do not address the substance of Plaintiff's RLUIPA claim, relying instead entirely on Eleventh Amendment immunity. (*See generally* Doc. 109). In their reply brief, however, Defendants add the conclusory assertion that "even if [Plaintiff] had a claim under RLUIPA it would fail because, without [a] genuine issue of material fact, his request for a vegetarian diet that excluded certain brands and contained

the allocation of no animal products in its distribution chain was neither (1) religious nor (2) sincere. RLUIPA protects practices only if they are both." (Doc. 117 at 11). They argue that Plaintiff's RLUIPA claim fails because the Supreme Court has held that although "RLUIPA protects 'any exercise of religion[, whether or not compelled by, or central to, a system of religious belief] . . . , a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation.'" (*Id.* (quoting *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015))). Even in their reply brief, however, Defendants do not argue for summary judgment purposes that the refusal of Plaintiff's dietary requests reflected the least restrictive means to further a compelling government interest.

Plaintiff argues that he "plainly satisfied the standard for accommodating religious rights under RLUIPA, which is less deferential to prison officials than the First Amendment standard." (Doc. 112 at 6); *see Holt*, 135 S. Ct. at 864 ("Prison officials are experts in running prisons and evaluating the likely effects of altering prison rules, and courts should respect that expertise. But that respect does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA' s rigorous standard."). Plaintiff contends that "the undisputed evidence is that (1) there was no additional cost to providing a religiously-based vegetarian diet; (2) just such a vegetarian diet was contractually anticipated by the jail; (3) a vegetarian diet was provided for medical reasons; and (4) one was

ultimately actually provided to [him]" as well. (Doc. 112 at 6 (citations omitted)).

Defendants failure to assert any challenge to the merits of the RLUIPA claim in their initial brief waives the issue for purposes of summary judgment. *See United States v. Levy*, 379 F.3d 1241, 1244 (11th Cir. 2004) (noting that the Eleventh Circuit "repeatedly has refused to consider issues raised for the first time in an appellant's reply brief"); *Strategic Decisions, LLC v. Martin Luther King, Jr. Center for Nonviolent Change, Inc.*, 1:13-cv-2510-WSD, 2014 U.S. Dist. LEXIS 183792, at *26 (N.D. Ga. Dec. 5, 2014) ("It is well settled that issues raised for the first time in a reply brief are deemed waived." (internal quotations omitted)). Nevertheless, for the reasons discussed below with regard to Plaintiff's First Amendment claim under § 1983, the Court finds that genuine issues of material fact exist as to whether Plaintiff harbored a sincere, religious belief requiring a restrictive diet. This also would dispose of the conclusory attack Defendant Skelton belatedly asserts to the merits of the RLUIPA claim. Thus, Defendants' motion for summary judgment as it relates to the RLUIPA claim should be **DENIED** as to Defendant Skelton in his official capacity, and **GRANTED** in all other respects.

B. *The First Amendment Claim Under 42 U.S.C. § 1983*

1. Whether Plaintiff's First Amendment Rights Were Violated

Plaintiff seeks monetary damages against both Defendants in their individual capacities under the Free Exercise Clause of the First Amendment to the United States Constitution, applicable to the states via the Fourteenth Amendment.[3]

> Although prison inmates retain protections afforded by the First Amendment's Free Exercise Clause, prison officials may impose limitations on an inmate's exercise of sincerely held religious beliefs if the limitations are "reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987). Thus, a "prison regulation, even though it infringes the inmate's constitutional rights, is an actionable constitutional violation only if the regulation is unreasonable." *Hakim v. Hicks*, 223 F.3d 1244, 1247 (11th Cir. 2000). In evaluating a prison

---

[3] This Court has already concluded that Howell is a state actor for purposes of Plaintiff's First Amendment claim. (*See* Docs. 42, 49, 58, 67). But "Howell does not concede that he is a state actor under 42 U.S.C. § 1983, although the Court previously rejected this argument." (Doc. 109 at 14). Howell notes that he is employed by WellStar Health System, Inc., a private company; his "duties include overseeing WellStar's clinical clerical support staff and providers that work at CCADC and ensuring they have necessary equipment and staffing"; he "is not a physician or practitioner of the healing arts"; and his "salary is paid by WellStar, not Cobb County." (*Id.*). The Court sees no reason to revisit this issue.

> regulation's reasonableness, [courts] consider four factors, first enunciated in *Turner v. Safley*, 482 U.S. 78 (1987), including: "(1) whether there is a valid, rational connection between the regulation and a legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the asserted constitutional right that remain open to the inmates; (3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and the allocation of prison resources generally; and (4) whether the regulation represents an exaggerated response to prison concerns." *Hicks*, 223 F.3d at 1247-48 (quotation marks omitted).

Johnson v. Brown, 581 Fed. Appx. 777, 780 (11th Cir. 2014); *see Holt*, 135 S. Ct. at 859 (noting that in *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 878-82 (1990), the Supreme Court "held that neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment"); *see also Joe v. Nelson*, No. 5:14-CV-0184-MTT-CHW, 2014 U.S. Dist. LEXIS 87560, at *8-9 (M.D. Ga. June 27, 2014) ("It is, of course, well-settled that the First Amendment . . . prohibits prison officials from imposing a substantial burden on the free exercise of an inmate's sincerely held religious belief unless their actions or restrictions are reasonably related to legitimate penological interests." (internal quotations omitted)).

> To establish a violation of his right to free exercise, [a plaintiff] must first establish that a state actor imposed a "substantial burden" on his practice of religion. *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1549 (11th Cir. 1993). The state actor can then defend its conduct on the ground that it applied a "neutral law of general applicability[.]" *Smith*, 494 U.S. at 879. In the prison context, the state actor can also defend the action if it is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.
>
> To prove that his religious exercise was substantially burdened, [a plaintiff] must present evidence that *he was coerced to perform conduct that his religion forbids or prevented from performing conduct that his religion requires.*

Wilkinson v. Geo Group, No. 14-10215, 2015 U.S. App. LEXIS 5533, at *5 (11th Cir. Apr. 7, 2015) (emphasis added).

a. Whether Plaintiff's Request for a Special Diet Derived From a Sincerely Held Religious Belief

Defendants ask this Court to find as a matter of law that Plaintiff lacked a sincere religious belief. The Eleventh Circuit has recently explained, however, just how limited a role the courts can play in determining such facts:

[T]he 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." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (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." *Smith*, 494 U.S. at 887; *see also Thomas*, 450 U.S. at 716 (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. Commissioner*, 490 U.S. 680, 699 (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.*

Davila v. Gladden, 777 F.3d 1198, 1204 (11th Cir. 2015) (citations altered).

Defendants argue that "[b]eliefs and practices based merely on personal preference or that have secular bases do not qualify for protection under the First Amendment right to the free exercise of one's religion," as opposed to "beliefs rooted in religion." (Doc. 109 at 16). In accordance with this Court's earlier assessment of the controlling caselaw (*see* Doc. 49 at 6), Defendants note:

> The question is not whether the plaintiff's beliefs are religious in the objective, reasonable person's view, but whether they are religious in the subjective, personal view of the plaintiff. . . . Simply put, judges and juries must not inquire into the validity of a religious doctrine, and the task of courts is to examine whether a plaintiff's beliefs are, in his own scheme of things, religious. . . . [R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection.

(Doc. 109 at 17 (internal quotations omitted) (citing *Watts*, 495 F.3d at 1298-99; *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 531 (1993)). And "courts do not require strict adherence to doctrinal

tenets in order to classify a religious belief as sincere." (*Id.*). But courts have concluded, Defendants note, that some "religious" claims are "so bizarre, so clearly non-religious in motivation as not to be entitled to protection under the Free Exercise Clause"; "so idiosyncratic as to be insincere"; or so "single-faceted" – such as vegetarianism – as not to be religious. (*Id.* at 18 (citing *Thomas*, 450 U.S. at 715-16; *Martinelli v. Dugger*, 817 F.2d 1499, 1500 (11th Cir. Fla. 1987); *Africa v. Pennsylvania*, 662 F.2d 1025, 1035 (3d Cir. 1981))).

Defendants argue that Plaintiff's request for a vegetarian diet was not based on a sincerely held religious belief. (*Id.* at 20). They contend that the basis for his vegetarian diet, his "vow not to be responsible for the deaths of any of God's creations" in order to "appease God for the return of his friend Leslie," was not religious in nature but rather an attempt "to impress Leslie," which "was one of several plays [Plaintiff] made for her favor." (*Id.* at 20-21).

> In his deposition, [Plaintiff] acknowledged that he sought to raise and convey to Leslie $500 million as an inducement for her to be his friend. ([Pl.] Dep. at 134:16-135:9, 135:19-22; Dep. Ex. 4). In addition, [Plaintiff] has offered to become Leslie's legal slave. ([Pl.] Dep. at 161:17-162:2). And [Plaintiff] has offered to sacrifice his life by becoming an organ donor to Leslie. ([*Id.*] at 162:3-10). [Plaintiff] has also pursued Leslie's friendship by imploring her to meet him at Mellow Mushroom in Vinings, GA. ([*Id.*] at 136:8-137:6, 137:24-138:5; Dep. Ex. 5).

> That [Plaintiff's] request for a vegetarian diet was not based on religion but rather [his] desire [] to impress Leslie is plain from his announcement that he would stop the diet and eat meat if Leslie would become his friend. [He] testified that if Leslie would "accept" him he would participate in the "Carnivore Challenge," offered by local pizza restaurant Big Pie in the Sky. According to the Carnivore Challenge, if two people eat an 11 lb. pizza that is half meat in one hour without throwing up, they win $250. ([Pl.] Dep. at 139:19-143:13; Dep. Exs. 6, 7). This shows that [Plaintiff's] desire for a vegetarian diet was not based on religious commitment. Rather the purpose was to impress and win the favor of Leslie.

(*Id.* at 21-22).

Defendants note that although Plaintiff claims to be a Christian, "he worships Leslie, whom he considers a 'goddess' and 'infinite being,' superior to the Christian God" and " 'infallible.' " (*Id.* at 22 (citing Pl. Dep. at 26:14-16; 27:16-21; 121:5-8; 125:7-10; 129:10-12; 130:18-25)). When Howell asked Plaintiff "what 'sub group' of Christianity he followed, he did not respond." (*Id.* at 23 (citing Pl. Dep. at 206:25-207:6, 209:9-210:1; Dep. Ex. 11)). Defendants argue that Plaintiff's "attempts to tie his vegetarianism to Christianity by saying that his vow, regardless of its content, must be kept since Christianity teaches that one who makes a vow must keep the vow" is so bizarre and idiosyncratic as not to be worthy of protection under the First

Amendment. (*Id.* at 23-24). Defendants note the Seventh Circuit's discussion of the relevant law in a case involving an inmate's request for a vegan diet on religious grounds:

> A prison is entitled to ensure that a given claim reflects a sincere religious belief, rather than a preference for the way a given diet tastes, a belief that the preferred diet is less painful for animals, or a prisoner's desire to make a pest of himself and cause trouble for his captors. And although sincerity rather than orthodoxy is the touchstone, a prison still is entitled to give some consideration to an organization's tenets. For the more a given person's professed beliefs differ from the orthodox beliefs of his faith, the less likely they are to be sincerely held.

(*Id.* at 24-25 (quoting *Vinning-El v. Evans*, 657 F.3d 591, 594 (7th Cir. 2011))). Defendants argue that "[u]nder applicable law, [Plaintiff's] obsession does not qualify as a religious exercise. Therefore, [their] conclusion that [his] request was [a] 'personal choice' rather than religious was eminently reasonable." (*Id.* at 25).

Defendants argue further that Plaintiff's "half-hearted attempts [] to package his request for a vegetarian diet in religious language are transparently insincere." (*Id.* at 26 (stating that Plaintiff's "concession [] that he would end his vegetarian diet and eat meat in the Carnivore Challenge, if Leslie would accept his friendship, shows that the diet was not and is not

sincerely based on religious belief")). Defendants contend that the sincerity of Plaintiff's vegetarian vow is undermined by (1) his "insistence that he be given a diet free of certain branded products," made by Pepsi or Kraft, because these companies allegedly tested "flavor enhancers [] with embryonic stem cells," and (2) "his irrational assertion that refusing to eat anything (even non-meat products) on the food trays served to him prevented the 'allocation' of meat and killing of animals for his benefit." (*Id.* at 26-27 (noting that Plaintiff "testified that it would not have been satisfactory to him if CCSO [Cobb County Sheriff's Office] personnel had removed all meat products from his food trays, because meat would still have been 'allocated' to him" (citing Pl. Dep. at 204:18-23))). Plaintiff asserts that his refusal to accept food trays with meat on them "would reduce the demand for animal products going forward and, as a result, save animals," but Lt. Col. Prince "explains in her declaration [that] during the time of [Plaintiff's] incarceration, the refusal of a prisoner at CCADC to eat meat on food trays served to him would not have changed or reduced the food orders of the CCSO to the food vendor." (*Id.* at 28; *see* Prince Decl. ¶ 10)).

Plaintiff responds that this Court has already concluded that his vegetarian vow is protected by the First Amendment. (Doc. 112 at 7-8; *see* Doc. 49 at 6-7 ("The Court does not doubt the sincerity of Plaintiff's vegetarian belief and commitment, particularly in light of his three day hunger strike and alleged significant loss of weight in connection with his dietary

restrictions. . . . Plaintiff's vegetarian religious belief, as alleged, is constitutionally protected as a religious belief under the First Amendment.")). Plaintiff asserts:

> The sincerity of [his] religious beliefs and . . . vow, and the lack of any evidence that he deviated from those beliefs, are borne out by his own testimony and the documents supporting his repeated grievances on the matter. Defendants' vigorous argument claiming lack of sincerity cannot be reconciled with the previous orders of this Court, the at-best disputed factual record on sincerity and the very longstanding case-law that defers to even eccentric assertions of religious belief.

(Doc. 112 at 8 (citations omitted)).

Defendants – citing the Court's previous orders, discussed in greater detail above – reply that "the Court has not ruled on the question of whether there is a genuine issue of material fact, sufficient to withstand summary judgment, as to (1) the religious nature and (2) sincerity of [Plaintiff's] request for a vegetarian diet that excluded certain brands and did not contain the allocation of any animal products at any point in the pre-consumption distribution chain." (Doc. 117 at 5). Defendants argue:

> [Plaintiff's] request for a vegetarian diet that excluded certain brands and for which no animal products had been allocated flowed from his irrational obsession with Leslie, rather than from any religious commitment. The non-religious nature and insincerity of

> [Plaintiff's] request is shown by many factors including his willingness to abandon the diet and eat meat if Leslie would be his friend and his demand that his food trays exclude not just meat but also products made by certain major food companies and that no animal products ever have been allocated for his consumption. As to allocation, his] demand [ ] was not just that no meat be served to him but that in fact no animal products ever have been allocated for his meal – an impossible demand.

(*Id.* at 6-7).

There appear to be genuine issues of material fact as to whether Plaintiff had sincerely held religious beliefs and practices that warranted First Amendment protection at the CCADC. While aspects of Plaintiff's explanation of his vow may be subject to doubt, the Court is not in a position to say as a matter of law whether his vows are "religious" or "sincere" or not. As to sincerity, the lengths to which Plaintiff went to comply with his vow – at great medical risk to himself – are alone sufficient to survive summary judgment.

As to religiosity, it is true that Plaintiff does not show that vegetarianism is a particular tenet of Christianity generally, or any sub-group, sect or version of Christianity that he followed specifically. Rather, Plaintiff's argument is, essentially, that he made a vow to God not to eat meat, and that having made that vow, as a Christian, he is bound to follow it, even if the vow itself does not particularly emanate from Christianity.

Plaintiff also explained that his aversion to products from certain manufacturers supposedly involved in stem cell research relates also to this vow, and in one instance he stated that it also relates to his Christian view that life begins at conception. The connection to religion here was not always direct and clear, but the Court cannot find as a matter of law that there lacked a sufficient connection to a religious belief. The Court therefore cannot find that Defendants are entitled to summary judgment on the ground that Plaintiff's dietary requests were not the result of sincere religious beliefs.

b. Whether Defendants' Actions Were Rationally Related to Legitimate State Interests in the Security and Efficient Operation of the CCADC

Defendants argue that they were not obligated to honor Plaintiff's request for a special diet because "to grant requests for special diets that are not medically or religiously required would" do the following: (1) "plac[e] an impossible burden on CCSO personnel to accommodate personal diet preferences, including brand preferences, for 1,800 inmates eating three meals per day"; (2) "divert[ ] attention of prison personnel away from security"; and (3) "creat[e] the appearance of favoritism by accommodating personal preferences, [which] could cause resentment and dissension among other prisoners." (Doc. 109 at 31). They argue that their failure to provide Plaintiff the diet he requested was "rationally related to the state's

legitimate interest in prison security and the efficient operation of the CCADC. As a result, their actions did not violate Lake's First Amendment right to free exercise of religion." (*Id.* at 31-32).

Plaintiff responds that "there is, at minimum, disputed evidence as to the weight of security concerns and availability of alternatives. CCADC already distributed at least 14 separate types of special diets to 332 inmates every day." (Doc. 112 at 9-10). Plaintiff rejects Defendants' contention that there were legitimate penological interests for denying him a vegetarian diet:

> (1) The CCADC contract allowed for vegetarian meals at no additional cost;
>
> (2) There was no additional cost for vegetarian meals;
>
> (3) Other facilities, including Georgia [state prisons] and the federal system allow for religiously-based vegetarian meals;
>
> (4) Medically based vegetarian meals are allowed at CCADC;
>
> (5) [Plaintiff] was ultimately given a vegetarian meal; and
>
> (6) [Plaintiff] offered alternatives that would still honor his religious vows while addressing institutional interests.

(*Id.* at 11-12).

Defendants reply that Plaintiff's request for accommodation was not "a simple request, requiring nothing more than providing a diet similar to other diets being provided to other prisoners," but rather "compliance with [his] bizarre request would have required a substantial commitment of resources, primarily to eliminate the branded products and to assure that no animal products had ever been allocated in the distribution chain." (Doc. 117 at 12).

Although these individual Defendants may have been unaware at the time, it appears undisputed that, at least as of February 2012, a vegetarian meal option was available on the menu at no added cost. At least as of that time, the Court cannot find as a matter of law that the jail had a legitimate penological interest in denying Plaintiff that standard available option. That is not to say that the jail was obliged to accede to all of Plaintiff's somewhat bizarre and idiosyncratic demands as to eliminating all gelatin, pectin, and any Kraft or Pepsi products, and guaranteeing no "allocation" of any such products or meat to him in any way whatsoever. Such anecdotal demands from an individual prisoner that would require product chain research and potential distributor changes would clearly run afoul of the prison's legitimate interests in cost efficiency. But to the extent Plaintiff was demanding at any particular point in time, after a vegeterian option became available on the menu, that he simply receive that option, the Court cannot find that costs or other

penological interests identified by Defendants justified denying that request as a matter of law.[4]

3. Liability of the Individual Defendants

a. Whether Defendants Are Protected in Their Individual Capacities by Qualified Immunity Or Good Faith Immunity From Plaintiff's First Amendment Claims

"Qualified immunity offers complete protection for government officials sued in their individual capacities if their conduct 'does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Vinyard v. Wilson*, 311 F.3d 1340, 1346 (11th Cir. 2002) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Courts apply a two-part test in determining whether qualified immunity protects a defendant:

1. The defendant public official must first prove that he was acting within the scope

---

[4] As explained further below with regard to qualified and good faith immunity, it is highly confusing as to what specific restrictions Plaintiff at any given time was demanding and whether he ever made clear during the course of these events whether he would simply accept the same vegetarian meal that was available on the menu with no additional restrictions about products. A jury would have to sort this issue out if it were necessary to do so. Nevertheless, as explained below, the very existence of this and other confusion created by Plaintiff's requests is why the Defendants enjoy immunity in their individual capacities, and why Plaintiff's § 1983 claim must thereby be dismissed.

of his discretionary authority when the allegedly wrongful acts occurred.

2. Once the defendant public official satisfies his burden of moving forward with the evidence, the burden shifts to the plaintiff to show lack of good faith on the defendant's part. This burden is met by proof demonstrating that the defendant public official's actions violated clearly established constitutional law.

Rich v. Dollar, 841 F.2d 1558, 1563-64 (11th Cir. 1988) (internal quotations omitted). There are also two parts to the question whether the defendant public official's actions violated clearly established constitutional law, and these questions need not be addressed in a particular order. *See Pearson v. Callahan*, 555 U.S. 223, 227, 232-36 (2009). On summary judgment, "a court must decide whether the facts that a plaintiff has . . . shown . . . make out a violation of a constitutional right" and "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* at 232. "The burden rests on the plaintiff to show that qualified immunity is not appropriate." *Snider v. Jefferson State Cmty. Coll.*, 344 F.3d 1325, 1327 (11th Cir. 2003). But, as is the general rule when a court considers a motion for summary judgment, the court must consider the facts in the light most favorable to the nonmovant. *See Barnett v. Florence*, 409 Fed. Appx. 266, 270 (11th Cir. 2010) (explaining that in evaluating a qualified immunity claim on summary judgment appeal, the facts "must be [construed] . . . in the light most favorable to the plaintiff").

"If a constitutional right would have been violated under the plaintiff's version of the facts, the court must then determine whether the right was clearly established." *Hilger v. Velazquez*, 463 Fed. Appx. 847, 848 (11th Cir. 2012). A right was clearly established when it would have been clear to a reasonable official that his conduct was unlawful under the circumstances. *Bashir v. Rockdale County*, 445 F.3d 1323, 1330 (11th Cir. 2006).

> This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition. . . . The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful; but it is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 1330-31 (internal quotations omitted). In general, to determine whether a public official had "fair and clear notice" that his actions violated the Constitution, a court must examine "case law existing at the time of the violation" – "decisions of the U.S. Supreme Court, the United States Court of Appeals for the Eleventh Circuit, and the highest court of the pertinent state" – involving facts "similar to the case at hand." *Id.* at 1331 & n.9 (quotations omitted). "In rare cases, 'the words of a federal statute or federal constitutional provision may be so clear and the conduct so bad that case law is not needed to establish that the conduct

cannot be lawful.'" *Id.* at 1331 (quoting *Vinyard*, 311 F.3d at 1350). And "while some broad statements of principle in case law are not tied to particularized facts and can clearly establish law applicable in the future to different sets of detailed facts, more often, the facts are so material to the violation at issue that such generalized principles are insufficient." *Id.* (quotation omitted); *see Evans v. Stephens*, 407 F.3d 1272, 1282 (11th Cir. 2005) (*en banc*) ("In rare circumstances, a right may be so clear from the text of the Constitution or federal statute that no prior decision is necessary to give clear notice of it to an official." (internal quotations omitted)).

The defense of qualified immunity is clearly available to Defendant Skelton, who was a public employee during all of the events in question. As for Defendant Howell, the question is more complicated, as he was a private person, albeit one arguably acting under color of state law. *See* Note 3, *supra.* Howell argues that to the extent he can be held liable as a state actor under § 1983 he is also entitled to either a qualified immunity or a good faith immunity defense. (Doc. 109 at 36-40).

Generally, the Supreme Court has made clear that qualified immunity does not extend to privately-employed persons even if they are sued under § 1983. *See Richardson v. McKnight*, 521 U.S. 399, 412 (1997); *Hinson v. Edmond*, 192 F.3d 1342, 1345 (11th Cir. 1999) ("'[f]or the same reasons that the *Richardson* Court declined to extend the doctrine of qualified immunity to privately employed prison guards, we

decline to extend qualified immunity to this privately employed prison physician.")

Nevertheless, even after *Richardson*, some courts have extended qualified immunity to privately-employed professionals found to be performing necessary functions for or under the close direction of a public agency. *See, e.g.*, *Burke v. Town of Walpole*, 405 F.3d 66, 88 (1st Cir. 2005) (forensic odontologist retained by district attorney's office to evaluate bite-mark evidence as a part of a criminal investigation was entitled to qualified immunity). Many more courts have followed the Supreme Court's suggestion in *Richardson* that in certain circumstances private persons properly sued under § 1983, even not entitled to qualified immunity, may be entitled to a good faith defense. *See Richardson*, 521 U.S. at 413-14 (declining to express a view on the subject of whether "the appropriate balance to be struck here is to permit the correctional officers to assert a good faith defense, rather than qualified immunity" (quotations omitted)). The Eleventh Circuit has so far declined to consider whether a "good faith" defense is available for private persons sued under § 1983, but numerous other Circuits and at least one district court in this Circuit have specifically found this defense to apply. *See Clement v. City of Glendale*, 518 F.3d 1090, 1097 (9th Cir. 2008) (noting that "courts have previously held open the possibility that private defendants may assert a 'good faith' defense to a section 1983 claim" and concluding that "[t]he facts of this case justify allowing Monterey Tow Service to assert such a good faith defense. The company did its best to follow

the law and had no reason to suspect that there would be a constitutional challenge to its actions."); *Vector Research v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 699 (6th Cir. 1996) (agreeing with the Third and Fifth Circuits that "private persons who act under color of law may assert a good faith defense"); *Wyatt v. Cole*, 994 F.2d 1113, 1120 (5th Cir. 1993) (concluding that "private defendants, at least those invoking ex parte prejudgment statutes, should not be held liable under § 1983 absent a showing of malice and evidence that they either knew or should have known of the statute's constitutional infirmity"); *Britt v. Whitehall Income Fund '86*, 891 F.Supp. 1578, 1583-84 (M.D.Ga. 1993) (finding that private Defendant was entitled to summary judgment based on lack of evidence refuting Defendant's good faith belief in the legality of its actions). The undersigned is persuaded by these cases that private individuals sued under § 1983 in certain circumstances should be able to assert a good faith immunity defense. Whether any immunity or other defense entitles either Defendant to summary judgment on the specific facts here is discussed below.

b. Discussion

Defendants argue that they are entitled to qualified and/or good faith immunity from Plaintiff's First Amendment claim because they "could have reasonably believed that [Plaintiff's] bizarre, idiosyncratic request for a vegetarian diet was not religious and/or not sincere. A reasonable official could also have reasonably believed that there was a rational relationship

between denying [Plaintiff's] request and prison security and/or the efficiency of prison administration." (Doc. 109 at 35-36 (citing cases allegedly showing that "a reasonable prison official could have reached the same conclusion as Skelton" and noting that "it is [Plaintiff's] burden to prove the contrary")).

Plaintiff responds that "it was clearly established by this Court, at least by July 2010, that there was fair warning that accommodating a religiously based request for a vegetarian diet was required when accommodation could be done at no cost to the facility and where such diets were already available." (Doc. 112 at 15 (citing *Muhammad v. Sapp*, 388 Fed. Appx. 892 (11th Cir. 2010))).

Defendants reply that "[t]he bizarre nature of [Plaintiff's] request for a vegetarian diet excluding certain branded products and assuring that no animal products had been allocated in the distribution chain and the burden this imposed on [them] to respond strengthens their immunity defenses." (Doc. 117 at 12-13). They argue that they

> were presented with a bizarre demand for more than a garden-variety vegetarian diet. They were asked to exclude a large number of major food brands and assure that no animal products had been allocated in the pre-consumption distribution chain. Moreover, [this] case is more compelling for qualified immunity because [Plaintiff's] diet request was not rooted in a recognizable religion. The diet request in the present case was less clearly

> (1) religious and (2) sincere than was the request in *Muhammad*. The holding of the Eleventh Circuit is applicable here: "[W]e cannot say that it would be [] obvious to all reasonable correctional officials that denying [Plaintiff's] dietary request violated federal law."

(Doc. 117 at 13-14 (quoting *Muhammad*, 388 Fed. Appx. at 898-99)).

The Court finds that Defendant Skelton is entitled to qualified immunity and any claims against him should be dismissed on that ground. The issue is not whether a reasonable officer was generally aware that denying inmates religiously-required dietary restrictions would burden their First Amendment rights. That principle was obviously well known as of the time of this conduct. Rather, the issue is whether an officer in Skelton's specific position would have been clearly aware that Plaintiff's particular dietary demands were the basis of sincere religious belief that could be accommodated without impinging a legitimate governmental interest. *See Watkins v. Haynes*, No. CV 212-050, 2013 U.S. Dist. LEXIS 43881, at *36-38 (S.D. Ga. Mar. 27, 2013) (citations and internal quotations omitted); *see id.* at 29 ("[T]he precise question relevant to this Court's inquiry is: Did the law, in May 2010, clearly establish a Rastafarian inmate's right to a particular dietary preparation (i.e., vegetarian meals prepared with utensils and dishes that had never come into contact with animal flesh)? It did not.")

Qualified immunity applies here as it did in *Watkins*. It is true that Defendants did not offer Plaintiff a

strictly vegetarian diet for an entire year, from November 2011 until November 2012, even after he had lost a significant amount of body mass, although Plaintiff did receive a vegetarian diet while he was in the hospital for approximately 2 and 1/2 months for assessment of his competency to stand trial, where he gained "approximately 15 pounds in about 45 days." (*See* Doc. 101 ¶ 43). But the Court is not aware of any clearly established law during the November 2011 to November 2012 time frame, and Plaintiff has not pointed to any, putting Defendants on notice that the First Amendment required them to honor Plaintiff's idiosyncratic dietary requests and bizarre and, at best, confusing explanations of the religious principles behind them.

First, as explained above, the law plainly permits jail officials to "ensure that a given claim reflects a sincere religious belief, rather than a preference for the way a given diet tastes, a belief that the preferred diet is less painful for animals, or a prisoner's desire to make a pest of himself and cause trouble for his captors." *Vinning-El*, 657 F.3d at 594 (noting that officials are "entitled to give *some* consideration to an organization's tenets").

A reasonable officer addressing Plaintiff's requests as they were made in real time would have been entitled to harbor significant skepticism about whether Plaintiff's vegetarian pledge was truly "religious." After all, the evolving explanations Plaintiff gave to the Defendants at the time were confusing and Plaintiff does not show that they would have been objectively recognized as reflective of any known

religious beliefs. On December 1, 2011, Plaintiff filed a grievance, stating that "14 years ago I made a religious pact not to be responsible for the death of any of God's (animal) creations for appeasement after losing my friend after we parted for college." (Doc. 109-10 at 21). On December 4, Plaintiff described himself as a "religious vegetarian" and requested a "vegetarian diet." (Doc. 109-12 at 15). On December 7, Plaintiff appealed the denial of his grievance, stating that he is "a religious vegetarian." (Doc. 109-10 at 23). On December 10, he stated that he was "requesting a vegetarian diet because of [his] *personal* religious vow not to be responsible for the death of any animal." (Doc. 109-11 at 3 (emphasis added)). On December 18, Plaintiff filed a second grievance appeal, stating in part that he is "a Christian who has taken a religious vow not to be responsible for the death of any animals. As a Christian, it is doctrine that life begins at conception, [and] since Pepsi [] and Kraft [] contract[] Senomyx to develop flavor enhancers using human embryonic stem cells[,] I do not and cannot eat their foods." (Doc. 109-10 at 24).

Plaintiff does not show that vegetarianism is a tenet of Christianity or of any subset or sect or known variety of Christian faith, or that Defendants would have objectively recognized it as such. Rather, as noted above, Plaintiff's theory is more indirect, that is, that by making a vow to God he was required to comply with it. While the Court finds that this theory should not be excluded from First Amendment protection as a matter of law, Plaintiff cites no particular precedent on the question and the Court is unaware of any. Thus,

reasonable jail officials may have questioned their need to comply with this demand, at least without inquiring further as to the basis for the beliefs, which the record shows the Defendants did.

Second, Defendants did not deny all relief. Rather, when Plaintiff began making his demands, Defendants arranged for him to receive the only option that Defendants understood to be available for vegetarians, which was a high calorie diabetic diet. While this option did not exclude meat, it included increased amounts of fruits and vegetables and other foods, such that meat could be set aside, or traded with other inmate for acceptable food. Plaintiff's reason for rejecting this was also confusing – that the mere "allocation" of meat to him, even if he did not eat it, would violate his vow. But, more importantly, Defendants state that they were unaware of other vegetarian options at the time, and Plaintiff does not show otherwise. Although a vegetarian meal option apparently became available at the CCADC as early as February 2012 after a change in vendors, Plaintiff do not show that Defendant was aware of that option until October 2012, and they deny being so aware. Thus, the evidence shows that Defendants provided Plaintiff the best option that they understood to be available at the institution at the time.

Third, Plaintiff's requests were not simple. He repeatedly stated that his "vow" prohibited not just eating meat, but also eating any product containing gelatin or similar substances, or any product at all affiliated with Kraft or Pepsi because of those companies'

supposed use of embryonic stem cells in research. Indeed, his "vow" prohibited not just eating any of this food, but also not having the products ever on his tray at all, or otherwise ever "allocated" to him in any way. Such a strange and intricate set of customized demands from an individual inmate was obviously problematic, and even if compliance was possible it would be likely to trigger significant burdens. Defendants were not on clear notice that such demands from individual inmates could be met without imposing undue burdens on the allocation of prison resources.[5]

In sum, for all of these reasons Defendants were not on clear notice that Plaintiff's First Amendment rights would be impinged by a failure to accede to these

---

[5] In his deposition, Plaintiff suggests that "what was most important here wasn't so much the brands but the vegetarian diet." (Howell Dep. at 208:21-24, 211:14-212:5). But the record does not make clear that he expressed this concession to Defendants at the time. The record does show that Plaintiff stated on August 7, 2012, "I request a vegetarian diet, even if it is just peanut butter sandwiches & multivitamins." (Doc. 109-11 at 9; *see* Pl. SMF ¶ 25). This *could* be interpreted as giving up on the strange demands about Pepsi and Kraft. But even that is not clear, because Plaintiff did not expressly state whether he would accept such a meal without assurances that no products from these two food conglomerates went into the peanut butter, bread, or any of the other items that would be on his tray including beverages. Moreover, Plaintiff does not establish that a peanut butter-only sandwich option was available for any prisoners, or that Defendants were aware of any vegetarian-only meal option at that time. Finally, less than two weeks after this August 7 grievance, Plaintiff it is undisputed that Plaintiff began receiving vegetarian meals at the hospital, where be remained until early November 2012, and then he began receiving vegetarian meals at the jail too within just two weeks or so of his return there.

customized meal demands. Qualified immunity is available at least for Defendant Skelton.

As discussed above, Defendant Howell may not be eligible for qualified immunity as such. He is at least entitled to dismissal, however, based on his good faith compliance with the First Amendment. For all of the reasons discussed above, the facts here are suggestive of good faith, and Plaintiff adduces no evidence to show otherwise. According to Howell, he was the one to direct that Plaintiff receive the only option for vegetarians of which Howell was aware at the time – the 3,000 diabetic diet. It may be that the jail should have had better and more extensive options, and/or should have educated its staff better about the options that were to later become available, and these jail policies might be relevant to the RLUIPA claim against the County. But there is no evidence to show that Howell personally should be responsible – as a private employee running the health clinic, not generally involved in choosing menu options – for the fact that the jail lacked more religiously-appropriate dietary options. Howell also stated that in response to Plaintiff's December 2011 grievance appeal and his August 2012 grievance, he "took no further actions" because he "was waiting for a response" from Plaintiff for more information regarding his religious beliefs. (Howell Dep. at 38:5-9). Plaintiff simply fails to show what Howell had the power to do that he failed to do in contravention of Plaintiff's clear First Amendment rights. Summary judgment is thus appropriate for Howell as well, whether on grounds of "good faith," or more simply because

Plaintiff fails to show a sufficient basis for Howell's responsibility.

IV. Conclusion

For the foregoing reasons, **IT IS RECOMMENDED** that Defendants' Motion for Summary Judgment (Doc. 109) be **GRANTED IN PART** and **DENIED IN PART**; that summary judgment be **GRANTED** to Defendants Howell and Skelton in their individual capacities because they are protected from Plaintiff's First Amendment claims by a defense of qualified immunity in Skelton's case and by a defense of good faith in Howell's; that Howell be **DISMISSED** from this action; and that summary judgment be **DENIED** to Skelton in his official capacity on Plaintiff's RLUIPA and First Amendment claims.

The parties' joint motion to exceed the page limit for briefs (Doc. 107) is **GRANTED** *nunc pro tunc*.

The Clerk is **DIRECTED** to terminate the reference to the undersigned.

SO RECOMMENDED and **ORDERED** this 27th day of May, 2015.

/s/ Justin S. Anand
JUSTIN S. ANAND
UNITED STATES
MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

MICHAEL LESLIE LAKE, **Plaintiff,** **v.** **DAVID HOWELL, MICHAEL SKELTON,** **Defendants.**	**CIVIL ACTION FILE NO. 1:12-CV-2018-MHC** **PRISONER CIVIL RIGHTS 42 U.S.C. § 1983**

ORDER

(Filed Jun. 30, 2015)

I. Introduction

Plaintiff, a former prisoner at the Cobb County Adult Detention Center ("CCADC"), has brought an action against David Howell ("Howell"), employed by WellStar Health System, Inc. as the Director of Health Services at the CCADC infirmary, in his individual capacity, and Michael Skelton ("Skelton"), a former employee of the Cobb County Sheriff's Office who worked as Operational Support Commander at the CCADC, in both his individual and official capacities. Plaintiff alleges that Defendants denied him a restrictive diet required by Plaintiff's religious beliefs in violation of the First and Fourteenth Amendments to the United States Constitution and of the Religious Land Use and Institutionalized Persons Act (42 U.S.C. § 2000cc-1(a)) ("RLUIPA").

This matter is before the Court on the Final Report and Recommendation ("R&R") of Magistrate Judge Justin S. Anand [Doc. 121] recommending that Defendants' Motion for Summary Judgment [Doc. 109]: (1) be granted as to Defendant Howell in his individual capacity based upon a defense of good faith and as to Defendant Skelton in his individual capacity based upon a defense of qualified immunity, and (2) be denied as to Defendant Skelton in his official capacity on Plaintiff's RLUIPA and First Amendment claims. The Order for Service of the R&R [Doc. 122] provided notice that, in accordance with 28 U.S.C. § 636(b)(1), the parties were authorized to file objections within fourteen (14) days of the receipt of that Order. Within the required time period, Skelton filed objections to the R&R [Doc. 123]. No other objections have been filed.[1]

II. Standard of Review

In reviewing a Magistrate Judge's R&R, the district court "shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1). "Parties filing objections to a magistrate's report and recommendation must specifically identify those findings objected to. Frivolous, conclusive, or general objections need not be considered by

[1] Plaintiff has filed a response to Skelton's objections but that response does not object to the portion of the R&R that recommends granting in part Defendants' Motion for Summary Judgment as to Defendants in their individual capacities. [Doc. 126.]

the district court." *United States v. Schultz*, 565 F.3d 1353, 1361 (11th Cir. 2009) (quoting *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988)) (internal quotation marks omitted). If there are no specific objections to factual findings made by the Magistrate Judge, there is no requirement that those findings be reviewed *de novo*. *Garvey v. Vaughn*, 993 F.2d 776, 779 n.9 (11th Cir. 1993). Absent objection, the district court judge "may accept, reject, or modify, in whole or in part, the findings and recommendations made by the magistrate [judge]," 28 U.S.C. § 636(b)(1), and "need only satisfy itself that there is no clear error on the face of the record" in order to accept the recommendation. FED. R. CIV. P. 72, advisory committee note, 1983 Addition, Subdivision (b). In accordance with 28 U.S.C. § 636(b)(1) and Rule 72 of the Federal Rules of Civil Procedure, the Court has conducted a *de novo* review of those portions of the R&R to which Plaintiff objects and has reviewed the remainder of the R&R for plain error. *See United States v. Slay*, 714 F.2d 1093, 1095 (11th Cir. 1983).

Summary judgment is appropriate when "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). A party seeking summary judgment has the burden of informing the district court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "Credibility determinations, the weighing of the evidence, and the drawing

of legitimate inferences from the facts are jury functions," and cannot be made by the district court in considering whether to grant summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Graham v. State Farm Mut. Ins. Co.*, 193 F.3d 1274, 1282 (11th Cir. 1999).

If a movant meets its burden, the party opposing summary judgment must present evidence that shows there is a genuine issue of material fact or that the movant is not entitled to judgment as a matter of law. *Celotex*, 477 U.S. at 324. In determining whether a genuine issue of material fact exists to defeat a motion for summary judgment, the evidence is viewed in the light most favorable to the party opposing summary judgment, "and all justifiable inferences are to be drawn" in favor of that opposing party. *Anderson*, 477 U.S. at 255; *see also Herzog v. Castle Rock Entertainment*, 193 F.3d 1241, 1246 (11th Cir. 1999). A fact is "material" only if it can affect the outcome of the lawsuit under the governing legal principles. *Anderson*, 477 U.S. at 248. A factual dispute is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. *Id*.

"If the record presents factual issues, the court must not decide them; it must deny the motion and proceed to trial." *Herzog*, 193 F.3d at 1246. But, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party," summary judgment for the moving party is proper. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

III. Discussion

A. Dismissal of Individual Capacity Claims

Plaintiff does not object to the portion of the R&R that recommends granting in part Defendants' Motion for Summary Judgment as to Defendants in their individual capacities. Applying the required standard of review and finding no plain error in the R&R, the Court **ADOPTS** the Magistrate Judge's recommendation that Plaintiff's claims against Howell and Skelton in their individual capacities be **DISMISSED**, which results in a dismissal of Howell as a Defendant in this action.

B. Skelton's Objections to the Denial of Summary Judgment in His Official Capacity

Skelton raises three objections to the R&R:

> *First*, [the R&R] mistakenly concludes that Skelton's response to [Plaintiff's] purportedly religious diet request was the performance of a county instead of a state function. *Second*, the [R&R] errs in recommending that the Court deny summary judgment to Skelton on the issue of whether [Plaintiffs] request was (1) sincere and (2) religious in nature. *Third*, the [R&R] errs in holding that Skelton in his official capacity may be liable even though there is no showing that Cobb County is responsible through a culpable policy or actions of a policymaker that authorized an alleged

> violation of [Plaintiffs] religious exercise rights.

Skelton's Objs. at 2. After a *de novo* review of those portions of the R&R to which Skelton objects, the Court **OVERRULES** the objections, as explained below.

1. Whether Skelton Performed a County Function

Skelton contends that the R&R mistakenly concludes that the function performed by him that led to the action challenged by Plaintiff (the failure of Skelton to accede to Plaintiffs request for a vegetarian diet based upon Plaintiffs alleged religious belief) is not a state but a county function. The United States Supreme Court has held that "neither a State nor its officials acting in their official capacities are 'persons' under [42 U.S.C.] § 1983." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989). States and state officials acting in official capacities are immune from suit brought pursuant to section 1983 under the Eleventh Amendment, which "protects a State from being sued in federal court without the State's consent." *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) *(en banc)*. Eleventh Amendment immunity from suit applies equally to lawsuits against the state as well as "arms of the state." *Id*.

As stated in the R&R, while a Georgia Sheriff generally acts as a state official in administering a jail, the Sheriff and his deputies do *not* act as arms of the State when performing *every* function involving the

administration of a county jail. R&R at 26. "In *Manders*, the Eleventh Circuit held that whether a sheriff acts on behalf of a state or county cannot be answered absolutely," and the determination "must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *McDaniel v. Yearwood*, No. 2:11-CV-165-RWS, 2012 WL 526078, at *7 (N.D. Ga. Feb. 16, 2012) (quoting *Manders*, 338 F.3d at 1304).

For example, under O.C.G.A. § 42-5-2(a), "it shall be the responsibility of the governmental unit . . . having the physical custody of an inmate to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention. . . ." The Eleventh Circuit in *Manders* distinguished the function of providing an inmate with "food, clothing, and any needed medical and hospital attention," necessities which are the responsibility of the local unit having custody of the inmate, with a Sheriffs "force policy at the jail and the training and disciplining of his deputies," which are functions for which the state provides funding. *Manders*, 338 F.3d at 1323. "We stress that this case does not involve medical care, which counties have a statutory obligation to provide to inmates in county jails" (citing O.C.G.A. § 42-5-2). *Id*. at 1323, n.43.; *see also Robinson v. Integrative Det. Health Servs.*, No. 3:12-CV-20 (CAR), 2014 WL 1314947, at *11 (M.D. Ga. Mar. 28, 2014) (noting that "every district court that has addressed this issue [whether the sheriff acts as a county or state official with respect to a particular

function] has held that a Georgia sheriff acts as an arm of the county when providing medical care").

Skelton argues that the Magistrate Judge erroneously rejected "the guidance of another decision from this Court," namely, *Scott v. Brown*, 1:11-CV-2514-TWT-JFK, 2012 WL 1080363 (N.D. Ga. Jan. 31, 2012), *adopted by* 2012 WL 1080322 (N.D. Ga. Mar. 29, 2012). In *Scott*, the plaintiff alleged a number of claims against the Sheriff of DeKalb County under the First Amendment and RLUIPA based upon a number of jail practices, including restrictions on clothing, the failure to retain a Muslim chaplain or to provide Qurans, and "not providing a special end-of-Ramadan meal although special meals are provided for other religious holidays." *Id*., 2012 WL 1080363, at *2. Without going into any detailed analysis concerning the portion of the plaintiff's claims relating to the Ramadan meal, the Magistrate Judge in *Scott* recommended dismissal of the plaintiff's official-capacity RLUIPA claims for damages because the Sheriff "does not act for the County in administering the DeKalb County Jail" and "is not liable for damages in his official capacity (acting for the state)." *Id*. at *3-4. The Magistrate Judge's recommendation in *Scott* was adopted without objection.

As indicated by the Magistrate Judge in the R&R under review, the *Scott* plaintiff never argued the distinction between state and county functions that Plaintiff raises here. R&R at 28-29. "[I]t is unclear whether the *Scott* court squarely addressed the issue here, namely, whether a sheriff or deputy sheriff acts for the state or the county in failing to provide

adequate nutrition to the jail's inmates. The Ramadan claim . . . involves only the timing of the meals offered, not the adequacy of the nutrition contained in those meals." *Id*. at 29.

Skelton objects to the Magistrate Judge's assessment of the persuasive value of *Scott* in part because "a Ramadan diet involves both the content and the timing of the diet." Skelton's Obj. at 4. But the issue here is far removed from a dispute about the timing or the content of a single holiday meal, as in *Scott*. Rather, based on his allegedly sincere religious beliefs, Plaintiff requested a dietary plan completely different from the one offered to him and, when he failed to receive it, he refused to eat any food from most of the trays served to him and lost a considerable amount of weight, to the point of his being placed on a suicide watch. R&R at 6-8. The provision of either a restricted diet allegedly required by Plaintiff's religious views or a diet which offered adequate nutrition are functions which are responsibilities of the government unit having the physical custody of the inmate (in this case, the county). *See* O.C.G.A. § 42-5-2(a). *Scott* does not stand for the proposition that the provision of a regular restricted diet for religious purposes or adequate nutrition in general is purely a state function.

Skelton agrees that Cobb County has a duty to provide food for inmates in its custody but argues that the issue here is the accommodation of Plaintiff's alleged religious practice, which he concludes is a state function even though it involves the furnishing of food, which is a county function. Skelton's Obj. at 4-5.

Skelton also reiterates his request – which he faults the Magistrate Judge for failing to address – to "consider an analogous situation involving use of force or a highspeed chase." *Id*. at 5. Skelton argues that "the use of force by a deputy sheriff who is carrying a weapon purchased by a county is plainly the performance of a state function. The same is true of a deputy sheriff carrying out law enforcement duties in a vehicle purchased by a county." *Id*. "Similarly, although a county purchases food and clothing for the sheriff's office to provide prisoners, the decision to serve (or not to serve) alternative meals or clothing to a specific inmate as a religious accommodation is a state function (i.e., 'administration of the jail'). . . ." *Id*. at 6.

The Court is not persuaded by this analogy. If a county jail fails to offer an inmate sufficient nutrition to maintain healthy living, regardless of its ultimate reason for doing so, it has failed to fulfill the county's function of meeting its inmates' nutritional needs. *See* O.C.G.A. § 42-5-2. As stated by the Magistrate Judge: "That the reason a particular inmate may not be receiving enough food or adequate nutritional content is a religious objection does not change the basic function at issue, which is the county's general obligation to feed the prisoner." R&R at 27-28. The fact that the county provides much of the equipment and other supplies that a Georgia Sheriff and his deputies may use in the performance of either a county or state function offers no guidance as to whether the particular function is a county or a state one. Instead, the Court finds that the provision of adequate nutrition to county jail

inmates is more analogous to the provision of adequate health care, an indisputable county function, than it is to the use of a county-purchased weapon to enforce discipline at the jail, a state function.

B. Whether Plaintiff's Diet Requests Were Based on a Sincerely Held Religious Belief

Skelton next objects to the R&R's conclusion that there is a genuine issue of fact for trial regarding whether the motivation for Plaintiff's refusal to accept most of the food trays offered to him at the CCADC was based on a sincerely held religious belief or merely personal in nature. Skelton's Objs. at 6-11. Skelton argues that Plaintiff's "request for a vegetarian diet that excluded certain brands and for which no animal products had been allocated flowed from his irrational obsession with Leslie [a former acquaintance], rather than from any religious commitment." *Id*. at 8. Skelton objects that Plaintiff's admitted "willingness to abandon the diet and eat meat if Leslie would be his friend" reveals the nonreligious nature of his dietary requests. *Id*.

It does not appear that Skelton objects to the R&R's conclusion that there is a genuine issue of fact regarding the sincerity of Plaintiff's beliefs. He challenges, rather, the alleged religiosity of those beliefs. But Skelton's argument about Plaintiff's willingness to eat meat by participating in the Carnivore Challenge should Leslie return to him (*see id*. at 8-9) is

misplaced. Plaintiff's vegetarian dietary restrictions allegedly arose from a vow he made to God not to harm any of God's creatures until Leslie returned to him. That vow would necessarily become a dead letter if and when Leslie returned, so that Plaintiff could then consume meat with Leslie without casting doubt upon his vow's religiosity – which vow, although idiosyncratic, is not so bizarre as to preclude this case from proceeding forward to a fact finder's resolution of the issue. As the R&R states, and as the Supreme Court has warned, courts "must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim." R&R at 34 (internal quotations omitted).

> [T]he Supreme Court recently explained that "it is not for us to say that [a plaintiffs] 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." [Burwell v.] Hobby Lobby [Stores, Inc.]*, 134 S.Ct. at 2779 (emphasis added) (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716, (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 (1990); *see also Thomas*, 450 U.S. at 716 (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 (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*.

Davila v. Gladden, 777 F.3d 1198, 1204 (11th Cir. 2015) (parallel citations omitted); *see also Holt v. Hobbs*, 135 S. Ct. 853, 862-63 (2015) ("Petitioner's belief is by no means idiosyncratic. . . . But even if it were, the protection of RLUIPA, no less than the guarantee of the free exercise clause, is 'not limited to beliefs which are shared by all of the members of a religious sect.'" (internal quotation marks and citation omitted)).

C. Whether Skelton Acted Pursuant to a Cobb County Policy

"Cobb County may be held liable for an alleged violation of Plaintiff's RLUIPA or First Amendment rights, but only if it 'had a custom or policy' that 'caused [a] violation' of those rights." R&R at 23 (quoting *McDowell v. Brown*, 392 F.3d 1283, 1289 (11th Cir. 2004)). Skelton objects that Plaintiff "has not and cannot identify any defective policy authorized by Cobb County that proximately caused the alleged deprivation of his religious exercise rights. This is an alternative reason for summary judgment to Skelton in his official capacity." Skelton's Objs. at 13-14. However, as the R&R states, "[o]n January 29, 2012, . . . Skelton wrote to Lt. Col. Prince, recommending that the CCADC '*maintain [its] practices* of only offering diets supported by documented medical need and/or established recognized religious doctrine. Th[ese are] the established procedures of our surrounding counties[, which are] supported by case law within our District.'" R&R at 10 (quoting Doc. 109-11 at 4 (emphasis added)). The quoted text from Skelton's memorandum is sufficiently indicative of a county custom or policy underlying his actions to create a genuine issue of fact for trial on this point as well.

IV. Conclusion

For the foregoing reasons:

- Defendant Skelton's Objections [Doc. 123] are **OVERRULED**.

- The Magistrate Judge's Report and Recommendation [Doc. 121] is **APPROVED AND ADOPTED** as the Order of this Court.
- Defendants' Motion for Summary Judgment [Doc. 109] is **GRANTED IN PART** and **DENIED IN PART**, as follows: The Motion is **GRANTED** as to Plaintiff's claims against Defendants Howell and Skelton in their individual capacities and **DENIED** as to Plaintiff's RLUIPA and First Amendment claims against Defendant Skelton in his official capacity.
- Defendant Howell is **DISMISSED** from this action.
- Plaintiff's RLUIPA and First Amendment claims against Defendant Skelton in his official capacity **MAY PROCEED**.

It is further **ORDERED** that the remaining parties shall file a Consolidated Pretrial Order no later than July 30, 2015.

It is further **ORDERED** that a Jury Trial on the remaining claims is set for September 9, 2015, at 9:30 A.M. before the undersigned in Courtroom 1905. A Pretrial Conference is hereby set for September 2, 2015, at 2:00 P.M. in Courtroom 1905. Motions in limine shall be filed on or before August 20, 2015; responses to motions in limine shall be filed on or before August 27, 2015. Only one consolidated motion in limine shall be filed by each party and any motion shall not exceed

twenty-five (25) pages. The response brief to any motion in limine shall not exceed twenty-five (25) pages.

IT IS SO ORDERED this 30th day of June, 2015.

/s/ Mark H. Cohen
MARK H. COHEN
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-13124

D.C. Docket No. 1:12-cv-02018-MHC

Michael Leslie LAKE,

Plaintiff-Appellee,

versus

Michael SKELTON,

Defendant-Appellant.

Appeals from the United States District Court
for the Northern District of Georgia,

(Filed Sep. 28, 2017)

Before ED CARNES, Chief Judge, TJOFLAT, HULL, MARCUS, WILSON, WILLIAM PRYOR, MARTIN, JORDAN, ROSENBAUM, JULIE CARNES, and NEWSOM, Circuit Judges.*

BY THE COURT:

A petition for rehearing having been filed and a member of this Court in active service having requested a poll on whether this case should be reheard

---

* Judge Jill Pryor recused herself and did not participate in the en banc poll.

by the Court sitting en banc, and a majority of the judges in active service on this Court having voted against granting a rehearing en banc, it is ORDERED that this case will not be reheard en banc.

WILLIAM PRYOR, Circuit Judge, joined by BLACK, Circuit Judge, respecting the denial of rehearing en banc:

A majority of the Court has voted not to rehear en banc our decision in *Lake v. Skelton*, 840 F.3d 1334 (11th Cir. 2016), which held that Georgia's sovereign immunity bars a complaint for damages against a deputy sheriff who failed to accommodate a dietary request from an inmate in a county jail in Georgia. The panel faithfully applied the arm-of-the-state test set out in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc), in this appeal. Our dissenting colleague does not "quarrel with this Court's ruling in *Manders*." Dissenting Op. at 31. Instead, our colleague argues that the panel decision ignored "this Court's express admonitions in *Manders*" and that the opinion "represents a distinct break from the law established" in *Manders*. *Id.* at 34, 14 n.2. But our colleague misreads both *Manders* and the panel's decision. As members of the panel, we write to set the record straight.

I. Background

On November 28, 2011, Michael Lake was arrested for stalking a woman named Leslie and

detained without bond at the Cobb County Adult Detention Center. The sheriff of Cobb County operates the Detention Center, and Major Michael Skelton served there as operational support commander. There is no difference, for purposes of this appeal, between the sheriff and deputy sheriffs. *Lake*, 840 F.3d at 1342.

Lake requested a special diet to accommodate a religious vow he had made to gain him Leslie's friendship. The jailers denied his request. In response, Lake sued Major Skelton in his official and individual capacities, alleging violations of the First and Fourteenth Amendments and the Religious Land Use and Institutionalized Persons Act. The district court granted summary judgment in favor of Skelton in his individual capacity, but it declined to grant summary judgment in favor of him in his official capacity. On appeal, the panel considered only the narrow question whether the sovereign immunity of Georgia extends to Skelton when he is sued in his official capacity for decisions made about the provision of food to inmates. On that question, the panel reversed.

II. Discussion

Our decision in *Manders* established the analytical framework for deciding whether a state entity is an "arm of the State" entitled to sovereign immunity. We consider four factors: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the

entity." *Manders*, 338 F.3d at 1309. Applying those factors, the *Manders* Court held that the sheriff of Clinch County, Georgia was "an arm of the State, not Clinch County, in establishing [and implementing a] use-of-force policy." *Id.* at 1328.

Contrary to our colleague's assertions, *Manders* did not decide whether Georgia sheriffs are entitled to sovereign immunity when performing functions other than establishing and implementing force policies. In fact, *Manders* explicitly disclaimed that interpretation, stating that it "d[id] not answer" the question whether a sheriff "wears a 'state hat' for any other functions he performs." *Id.* Our colleague distorts this clear limiting language and argues instead that the *Manders* Court "forcefully swore off its application" to cases, like this one, that involve the provision of food. Dissenting Op. at 14 n.2. In support, our colleague points to a handful of statements *distinguishing* that question. *Id.* at 13-14. For example, the *Manders* Court stated that "obligations involving the jail structure and inmates food, clothing, and medical necessities . . . involve wholly separate and distinct matters from the sheriff's force policy" and its implementation. *Manders*, 338 F.3d at 1322. Manders "challenge[d] only" the sheriff's force policy and its implementation, so the Court limited its holding to "only . . . the limited functions" of establishing and implementing the force policy. *Id.* at 1323, 1328. But *Manders* offered no "express admonitions" one way or the other for cases involving the provision of food, dissenting op. at 34; it instead expressly declined to decide the question.

When presented with that question, our panel faithfully applied our precedent. We weighed the four arm-of-the-state factors as dictated by *Manders* and concluded that Georgia sheriffs act as arms of the state when they make decisions about the provision of food. Our colleague argues that the panel incorrectly applied the factors and that its decision was not dictated by precedent. *Id.* at 14-15. But *Manders* itself rejected many of the arguments our colleague raises.

In considering how state law defines the office of sheriff, our dissenting colleague argues that "Georgia law makes absolutely clear that the position of sheriff is defined as an officer of the county, not the state," *id.* at 18, but we decided otherwise in *Manders*. To be sure, we acknowledged in *Manders* that, in the words of our colleague, "[t]he Georgia Constitution expressly designates sheriffs as 'county officers.'" *Id.*; *see Manders*, 338 F.3d at 1312. But instead of holding that the state constitutional label "weigh[ed] heavily against arm-of-the-state status," dissenting op. at 19, we explained that it reflected only "a geographic label defining the territory in which a sheriff is elected and mainly operates." *Manders*, 338 F.3d at 1312. We have since reiterated that sheriffs are "only 'county officers' in the sense that they have a limited geographic jurisdiction." *Pellitteri v. Prine*, 776 F.3d 777, 780 (11th Cir. 2015) (Martin, J.). After reviewing Georgia's Constitution, statutes, and caselaw, the panel followed this precedent and determined that "[t]he Cobb County Sheriff derives his powers from the State and, with the exception of funding, is largely independent of the county."

Lake, 840 F.3d at 1339; *see Manders*, 338 F.3d at 1312 ("Georgia's Constitution . . . makes the sheriff's office a constitutional office independent from the county entity itself, precludes all county control, and grants only the State control over sheriffs. . . .").

Our dissenting colleague also critiques the panel's analysis of how Georgia law defines the specific function of providing food. Our colleague takes particular issue with how the panel opinion interprets one of the relevant statutes: section 42-5-2 of the Georgia Code. Dissenting Op. at 20-25. That provision makes it "the responsibility of the governmental unit, subdivision, or agency having the physical custody of an inmate to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention." Ga. Code Ann. § 42-5-2(a).

Our colleague's criticism again misses the mark. As the panel explained, Georgia law clearly requires the sheriff "[t]o take . . . custody of the jail and the bodies of such persons as are confined therein." *Id.* § 42-4-4(a)(1). Thus, the sheriff is the "governmental unit, subdivision, or agency" having custody of inmates in county jails. *Lake*, 840 F.3d at 1340.

None of the cases cited by our colleague undermines this reasoning. The majority of the Georgia cases cited by our colleague evaluate only whether section 42-5-2 waives the state sovereign immunity of the county. *See Tattnall Cty. v. Armstrong*, 775 S.E.2d 573 (Ga. Ct. App. 2015), *overruled on other grounds by Rivera v. Washington*, 784 S.E.2d 775 (Ga. 2016); *Graham*

v. Cobb Cty., 730 S.E.2d 439 (Ga. Ct. App. 2012); *Gish v. Thomas*, 691 S.E.2d 900 (Ga. Ct. App. 2010). As a result, they describe the statute in general terms and do not address, because they had no reason to address, the contours of the duty imposed on the county by the statute.

As the panel explained at length, when the Georgia courts *have* addressed the nature of the duty, they have drawn the same distinction the panel did between the duty to fund and the duty to provide. *Lake*, 840 F.3d at 1341-42. The Georgia courts have specifically considered the duty to provide medical care, another duty imposed by section 42-5-2. In that context, the Georgia Supreme Court has distinguished between the county's duty to *fund* the provision of medical care under section 42-5-2(a) and the sheriff's duty to provide that care. *Bd. of Comm'rs of Spalding Cty. v. Stewart*, 668 S.E.2d 644, 645 (Ga. 2008); *Lake*, 840 F.3d at 1341-42. This panel adopted that reasoning, and *Lawson v. Lincoln County*, 664 S.E.2d 900, 902 (Ga. Ct. App. 2008), a case cited by our colleague, dissenting op. at 22, supports our conclusion. In *Lawson*, the Georgia Court of Appeals stated that the county has a duty "to maintain the inmate, furnishing him food," but explained that "to meet their duty, the county commissioners have 'a duty to adopt a budget making reasonable and adequate provision . . . to enable the sheriff to perform his duties of enforcing the law and preserving the peace.'" 664 S.E.2d at 902 (quoting *Wolfe v. Huff*, 210 S.E.2d 699, 700 (Ga. 1974)).

Our colleague also suggests that dicta in *Manders* as well as a Georgia law requiring counties to build and maintain a county jail suggest that the sheriff provides food to inmates on behalf of the county, dissenting op. at 22-24, but neither argument is persuasive. As discussed above, *Manders* "d[id] not answer . . . whether [a sheriff] wears a 'state hat' for any other functions" outside of establishing and implementing a use-of-force policy. 338 F.3d at 1328. And although Georgia law requires that counties "erect" and "repair" the county jail, Ga. Code Ann. § 36-9-5(a), we explained in *Manders* that "the location where the sheriff's policing function is performed does not automatically transmute the function into a state function or a county function." 338 F.3d at 1319.

Manders also forecloses our colleague's remaining arguments on the second, third, and fourth arm-of-the-state factors. Our colleague argues that statutes requiring that inmates be provided with daily meals that comply with state health regulations are insufficient to establish control by the state. Dissenting Op. at 25-26 (citing Ga. Code Ann. § 42-4-32(a) & (b)). But in *Manders*, we concluded that the regulation of "the preparation, service, and number of meals" served in county jails is "evidence of how the duties of sheriffs in Georgia are governed by the State and not by county governing bodies." 338 F.3d at 1317 n.30. Our colleague argues that counties have "significant power to oversee the sheriff's operation of the county jail" because grand juries may inspect and make recommendations about the jail. Dissenting Op. at 27. But *Manders*

explained that "[b]ecause the grand jury is independent and equally oversees county governing authorities, it cannot fairly be said that grand juries work at the counties' disposal or act for counties in investigating sheriffs or county jails." 338 F.3d at 1322 n.40. Our colleague argues that the funding factor supports county control because the county pays for the food served in county jails. Dissenting Op. at 28-29. But in *Manders* we held that "[p]ayment of [the sheriff's] budget, when required by the State, does not establish any control by [the county]," and we observed that the county "bears the major burden of funding . . . the jail," including "appropriat[ing] funds for necessities [such as food] to inmates," only "because the State so mandates." 338 F.3d at 1324, 1323. And our colleague argues that the fourth factor, responsibility for adverse judgments, supports county control because the state is not directly liable for judgments against the sheriff. Dissenting Op. at 29-31. But *Manders* considered the same Georgia budgeting scheme and determined that "the liability-for-adverse-judgment factor does not defeat" immunity because paying a judgment out of the budget of the sheriff's office "implicate[s]" "both county and state funds." 338 F.3d at 1328, 1329.

Finally, our colleague misstates the impact of the panel opinion when she contends that it will "bar[ ] suit against sheriffs for virtually any way they violate a jail inmate's rights – from the use of force to the denial of medical care." Dissenting Op. at 34. As a threshold matter, the panel addressed only the provision of food. The panel did not decide whether the sheriff is entitled

to sovereign immunity when he provides medical care, and a review of Georgia law might lead to a different result in a case about the provision of medical care. The panel opinion also addressed only a suit seeking money damages for a decision made by a deputy sheriff in his official capacity. It did not address suits against sheriffs or their deputies in their individual capacities. *See Manders*, 338 F.3d at 1308 n.7 (collecting cases). And it does not prevent inmates from seeking injunctive relief against sheriffs or their deputies in their official capacities. *See Lane v. Cent. Alabama Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014).

Far from "achiev[ing] [a] dramatic change in the law," dissenting op. at 15, the panel faithfully applied this Court's en banc precedent in *Manders*. Because the panel opinion is correct, we agree with the decision not to rehear this appeal en banc.

MARTIN, Circuit Judge, dissenting from the denial of rehearing en banc:

The Eleventh Amendment to the U.S. Constitution gives states immunity from being sued in federal court. *Hans v. Louisiana*, 134 U.S. 1, 14-17, 10 S. Ct. 504, 507-08 (1890). The state's immunity, known as sovereign immunity, also extends to public officials when they act as an "arm of the state." *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc). But the state's immunity does not protect local governments – such as counties – or their officers. *Mt. Healthy City Sch. Dist. Bd.*

of Educ. v. Doyle, 429 U.S. 274, 280, 97 S. Ct. 568, 572 (1977); *Lincoln Cty. v. Luning*, 133 U.S. 529, 530, 10 S. Ct. 363, 363 (1890). In this case, Michael Lake sued Major Michael Skelton, who at the time was an employee of the Cobb County Sheriff's Department. The question presented by his case, then, is whether county sheriffs in Georgia function as an "arm of the state," and are thus entitled to Eleventh Amendment immunity, when they feed (or fail to properly feed) people detained in the county jail.[1]

Until our decision in *Manders* in 2003, this Court always treated a claim against a Georgia county sheriff for operating a county jail as a claim against the county. *See, e.g.*, *Wayne v. Jarvis*, 197 F.3d 1098, 1105 (11th Cir. 1999) (holding that jail inmate's 42 U.S.C. § 1983 claim "against Sheriff Jarvis in his official capacity is a claim against DeKalb County"). That meant we never granted county sheriffs the immunity the Eleventh Amendment affords the states. Then, in *Manders*, we changed course. And that course established a four-factor test for deciding whether a county sheriff acts as an "arm of the state." *See Manders*, 338 F.3d at 1309. The *Manders* court then applied the test it created to decide that a Georgia county sheriff does act as

---

[1] The defendant in this case, Major Michael Skelton, was a deputy sheriff. *Lake v. Skelton*, 840 F.3d 1334, 1336 (11th Cir. 2016). But as the panel noted, "a deputy receives all of his powers and obligations . . . from the sheriff." *Id.* at 1342. Therefore, like the panel, I refer to the office of county sheriff, which in this case includes the sheriff's deputy.

an "arm of the state" when implementing a use-of-force policy at the county jail. *Id.* at 1319, 1328.

Although *Manders* granted county sheriffs Eleventh Amendment immunity for suits involving their use-of-force policies, the en banc Court made absolutely clear that its holding would not extend to a case involving "feeding, clothing, or providing medical care to inmates" – the basic necessities enumerated in § 42-5-2 of the Georgia Code. *See id.* at 1319; *see also* O.C.G.A. § 42-5-2(a). The *Manders* court took great pains to limit its holding to the particular use-of-force function at issue in that case, and to distinguish that function from the duty to provide basic necessities. *See Manders*, 338 F.3d at 1319 ("This case is not a case of feeding, clothing, or providing medical care to inmates, which necessarily occur within the jail. Instead, it involves Sheriff Peterson's force policy, which happens to be at issue in the jail context in this particular case."); *id.* at 1322 ("While Georgia counties have obligations involving the jail structure and inmates' food, clothing, and medical necessities, such duties involve wholly separate and distinct matters from the sheriff's force policy at the jail and his training and disciplining of deputies in that regard."); *id.* at 1323 n.43 ("We stress that this case does not involve medical care, which counties have a statutory obligation to provide to inmates in county jails." (citing O.C.G.A. § 42-5-2)); *id.* at 1323 ("Manders does not allege that Sheriff Peterson denied him necessities in O.C.G.A. § 42-5-2. Rather, Manders challenges only Sheriff Peterson's force policy

at the jail and the training and disciplining of his deputies.").[2]

Despite this Court's repeated observation in *Manders* that arm-of-the-state status would not be given to a sheriff who failed to give food or the other necessities listed in § 42-5-2, the panel for Mr. Lake's case held that county sheriffs are entitled to Eleventh Amendment immunity in precisely this circumstance. *See Lake*, 840 F.3d at 1344. But it is not only because we advised against this outcome in *Manders* that the *Lake* panel's conclusion is mistaken. Even if *Manders* had never mentioned § 42-5-2, a straightforward application of the four-part test it developed shows that each factor weighs heavily against granting the sheriff arm-of-the-state status in connection with his feeding of inmates. In reaching its conclusion, the panel misread the relevant Georgia case law and statutes, and failed to correctly apply this Court's arm-of-the-state precedent.

As a result, the *Lake* panel opinion is a dramatic expansion of what had until now been a narrow reach of sovereign immunity into the administration of Georgia county jails. For the 50,000 people detained in

---

[2] The composition of this Court has changed since *Manders* issued in 2003, yet several members of the Court who signed onto the *Manders* majority opinion, which so forcefully swore off its application to the very facts now presented in Mr. Lake's case, are still active members of this Court. If they had continued to apply the law as stated in *Manders*, the *Lake* panel opinion would have been vacated. There should therefore be no mistake about it: the *Lake* panel opinion represents a distinct break from the law established by the 2003 en banc Court in *Manders*.

county jails across the state of Georgia, the consequences of the panel's holding are large. *See* Pet. Reh'g at 15. Judge Barrington Parker, dissenting from the panel opinion, said it well. He explained that this decision "will leave Georgia counties unanswerable for constitutional violations predicated on their failure to provide food or any of the other necessities required by § 42-5-2." *Lake*, 840 F.3d at 1345 (Parker, J., dissenting). Under the panel's expansion of sovereign immunity, no person in a county jail will be able to sue his jailer (in the jailer's official capacity) for damages in federal court, even where the jailer violated the law by depriving the inmate of life's most basic necessities: food, clothing, and medical care. The panel achieved this dramatic change in the law without convening en banc. I dissent from this Court's decision to let the *Lake* panel opinion stand as the law of this circuit.

I. BACKGROUND

A.

Michael Lake made a religious vow in 1997 to abstain from eating meat. *Lake*, 840 F.3d at 1336. In 2011, after he was arrested for stalking, Mr. Lake was detained without bond at Cobb County Adult Detention Center. *Id.* at 1336-37. The Detention Center is operated by the sheriff of Cobb County. *Id.* A deputy sheriff, Major Michael Skelton, served as operational support commander at the Detention Center. *Id.* at 1337. In keeping with his religious vow, Mr. Lake

requested a vegetarian diet. *Id.* The jailers denied his request. *Id.*

Mr. Lake sued Major Skelton in his official capacity, alleging that Skelton's refusal to give him a vegetarian diet violated his rights under the First and Fourteenth Amendments, as well as the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc. *Id.* Major Skelton moved for summary judgment, arguing that he is entitled to the sovereign immunity given to Georgia by the Eleventh Amendment. *Id.* The District Court denied summary judgment on this ground. *Id.* This Court reversed on appeal, holding that "the sovereign immunity of Georgia extends to a deputy sheriff who denies a dietary request of an inmate in a county jail." *Id.* at 1336.

B.

In *Manders*, this circuit adopted a function-specific approach to the arm-of-the-state analysis: "Whether a defendant is an 'arm of the State' must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise." *Manders*, 338 F.3d at 1308. We consider whether the defendant is an "arm of the state" in his performance of any given function by examining four factors: "(1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity." *Id.* at 1309. "Whether an entity functions

as an 'arm of the state' is a federal question that we resolve by reviewing how the state courts treat the entity." *Ross v. Jefferson Cty. Dep't of Health*, 701 F.3d 655, 659 (11th Cir. 2012) (per curiam).

II. DISCUSSION

A.

The first *Manders* factor has, in turn, two prongs we must analyze. First we examine how state law defines the "entity" itself. Second we look to how state law defines the particular function at issue. *See Manders*, 338 F.3d at 1309 ("We first examine the governmental structure of Sheriff Peterson's office vis-à-vis the State and Clinch County under Georgia law."); *see also*, *e.g.*, *Stanley v. Israel*, 843 F.3d 920, 926 (11th Cir. 2016) (considering, as part of the first factor, whether "state law defines sheriffs as county officers"); *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298, 1305 (11th Cir. 2005) (same).

We start, then, by looking at how Georgia defines the office of a county sheriff. And Georgia law makes absolutely clear that the position of sheriff is defined as an officer of the county, not the state. The Georgia Constitution expressly designates sheriffs as "county officers." Ga. Const. art. IX, § 1, ¶ 3. Sheriffs are elected by the voters of their county, *id.* ¶ 3(a), and are independent from the executive branch of the state. *Compare id.* art. IX (addressing "Counties and Municipal Corporations"), *with id.* art. V (addressing the state's "Executive Branch"); *see also Grech v. Clayton Cty.*, 335

F.3d 1326, 1353 (11th Cir. 2003) (en banc) (Barkett, J., concurring) ("[W]hereas the Alabama Constitution includes sheriffs within an article addressing the executive branch of the state government, Georgia's constitution discusses sheriffs in an article addressing local government."). As the Supreme Court of Georgia explained long ago, "the sheriff function[s] with reference to State matters, as well as county matters; but they are not regarded as State officers." *Truesdel v. Freeney*, 197 S.E. 783, 786 (Ga. 1938). Because each sheriff represents, and is answerable to, the voters of the county where he was elected, he acts on behalf of the county and carries out its will. Recognizing this, the Georgia courts have always treated claims against county sheriffs in their official capacity as claims against the county, as opposed to the state. *See, e.g.*, *Gilbert v. Richardson*, 452 S.E.2d 476, 478 n.4 (Ga. 1994) ("Although Walker County is not a named defendant in this action, [Sheriff] Millard was sued in his capacity as Walker County sheriff. Accordingly, [plaintiffs'] claims are, in essence, claims against Walker County and Millard may raise any defense available to the county. . . .").[3]

This Court's arm-of-the-state jurisprudence has consistently said that where a state constitution or state supreme court defines sheriffs as county officers,

---

[3] Judge Rosemary Barkett observed when she wrote her 2003 opinion in *Grech* that there were then no less than thirty-one Georgia cases specifically recognizing sheriffs as officers of the county. *See Grech*, 335 F.3d at 1355 & n.12 (Barkett, J., concurring) (collecting cases).

this "weighs heavily against assigning arm of the state status to [the] sheriff." *Abusaid*, 405 F.3d at 1305-06; *see also Stanley*, 843 F.3d at 926; *Hufford v. Rodgers*, 912 F.2d 1338, 1341 (11th Cir. 1990). This logic weighs heavily against arm-of-the-state status here.[4] But the panel opinion ignores this lesson from our precedent when it says the "definition in state law . . . favor[s] immunity." *Lake*, 840 F.3d at 1339.

Having considered how Georgia law defines the office of sheriff, the next question in the factor-one inquiry is: How does Georgia law define the specific function of providing food to inmates – does the sheriff perform this function on behalf of the state or on behalf of the county? *See Manders*, 338 F.3d at 1319 n.35 ("The key question is not what . . . powers sheriffs have, but *for whom* sheriffs exercise that power.").

Section 42-5-2(a) of the Georgia Code establishes the requirement for feeding inmates. It says plainly: "[I]t shall be the responsibility of the governmental unit . . . having the physical custody of an inmate to maintain the inmate, furnishing him food, clothing,

---

[4] Neither is it inconsistent with the opinion I authored in *Pellitteri v. Prine*, 776 F.3d 777 (11th Cir. 2015). The Pellitteri opinion began its immunity analysis by reiterating that the *Manders* Court found the first prong weighed in favor of immunity. *Id.* at 780. This mere reference to *Manders* in the context of an employment discrimination case brought against a Georgia sheriff does not conflict with how I now seek to apply *Manders* in the context of providing food to inmates.

and any needed medical and hospital attention."[5] Mr. Lake pointed to this statute as demonstrating that the county is responsible for feeding inmates, because the county has physical custody of the inmate. *Lake*, 840 F.3d at 1340. The panel said no, instead the "governmental unit" having physical custody of county jail inmates is the sheriff. *Id.* Said another way, the panel deemed the human being who county voters elect to be their sheriff to be a "governmental unit," as that term is used in the statute. Having recrafted the statute in this way, the panel said § 42-5-2 "imposes directly on the sheriff" the "responsibility . . . of providing food to inmates," *id.*, and since the panel had already designated the sheriff an officer of the state, it said feeding inmates and the other necessities required by § 42-5-2 are now state functions. So it was by this route the panel arrived at its decision that the first *Manders* factor weighs in favor of granting arm-of-the-state status. *See id.* at 1342 ("[W]e conclude that the duty to feed inmates – including the denial of an inmate's dietary request – is not delegated by the county but instead is directly assigned by the state." (quotation omitted)). However, my review tells me that the panel's interpretation of § 42-5-2 contradicts how Georgia's courts interpret § 42-5-2; how this Court has interpreted that statute up until now; other Georgia statutory

[5] A separate provision specifies that "[a]ll inmates shall be given not less than two substantial and wholesome meals daily." O.C.G.A. § 42-4-32(b).

provisions that bear on this question; and even what Major Skelton conceded in this action.[6]

This Court has recognized that, in conducting the arm-of-the-state analysis, "the most important factor is how the entity has been treated by the state courts." *Ross*, 701 F.3d at 659 (quotation omitted). And the Georgia courts have been clear. Georgia's appellate courts have uniformly and expressly held that § 42-5-2 imposes an obligation *on the county* to provide inmates with the necessities required under § 42-5-2. *See Tattnall Cty. v. Armstrong*, 775 S.E.2d 573, 577 (Ga. Ct. App. 2015) (en banc) ("OCGA § 42-5-2(a) imposes upon the county the duty and cost of medical care for inmates in its custody." (quotation omitted)), *overruled on other grounds by Rivera v. Washington*, 784 S.E.2d

---

[6] The parties did not dispute that § 42-5-2 imposes a duty on counties – rather than directly on the sheriff – to provide food to inmates detained in county jails. Both Major Skelton and the Georgia Sheriffs Association (participating as amicus curiae) recognize this to be true. Defs.' Reply Br. at 8, *Lake v. Skelton*, No. 1:12-cv-2018-MHC (N.D. Ga. May 4, 2015), ECF No. 117 ("Skelton and Howell agree that Cobb County has a duty under O.C.G.A. §§ 42-4-32, 42-5-2 to provide food to prisoners – including Lake when he was confined in its jail."); Amicus Curiae Br. by Ga. Sheriffs' Ass'n at 5 ("The State of Georgia imposes the responsibility on its counties to maintain and furnish the jail and maintain the inmate. This fiscal responsibility is discharged by the county through the Office of Sheriff." (citing O.C.G.A. § 42-5-2(a))). In another recent arm-of-the-state case, where the defendant also conceded one of the *Manders* factors, this Court ruled that the conceded "factor can summarily be taken in favor of county rather than state status." *Stanley*, 843 F.3d at 930. This is what should have happened here.

775 (Ga. 2016);[7] *Graham v. Cobb Cty.*, 730 S.E.2d 439, 443 (Ga. Ct. App. 2012) (same); *Gish v. Thomas*, 691 S.E.2d 900, 907 (Ga. Ct. App. 2010) ("OCGA § 42-5-2(a) imposes the duty and the cost for medical care of inmates in the custody of a county upon the county." (quotation omitted)); *Lawson v. Lincoln Cty.*, 664 S.E.2d 900, 902 (Ga. Ct. App. 2008) ("A county also has the duty . . . 'to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention.'" (quoting O.C.G.A. § 42-5-2(a))).[8] Because the Georgia courts have held that § 42-5-2 imposes the duty of furnishing basic necessities (including food) on the county, the function of providing food to inmates is

---

[7] The Georgia cases interpreting § 42-5-2 all involve the provision of medical care, not food. But as the panel says, the same result that would apply for the deprivation of medical care applies for the deprivation of food. *See Lake*, 840 F.3d at 1341-42. Indeed, this is one way the panel's grant of sovereign immunity will have such far-reaching effect.

[8] The panel distinguishes these cases by saying they hold that counties are responsible only for *funding* the provision of the § 42-5-2 necessities, while making sheriffs directly responsible for *providing* basic necessities. *See Lake*, 840 F.3d at 1341 ("[T]he Georgia Court of Appeals, like we do, distinguishes between the duty imposed by section 42-5-2 on a county to fund medical care and the duty of a sheriff to provide medical care."). This distinction between providing for the needs of inmates and paying for them finds no support in *Tattnall* or any other of these cases. To the contrary, the Georgia Court of Appeals has consistently said that § 42-5-2(a) "imposes upon the county" both "the duty *and* cost" of the § 42-5-2(a) necessities. *See Tattnall*, 775 S.E.2d at 577 (emphasis added); *Graham*, 730 S.E.2d at 443; *Gish*, 691 S.E.2d at 907.

one that the sheriff carries out on the county's behalf, not the state's.

Our Court made this point clear in *Manders*. Citing the Georgia Court of Appeals' interpretation of § 42-5-2, we explained that § 42-5-2 imposes on "counties [] a statutory obligation to provide [basic necessities] to inmates in county jails." *Manders*, 338 F.3d at 1323 n.43; *see also id.* at 1322 ("Georgia counties have obligations involving the jail structure and inmates' food, clothing, and medical necessities."). And we said the same thing (albeit in an unpublished decision) three years later. *See Gary v. Modena*, No. 05-16973, slip op. at 26-27 (11th Cir. Dec. 21, 2006) ("Given that county governments have a statutory obligation to provide inmates in county jails with access to medical care, Bibb County cannot avoid liability under § 1983 simply by arguing that the Sheriff is subject to the exclusive control of the state."). Thus, the panel's conclusion that § 42-5-2 imposes the duty of furnishing basic necessities directly on sheriffs – and not on the counties – cannot be squared with the Georgia appellate decisions or our own.

Other provisions of the Georgia Code offer guidance on this subject, and the panel opinion fails to heed that guidance too. For example, Georgia law requires each county to build and maintain a county jail, and the county sheriff is tasked with operating the jail on the county's behalf. Specifically, § 36-9-5 says that a county jail is a "necessary county building[]," and "[i]t is the duty of the county . . . to erect [and] repair" the county jail. O.C.G.A. § 36-9-5(a). Section 42-4-1(a) in

turn provides that "sheriffs are jailers *of the counties* and have the authority to appoint other jailers, subject to the supervision of the county governing authority." *Id.* § 42-4-1(a) (emphasis added). This statutory language – "sheriffs are jailers of the counties" – makes it perfectly clear that sheriffs act as an agent of the county, not the state, when they carry out the functions necessary to maintain the jail. So even if the panel is right that § 42-5-2 imposes the obligation of providing food directly on the county sheriff, the sheriff would still carry out that function on the county's behalf. County sheriffs are, by statutory command, the "jailers of the counties." *Id.*

An examination of state-law sovereign immunity cases arising under § 42-5-2 also supports that sheriffs act on behalf of the county when feeding inmates. The sovereign immunity provided under the Georgia Constitution extends to both the state and to counties, but the immunity of the counties is separate and distinct in scope from that of the state. *See Gilbert*, 452 S.E.2d at 479 ("The Georgia Tort Claims Act was [] enacted to waive the sovereign immunity of the state for the torts of its officers and employees but expressly excludes counties from the ambit of this waiver." (citation omitted)). As a result, one way to see whether, under Georgia law, county sheriffs act as an officer of the state or of the county when they carry out § 42-5-2 functions is to look at the type of state-law sovereign immunity that applies when a county sheriff is sued in state court for violating § 42-5-2. For example, in *Tattnall*, the Georgia Court of Appeals held that the sheriff was

entitled to immunity on the basis of the "county's sovereign immunity," not the state's. *Tattnall*, 775 S.E.2d at 577; *see also Graham*, 730 S.E.2d at 443 (dismissing § 42-5-2 claim against county sheriff based on the "sovereign immunity of the county or its agents or employees"). The *Tattnall* court affirmatively set out that the Georgia Tort Claims Act, O.C.G.A. § 50-21-20, which waives the sovereign immunity of the state for the torts of its officers, cannot be the basis for waiving the immunity of county sheriffs because "the legislature expressly excluded counties from the ambit of this waiver." *Tattnall*, 775 S.E.2d at 576 n.5 (quotation omitted). So it is clear that the Georgia courts consider county sheriffs to be acting on behalf of the county, not the state, when they fail to provide the necessities required by § 42-5-2.

B.

Under the second factor of the *Manders* test, we ask "what degree of control the State maintains" over the sheriff's function of feeding inmates. *Manders*, 338 F.3d at 1309, 1320. The panel found this factor to strongly support immunity. *See Lake*, 840 F.3d at 1342-43. I cannot agree.

The panel finds support for its position in two modest requirements found in Georgia law: (1) the food must meet certain state agency health standards, and (2) inmates must be fed twice a day. *Id.* at 1342. The Georgia Code requires that "[a]ll aspects of food preparation and food service shall conform to the applicable

standards of the Department of Public Health," O.C.G.A. § 42-4-32(a), and further that "[a]ll inmates shall be given not less than two substantial and wholesome meals daily," *id.* § 42-4-32(b). These provisions hardly evidence "control." The state does not regulate nutritional content; when or where meals are served; or whether and how sheriffs may contract with third-party providers. And, as for the specific food service responsibility at issue in Mr. Lake's case (feeding inmates with special dietary needs), state laws say absolutely nothing. Working out these types of details is left to the unfettered discretion of the county sheriff.

So long as the food complies with Department of Public Health standards, and the inmates get two meals a day, the county sheriff retains complete autonomy to carry out the function of feeding inmates however he sees fit. The rule in this circuit is that "[e]stablishing minimum requirements is not sufficient to demonstrate control" for Eleventh Amendment purposes.[9] *Lightfoot v. Henry Cty. Sch. Dist.*, 771 F.3d 764, 773 (11th Cir. 2014). Section 42-4-32's generic requirement of compliance with public health standards for two meals a day is precisely the sort of minimum requirement that this Court has said fails to establish state control. *See id.* It falls woefully short of demonstrating "direct and substantial control" by the state

[9] This Court has also held that minimum requirements can be a "strong indicia of state control," but that such indicia are outweighed by the autonomy afforded to county officials. *Stanley*, 843 F.3d at 928. That is the case here, where the state has set minimum requirements on food service, but the sheriff otherwise retains full autonomy to carry out that function.

over the function at issue. *See Manders*, 338 F.3d at 1322.

In contrast to the minimal control given to the state, Georgia law gives county authorities significant power to oversee the sheriff's operation of the county jail. Section 15-12-78 of the Georgia Code expressly requires grand juries to "inspect the sanitary condition of the jails" along with "the treatment of the inmates," and then "make such recommendations to the county governing authorities as may be necessary." O.C.G.A. § 15-12-78. This statute gives "county governing authorities" the power to oversee the sheriff's provision of basic necessities at the county jail – including feeding inmates – and imposes an obligation on the county to "strictly enforce" recommendations about county jail conditions. *Id.* The panel opinion never mentions this substantial source of county control. Due to the almost complete lack of state control over what and how sheriffs feed inmates, and the statutory mechanism for direct county oversight, the second *Manders* factor cuts sharply against designating Georgia sheriffs arms-of-the-state.

C.

The third *Manders* factor asks "where the entity derives its funds," looking to whether the state or the county pays. *Manders*, 338 F.3d at 1309. The panel said it analyzed this factor in a way that was "indistinguishable from the application in *Manders*." *Lake*, 840 F.3d at 1343-44. With that in mind, the panel said this

factor "tilts toward immunity" because "[t]he state pays for some of the operations of the sheriff's office, and the county bears the major burden of funding the sheriff's office because the State so mandates." *Id.* (quotation omitted and alterations adopted). Here again, the panel opinion missed the mark.

To apply *Manders* properly, we are required to look at the source of funding not for "the operations of the sheriff's office" in general, *id.*, but rather the source of funding for the *particular* function at issue – here, providing food to inmates. *See Manders*, 338 F.3d at 1309 ("[W]e apply the Eleventh Amendment factors to the sheriff's functions in issue: promulgating force policy and training and disciplining deputies in that regard."); *see also Abusaid*, 405 F.3d at 1310 (applying *Manders* and asking whether the state "funds the particular function in issue" (quotation omitted and alteration adopted)). That means the simple question here is who pays for the food given to county jail inmates – the state or the county?

No one disputes the answer. It is the county that pays for the food. The Georgia Supreme Court has said unequivocally: "It is the official duty of a board of county commissioners . . . to fix and allow to the sheriff as ex officio jailer 'a sufficient amount for the diet of the prisoners, that their strength and health should not suffer in consequence of any insufficiency of food.'" *Lumpkin Cty. v. Davis*, 195 S.E. 169, 170 (Ga. 1938) (quoting *Bd. of Comm'rs of Jasper Cty. v. Persons*, 116 S.E. 538, 539 (Ga. 1923)). This Court expressly accepted this as fact in *Manders*. *See Manders*, 338 F.3d

at 1323 ("[The] County must . . . appropriate funds for necessities to inmates (such as food, bedding, clothing, electricity, and sanitation)."). And indeed, the *Lake* panel's analysis of the first *Manders* factor hinges on the fact that § 42-5-2 imposes "the duty . . . on a county to fund medical care" and the other basic necessities. *Lake*, 840 F.3d at 1341; *see also supra* note 6. The *Lake* panel thus recognized that it is the county that is responsible for paying for food for inmates.[10] Because the sheriff's budget for food for inmates is paid entirely by the county, the third factor weighs decidedly against immunity.

D.

The fourth *Manders* factor asks who is responsible – the state or the county – for an adverse judgment against the sheriff. *Manders*, 338 F.3d at 1309. In this case, like all cases involving Georgia sheriffs, no one disputes that the state is not financially liable for a judgment against the sheriff. *See Lake*, 840 F.3d at 1344. Instead the sheriff's office pays for an adverse judgment *itself*, so neither the state nor the county directly pays a judgment against the sheriff. *Id.* The panel acknowledges the state is not liable for judgments against the sheriff, but concludes only that this

[10] Major Skelton also concedes this point. *See* Br. for Appellant at 14 ("Under O.C.G.A. § 42-5-2(a), counties must buy food for prisoners in county jails. . . . Georgia counties must pay for all operations of their respective sheriffs. . . ."); *id.* at 26 ("[A] county purchases food and clothing for the sheriff's office to provide prisoners.").

"does not defeat immunity." *Id.* (quoting *Manders*, 338 F.3d at 1329). This is not the proper way to weigh this factor.

Since *Manders* this Court has established exactly how the fourth factor should be weighed when a sheriff's office pays for its own adverse judgments, thereby relieving the state of any financial responsibility. For example, in *Abusaid*, this Court held "the fact that the state is not liable [] weighs heavily against extending the state's Eleventh Amendment immunity to the challenged conduct by the sheriff." *Abusaid*, 405 F.3d at 1313; *see also id.* ("[T]he fact that a judgement against the Sheriff in this case would *not* be paid out of the state treasury is, in itself, a clear marker that the Sheriff is not an arm of the state.").[11] In *Pellitteri*, this Court noted that an adverse judgment against a county

---

[11] *Abusaid* applied *Manders* to Florida county sheriffs. Under neither Florida nor Georgia law does the state pay adverse judgments against county sheriffs. *See Abusaid*, 405 F.3d at 1312; *Manders*, 338 F.3d at 1327. And in both states, the only drain on state coffers is indirect. *See Abusaid*, 405 F.3d at 1312 ("[S]tate funds would be implicated indirectly, since an adverse verdict would diminish the resources available to the Sheriff for law enforcement, requiring state law enforcement to fill the gap." (quotation omitted)); *Manders*, 338 F.3d at 1327 ("If a significant adverse judgment occurs, both county and state funds are implicated because Sheriff Peterson would need to seek a greater total budget from the county for his office and a greater daily rate from the State for felony offenders serving their state sentences in the county jail."). Thus, the holding in *Abusaid* – that where there is only an "indirect impact on the state treasury," the fourth *Manders* factor "weighs decidedly against arm of the state status" – applies equally to cases involving Georgia county sheriffs. *See Abusaid*, 405 F.3d at 1312.

sheriff could potentially have an impact on state funds, but explained that the state is not "required to directly pay for any adverse judgment against the Sheriff's office." *Pellitteri*, 776 F.3d at 783. Then, citing *Abusaid*, this Court concluded that "to the extent that the state treasury will be spared here from paying any adverse judgment, this factor weighs in favor of denying immunity." *Id*.

Of course it will *always* be the case that the lack of state fiscal liability does not necessarily "defeat immunity." *See Manders*, 338 F.3d at 1329. If all Eleventh Amendment immunity analysis of an entity's fiscal autonomy from the state is reduced to that truism, then we have effectively done away with the liability-for-judgment factor altogether. And this result would turn the entire doctrine of Eleventh Amendment immunity on its head. The Supreme Court has told us that "the vulnerability of the State's purse [i]s *the most salient factor* in Eleventh Amendment determinations." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 48, 115 S. Ct. 394, 404 (1994) (emphasis added). After all, the very "impetus for the Eleventh Amendment [is] the prevention of federal-court judgments that must be paid out of a State's treasury." *Id.* Clearly, since "the Eleventh Amendment's core concern is not implicated" in this case, *id.* at 51, 115 S. Ct. at 406, the fourth factor – like each of the others – weighs heavily against barring Mr. Lake's case based on sovereign immunity.

E.

I do not quarrel with this Court's ruling in *Manders*. My criticism of the *Lake* panel opinion embraces the holding of *Manders* and demonstrates how the *Lake* opinion flies in the face of what this Court said in *Manders*. But beyond what is wrong with the panel's analysis of each of the four *Manders* factors, there is another, more fundamental flaw that runs throughout the panel opinion, and that flawed reasoning seems to have begun in the *Manders* opinion. I had therefore hoped that, if this Court undertook to consider Mr. Lake's case en banc, we could have also addressed this flawed logic that first appeared in *Manders*.

The *Lake* panel repeatedly emphasizes as weighing in favor of arm-of-the state status that the sheriff is "independent from [the] [c]ounty." *Lake*, 840 F.3d at 1338; *see also id.* at 1339, 1341. The argument goes like this: because the sheriff is independent from the county, the sheriff must be an arm of the state. This mistaken premise, which (again) first appeared in *Manders*, 338 F.3d at 1319, took hold in the *Lake* panel decision. I had hoped that this mistaken premise would not become a permanent fixture of this Circuit's arm-of-the-state jurisprudence.

It is true that the sheriff, as an "elective county office[r]," occupies a constitutional office that is largely independent from other county governing authority. *See* Ga. Const. art. IX, § 2, ¶ 1(c)(1); Ga. Const. art. IX, § 1, ¶ 3; O.C.G.A. § 1-3-3(7). But the county governing authority – which is the county's legislative body and

is known as the board of county commissioners – is "not the only institution that acts *for* the county." *See Manders*, 338 F.3d at 1343 n.15 (Barkett, J., dissenting) (emphasis added). Not unlike the federal government's separation of powers among coequal branches, Georgia law creates a separation of powers at the county level: the sheriff is an executive officer of the county, and his authority is largely independent of the county's legislative body. *See Coffey v. Brooks Cty.*, 500 S.E.2d 341, 351 (Ga. Ct. App. 1998) (Eldridge, J., dissenting in part) ("The sheriff is not an entity of the State, either as an agency or department. The sheriff is a county officer; however, the sheriff is independent of and not answerable to the governing authorities of the county." (citation omitted)). "Thus, the sheriff's independence from the county commission should be interpreted not as independence *from the county*, but rather as *independent authority to act for the county* with respect to the functions entrusted his office." *Manders*, 338 F.3d at 1343 n.15 (Barkett, J., dissenting).

In any event, the panel's focus on the fact that the sheriff is largely independent of the county governing authority gives no aid in the relevant Eleventh Amendment inquiry. The Eleventh Amendment inquiry is about whether the *state* controls the sheriff and is financially responsible for his actions.[12] Wherever the

---

[12] As Judge Anderson explained in his dissent from *Manders*: "[The majority] asks the wrong question. It asks who has the most control, the state or the county. I submit that the proper question is whether the sheriff has carried his burden of proving that he is

sheriff stands within the hierarchy of county control, it is clear that the state exercises essentially no control over his feeding inmates. The state does not fund the provision of food. The state is not financially responsible for an adverse judgment against the sheriff. There is therefore no legal basis for Georgia county sheriffs to be accorded the state's sovereign immunity when they fail to give food to inmates at the county jail.

III. CONCLUSION

When *Manders* granted Georgia sheriffs Eleventh Amendment immunity for claims arising out of use-of-force policies in county jails, this Court was careful to narrowly cabin the scope of that immunity. The words this Court used in *Manders* reflected an understanding of what a serious thing it is to expand a doctrine that blocks a whole class of people from vindicating their federal rights in federal court. Every time we expand the list of sheriff's functions that are immune from suit, we impact tens of thousands of people who are detained in county jails across the state of Georgia. *See* Pet. Reh'g at 15. Most of these people have not yet been convicted of any crime and are presumed innocent.[13] Yet even in the face of this Court's express

---

an arm of the state. In other words, the issue is not the state versus the county; rather, the issue is whether the sheriff is an arm of the state *vel non*." *Manders*, 338 F.3d at 1331 (Anderson, J., dissenting).

[13] *See Manders*, 338 F.3d at 1315-17 (describing sheriffs as "custodians of pre-trial detainees" and noting limited classes of sentenced inmates in county jails); *see also Keith v. DeKalb Cty.*, 749 F.3d 1034, 1039 (11th Cir. 2014) ("The DeKalb County Jail

admonitions in *Manders*, the *Lake* panel opinion bars suit against sheriffs for virtually any way they violate a jail inmate's rights – from the use of force to the denial of medical care.

If a faithful application of this Court's and the Supreme Court's precedents required this result, I would accept it and move on. But because neither this circuit's precedent nor that of the Supreme Court supports this broad grant of immunity to Georgia county sheriffs, I respectfully dissent.

---

houses over 3,000 inmates. The overwhelming majority are pretrial detainees."); *Detention*, Cobb County Sheriff's Office (last visited Sept. 15, 2017), http://www.cobbsheriff.org/detention/ ("The Detention Division is comprised of the Jail, Work Deployment Facility and the Annex. . . . The Jail is a pretrial facility.").