No. 17-1089

In The
Supreme Court of the United States

MICHAEL LESLIE LAKE,

Petitioner,

v.

MICHAEL SKELTON,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. For purposes of Eleventh Amendment immunity, does a Georgia sheriff, who is not subject to any control by county government, perform a state function (as opposed to a county function) in responding to an insincere request for a custom religious diet by a prisoner, when the sheriff's food preparation and service is subject to state control and the sheriff is subject to state discipline for failing to comply with federal law concerning religious liberty?

2. May a petitioner seek to overturn circuit court precedent when he failed to raise the issue in the lower courts?

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INTRODUCTION

The Court should deny the petition for the writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit. *Lake v. Skelton*, 840 F.3d 1334 (11th Cir. 2016), *rehearing denied*, 871 F.3d 1340 (2017).

Eleventh Amendment immunity applies to both First Amendment religious exercise claims under 42 U.S.C. § 1983 and claims brought under the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a) (RLUIPA). *Quern v. Jordan*, 440 U.S. 332, 342-45 (1979); *Sossamon v. Texas*, 563 U.S. 277, 292-93 (2011).

The record shows that Petitioner Michael Lake's request for a "religious" diet was patently insincere, making this case particularly ill-suited for a broad review of Eleventh Amendment jurisprudence.

Lake now asks this Court to overturn circuit court precedent established in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1107 (2004), and followed by the Eleventh Circuit in many subsequent cases. Lake did not argue this position in the courts below. Even on his petition for rehearing in the Eleventh Circuit, Lake did not challenge the *Manders* precedent. (Petition for Rehearing, at 7).

Moreover, the Eleventh Circuit's *Manders* decision has proven to be a very compelling and workable application of the Eleventh Amendment to the office of sheriff. As the court held in the present case, the

multiple factors outlined in *Manders* – definition, control, funding, and judgment responsibility – pointed to immunity for the function at issue here of responding to an insincere request for a religious diet. The lower court did not decide whether any other function of a sheriff is a state, as opposed to a county, function.

Moreover, this case presents no circuit conflict or tension with the prior decisions of this Court. Lake offers no convincing reason to unsettle Eleventh Amendment law.

STATEMENT OF THE CASE

A. Lake's Arrest for Aggravated Stalking and Detention at the Cobb County Adult Detention Center

Since 1993, when he was in the eighth grade in Maine, Lake has been obsessed with then-classmate Leslie A. (Doc. 50 at 26-27). Leslie has consistently rejected Lake's persistent advances. (Doc. 109-6 (Lake Dep.) at 136-140; Doc. 109-9 (Dep. Exhibit 6) at 6, 26-27; Doc. 109-9 (Dep. Exhibit 5) at 3).

When Leslie rejected Lake's demands, Lake followed her cross-country from Maine to Georgia. Lake was arrested on November 28, 2011 for aggravated stalking of Leslie and held without bond at the Cobb County Adult Detention Center (CCADC), which is operated by the Cobb County, Georgia Sheriff's Office (CCSO), until July 15, 2013. (Doc. 101 ¶ 5; Lake Dep. at 18; 40-42).

B. Lake's Vegetarian Diet "Vow"

The views that Lake labels "religious" are unintelligible. (Lake Dep. at 16:3-5). Lake says that in 1997 he made a "vow" to be a vegetarian in order to appease God and win the affection of Leslie. (Lake Dep. at 45-47, 139; Doc. 50 ¶ 10).

Lake says his vegetarian vow will be completed when Leslie accepts his advances. (Doc. 50 ¶ 10). He states he would stop the diet and eat meat if Leslie would enter into a relationship with him. In fact, Lake said he would participate in the "Carnivore Challenge," offered by local pizza restaurant Big Pie in the Sky, in which two people win $250 if they eat in one hour, without throwing up, an 11 lb. pizza that is half meat. (Lake Dep. at 139-143; Doc. 109-9 (Dep. Exhibits 6, 7)).

Lake says he worships Leslie. He considers her a "goddess" and "infinite being," who is superior to the Christian God, although he calls himself a Christian. (Lake Dep. at 26-27, 121, 125, 129-130). Lake also considers Leslie to be "infallible." (Lake Dep. at 144; Doc. 109-9 (Dep. Exhibit 6)).

Of course, Lake's "religious views" are impossible to reconcile with any version of Christian doctrine, which holds that there is only one God, who alone is infinite and infallible. Ephesians 4:4-6 ("There is . . . One Lord, . . . One God and Father of all. . . ."); St. Thomas Aquinas, Summa Theologica, Vol. I, Pt. 1, Q. 54, Art. 2 (ca. 1265-74/2002) ("God's being alone is

simply infinite."); Psalm 18:30 ("As for God, His way is Perfect.").

Lake has never been a follower of any Christian denomination, such as Seventh Day Adventism, that practices vegetarianism. (Lake Dep. at 57-59).

When Lake was specifically asked by personnel at the CCADC what "sub group" of Christianity he followed, he did not respond. (Lake Dep. at 206-207, 209-210; Doc. 109-10 (Dep. Exhibit 11)). And he asserted his Fifth Amendment right against self-incrimination. (Lake Dep. at 235-238; Doc. 109-9 (Dep. Exhibit 8) page dated 05-15-2012).

Lake claims his vegetarian vow is religious just because there is a religious duty to keep all vows, regardless of content. (Lake Dep. at 59-60).

The desire for a vegetarian diet is a preference on Lake's part. (Doc. 109-8 (Skelton Dep.) at 19-20, 44-60; Doc. 109-11 (Dep. Exhibit 21)). Lake's professed vegetarianism reflects a bizarre obsession that is not Christian in any sense, though that is the religion nominally proclaimed by Lake. (Lake Dep. at 172, 206-207, 209-210; Docs. 109-9, 109-10, 109-11 (Dep. Exhibits 8, 11, 21)).

C. Other Extreme Efforts by Lake to Impress Leslie

In addition to his vow to follow a vegetarian diet until Leslie responds, Lake has also sought to impress Leslie in other ways. He testified in deposition that he

developed a computer language or program that he planned to sell, raising $500 million that he would give to Leslie as an inducement to accept him. (Lake Dep. at 134-135; Doc. 109-9 (Dep. Exhibit 4)).

Lake says he also wishes to become Leslie's legal slave. (Lake Dep. at 139-140, 161-162; Doc. 109-9 (Dep. Exhibit 6) at 27). And Lake has even proposed sacrificing his life by becoming an organ donor to Leslie. (Lake Dep. at 162).

D. Defendant Michael Skelton

Defendant Michael Skelton was employed by the CCSO, headed by Cobb County Sheriff Neil Warren, from March 1986 until April 30, 2014, when he retired. (Skelton Dep. at 18, 96-97). During 2011-2013, Skelton was a Major working at the CCADC as Operational Support Commander. (Skelton Dep. at 6; Doc. 109-4 (Skelton Decl.) ¶¶ 2-3).

E. Lake's Request at the Cobb County Adult Detention Center for a Custom "Religious" Diet

After he was arrested and confined at the CCADC, Lake requested a diet that met the following requirements:

- vegetarian with no gelatin;
- no products made by "Pepsi (Frito Lays, Doritos, Quaker Oats, Tropicana) nor Kraft (Cad[bury], Nabisco)," (Doc. 101 9,

18, 24; Lake Dep. at 71-72, 82-83; Doc. 109-7 (Howell Dep.) at 35:15-37:3; Doc. 109-10 (Dep. Exhibits 17, 19)); and

- no "allocation" of meat products at any point in the pre-consumer distribution claim, even if the meal served to Lake actually contained no meat products (Lake Dep. at 92, 203-204).

Lake contends he was denied an acceptable diet during his incarceration from November 28, 2011 until November 29, 2012, except for August 29, 2012 to November 13, 2012 when he was at Georgia Regional Hospital, a psychiatric facility, and provided a vegetarian diet he now says was acceptable to him. (Doc. 101 ¶¶ 5, 11, 43, 44, 47, 48; Lake Dep. at 148-149).

The simple vegetarian diet that Lake apparently accepted at Georgia Regional Hospital beginning in August 2012 and then began consuming when he was transferred back to the CCADC in November 2012 was not, Skelton contends, the same custom branded diet that he had demanded one year earlier.

F. Policy at CCADC Regarding Special Dietary Requests

During the period in which Lake was detained at the CCADC, the CCSO offered standard meals to prisoners and a wide variety of medical and religious diets. (Doc. 109-3 (Prince Decl.) ¶¶ 3-6; Doc. 109-2 (Craig Decl.) ¶ 3; Doc. 109-11 (Dep. Exhibit 28)). The CCSO offered the following specialty diets:

- Ramadan for Muslims,
- Kosher for Jews,
- Heart Health/Bland,
- Renal Dialysis (kidney failure),
- Pregnancy,
- Nutrition Support,
- High Fiber,
- No Fluid-Milk,
- Reduced Liver Function (Cirrhosis),
- No Concentrated Sweets,
- Diabetic, 1800 calories,
- Diabetic, 2200 calories,
- Diabetic, 2600 calories,
- Diabetic, 3000 calories,
- High Protein Full Liquid Straw,
- Full Liquid (3 days),
- Clear Liquid (2 days),
- No Peanut,
- Dental/Mechanical,
- No Wheat,
- No Eggs.

(Prince Decl. ¶ 4; Craig Decl. ¶ 3; Doc. 109-11 (Dep. Exhibit 28); Skelton Dep. at 98:7-10; Howell Dep. at

33-34, 58-59). Lake was not content to accept either a standard meal (and avoid eating the meat) or any of these specialty diets. Instead, he demanded the custom diet described above.

Policy 6.10 of the Cobb County Adult Detention Center Policy and Procedure Manual was in effect during Lake's detention. It provided: (1) inmates could refuse meals, (2) inmates could receive "special medical diet[s]," (3) inmates could receive "diets for religious purposes," with appropriate approval, but (4) "[n]o special meals w[ould] be ordered to accommodate inmates' personal preference or likes or dislikes for particular food items." (Prince Decl. ¶ 5).

G. Response to Lake's Request for a Custom Diet

On December 20, 2011, Skelton spoke to Lake regarding Lake's request for a custom vegetarian diet and asked Lake what the religious basis was for the request. Lake said that he was a Christian but did not describe a doctrinal basis. Also, Lake told Skelton that he would not eat Pepsi, Kraft, General Mills, and certain other brands of food products. Due to Lake's response, Skelton concluded that Lake's request was not based on a sincere religious belief and told Lake, "That sounds like more of preference, and we don't issue diets on preference." (Skelton Dep. at 19-20, 44-60; Doc. 109-11 (Dep. Exhibit 21)).

Skelton sent a memorandum to Lake summarizing the meeting and stating "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 [sic] one will not be provided." (Skelton Dep. at 44-45; Doc. 109-11 (Dep. Exhibit 21)).

As noted earlier, when questioned at CCADC by Skelton about the basis for his request for a vegetarian diet, Lake specifically invoked his Fifth Amendment privilege against self-incrimination. (Lake Dep. at 235-238; Doc. 109-9 (Dep. Exhibit 8) page dated 05-15-2012).

As a result, Lake was provided with the 3,000 calorie diabetic diet at CCADC during the period he says he was denied a branded custom diet according to his wishes. (Howell Dep. at 55, 88-89, 91; Doc. 109-12 (Dep. Exhibit 40)).

Rather than eating the non-meat portions and/or trading meat portions for vegetarian items in the 3,000 calorie diet served to him, Lake gave the entire plates away to other prisoners because, according to him, the servings reflected that meat products had been "allocated" to him. (Lake Dep. at 92, 107-109, 203). Lake's refusal to eat apparently caused him to lose weight.

H. Administrative Burden on Cobb County Sheriff's Office in Providing Diets Based on Personal Preference

During the time that Lake was detained at the CCADC, the facility housed approximately 1,800 prisoners. Each inmate received three meals per day. Therefore, about 5,400 meals were served per day at the CCADC. (Prince Decl. ¶ 6).

Although providing special diets for medical or religious reasons did not increase the costs charged by the vendor for food served to prisoners, providing special diets did increase the burden on the CCSO. It complicated the process of ordering, taking delivery, and serving food to prisoners. (Skelton Dep. at 66-69, 81-83; Doc. 109-11 (Dep. Exhibit 22); Prince Decl. ¶¶ 6-9; Craig Decl. ¶ 3).

To have accommodated requests such as Lake's for a custom vegetarian diet that included no Pepsi, Kraft, or other branded products, and included no allocation of meat products at any point in the pre-consumer distribution chain, would have created an additional administrative and operational burden for the CCSO. Its personnel had no way of determining whether meals contained certain branded products, e.g., macaroni and cheese made from Kraft products. And they had no means of determining whether meat had ever been "allocated" for meals. (Skelton Dep. at 66-69; Doc. 109-11 (Dep. Exhibit 22); Prince Decl. ¶¶ 6-9; Craig Decl. ¶ 3).

To have accommodated requests such as Lake's for a vegetarian diet that included no Pepsi, Kraft, or

certain other branded products, and contained no pre-consumer meat allocation, would have also undermined security at CCADC by diverting attention of personnel away from their security duties. (Prince Decl. ¶ 9).

I. Commissary Food for Prisoners

In addition to the food served to prisoners at CCADC by the CCSO, prisoners have been able to order food items from the commissary once a week. The commissary carries many items that do not contain meat. (Howell Dep. at 122:8-22; Prince Decl. ¶ 11).

REASONS FOR DENYING THE WRIT

I. Although the Sincerity of Lake's "Religious" Belief Was Not Before the Eleventh Circuit, it Was Raised in the District Court and Can Be Weighed in this Court's Consideration of the Petition for Writ of Certiorari.

Respondent appealed to the Eleventh Circuit on an interlocutory basis from the district court's denial of Eleventh Amendment immunity. Thus, the sincerity of Lake's "religious" belief was not before that court, although it was argued in the district court as a ground for summary judgment on both Lake's RLUIPA and First Amendment religious exercise claims. (Doc. 109, at 15-29 (ECF pagination); Doc. 123, at 6-11). The

district court ruled that it was a question of fact. (Doc. 127, at 11-12).

However, this Court may consider issues raised by the record that were not addressed by the court of appeals. As the Court held in *Vance v. Terrazas*, 444 U.S. 252 (1980), "[C]onsideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the Court of Appeals is not beyond our power, and in appropriate circumstances we have addressed them." *Id*. at 259. *See also Dayton Bd. of Ed. v. Brinkman*, 433 U.S. 406, 418-19 (1977) ("respondents . . . are entitled under our precedents to urge any grounds which would lend support to the judgment below"); *Dandridge v. Williams*, 397 U.S. 471, 476 (1970) ("The prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court."); *Cole v. Ralph*, 252 U.S. 286, 289-90 (1920) ("The defendant does not rely entirely upon the ground of decision advanced by the Circuit Court of Appeals, but urges at length that, if it be not well taken, the record discloses other grounds, not considered by that court. . . . In the circumstances it is open to us . . . to proceed ourselves to a complete decision.").

For both his RLUIPA and First Amendment religious exercise claims, Lake must first prove that he held a religious belief that was sincere and required him to follow a vegetarian diet excluding certain brands and for which no animal products had ever been allocated. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015)

("Under RLUIPA, . . . a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation."); *United States v. Seeger*, 380 U.S. 163, 185 (1965) (under the First Amendment, "the threshold question of sincerity . . . must be resolved in every case" raising conscientious objector status to military service).

This issue of sincere religious belief breaks into two questions: "whether the beliefs avowed are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things." *Africa v. Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981) (*citing Seeger*, 380 U.S. at 185). As the Third Circuit acknowledged in *Africa*, the courts by necessity must make "uneasy differentiations" in this area. *Id*. at 1031.

Beliefs 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. The Supreme Court has held: "Only beliefs rooted in religion are protected by the Free Exercise Clause, which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 713 (1981).

In making these determinations, courts do not evaluate the truth or falsity of a religious belief. *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. In *Thomas*, the Supreme

Court mandated: "Courts should not undertake to dissect religious beliefs because the believer admits that he is 'struggling' with his position or because his beliefs are not articulated with the clarity and precision that a more sophisticated person might employ." *Thomas*, 450 U.S. at 715.

But in *Thomas*, the Court recognized: "One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause. . . ." *Thomas*, 450 U.S. at 715-16. And in *Africa*, the Third Circuit concluded that a "single-faceted" ideology such as "vegetarianism," which is not part of a "comprehensive belief system," is not religious. 662 F.2d at 1035. The Eleventh Circuit has also acknowledged that "some inmate claims may be so idiosyncratic as to be insincere." *Martinelli v. Dugger*, 817 F.2d 1499, 1500 (11th Cir. 1987).

Therefore, busy prison officials are inevitably called upon to determine whether a request for a religious diet or some other religious practice is based on a sincere religious belief. As the Ninth Circuit recognized in *McElyea v. Babbitt*, 833 F.2d 196 (9th Cir. 1987), "It is appropriate for prison authorities to deny a special diet if an inmate is not sincere in his religious beliefs." *Id*. at 198.

Lake's request for a custom vegetarian diet excluding certain brands and for which no animal products had been allocated was neither (1) religious nor (2) sincere. In effect, it was a personal preference, no

different than a request for a coconut-free diet based on personal taste. Lake's request flowed entirely from his irrational obsession with Leslie, rather than any religious commitment.

The non-religious nature and insincerity of Lake's request is shown by many factors including: his willingness to abandon the diet and gorge himself on meat if Leslie would accept his advances; his demand that food trays exclude not just meat but also products made by certain major food companies; the insistence that no animal products ever have been allocated for his consumption; and his invocation of the Fifth Amendment when asked the basis for his diet request. As to allocation, the demand by Lake was not just that no meat be served to him but also that in fact no animal products ever have been allocated for his meal, which the sheriff's office could not possibly have known inasmuch as it purchased prepared food from outside contractors.

Because the Court's consideration of the sincerity of Lake's "religious" belief would warrant affirmance of the Eleventh Circuit's ruling on entirely separate grounds, this case is not worthy of certiorari review.

II. The Court Should Not Entertain Lake's Challenge to the Eleventh Circuit's *Manders* Decision Because Lake Did Not Raise it in the Courts Below.

Before petitioning this Court for certiorari, Lake never directly challenged the Eleventh Circuit's en

banc decision in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1107 (2004). In his petition for rehearing in the Eleventh Circuit, Lake genuflected to *Manders*, arguing that the panel decision should be overturned because it was "contrary to *Manders v. Lee*." (Petition for Rehearing, at 7).

Now, for the first time in the long history of this case, Lake explicitly urges this Court to overturn *Manders*. He says, "The Eleventh Circuit majority opinion, unfortunately, reflects the serious problems that exist with the current arm-of-the-state analysis . . . the Eleventh Circuit's precedent was already incorrect before this case." (Petition for Cert., at 22). According to Lake, the Eleventh Circuit's consideration in this case of the independence of a Georgia sheriff from the local county is an "error from *Manders*." (Petition for Cert., at 24).

"Ordinarily, this Court does not decide questions not raised or resolved in the lower court." *Youakim v. Miller*, 425 U.S. 231, 234 (1976). *See also OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 398 (2015) ("Absent unusual circumstances . . . we will not entertain arguments not made below."). Instructively for our case, the Court declined in *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988), to consider an argument not adequately presented on a petition for rehearing in the appellate court below. *Id*. at 77.

The failure of Lake to challenge *Manders* in the lower courts, particularly on the petition for rehearing, should be seen as precluding his effort to overturn

Manders in this Court. This provides an additional reason for the Court to decline the petition.

III. The Court of Appeals Faithfully Followed the Teachings of this Court and its Own Precedents in Holding that Lake's Claim for Damages Based on the Sheriff's Response to His Request for a Custom "Religious" Diet Is Barred by the State's Eleventh Amendment Immunity.

The Eleventh Circuit carefully applied existing Eleventh Amendment jurisprudence in reaching the conclusion that "the sovereign immunity of Georgia extends to a deputy sheriff who denies a dietary request of an inmate in a county jail." *Lake*, 840 F.3d at 1336. The lower court did not decide whether other functions carried out by a Georgia sheriff are covered by sovereign immunity.

The court of appeals' decision in this case is not contrary to *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1984), nor did the Eleventh Circuit concede any inconsistency – unlike Lake's specious argument here. (Petition for Cert., at 17). In *Hess*, the Court ruled 5-4 that the Port Authority Trans-Hudson Corporation was "not cloaked with the Eleventh Amendment immunity that a State enjoys." *Id*. at 32-33. The Court grounded its decision on two factors: (1) the "bi-state" nature of the Port Authority as a "Compact Clause entity" created by Congress along with the

States of New Jersey and New York, distinguishing it "significantly" from a state sovereign; and (2) the absence of any actual state "financial responsibility" for the Port Authority, which "generate[d] its own revenues, and for decades ha[d] received no money from the States." *Id*. at 39-51. Our case does not involve a bistate entity and here there is more than a theoretical effect on the state treasury.

In the present case, the court of appeals applied to the sheriff the four-part test for Eleventh Amendment immunity enunciated by the court en banc in 2003 and as to which the Supreme Court denied certiorari. *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1107 (2004). The Eleventh Circuit has applied the same yardstick in numerous other cases, in some of which this Court has also denied certiorari. *E.g.*, *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003) (en banc); *Pellitteri v. Prine*, 776 F.3d 777 (11th Cir. 2015); *Ross v. Jefferson County Dep't of Health*, 701 F.3d 655, 660 (11th Cir. 2012); *Scott v. Mercier*, 268 F. App'x 872 (11th Cir.), *cert. denied*, 554 U.S. 904 (2008); *2025 Emery Highway, L.L.C. v. Bibb Cty.*, 218 F. App'x 869 (11th Cir.), *cert. denied*, 552 U.S. 1009 (2007); *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298 (11th Cir. 2005); *Purcell ex rel. Estate of Morgan v. Toombs County*, 400 F.3d 1313 (11th Cir. 2005).

Under *Manders*, a Georgia sheriff is entitled to Eleventh Amendment immunity when sued in his official capacity for performing a state function. *Manders*, 338 F.3d at 1308, 1319, 1328-29. In Georgia, a "sheriff's office is not a division or subunit of [a c]ounty or its

county governing body, and, thus, it is not a structural part of [a c]ounty government." *Id*. at 1310. A Georgia sheriff "functions as an arm of the State – not of [the c]ounty – when promulgating policies and procedures governing conditions of confinement at the . . . County Jail." *Purcell*, 400 F.3d at 1325. *See also Grech*, 335 F.3d at 1333 ("In contrast to the control it gives the State, Georgia's Constitution does not grant counties legislative power or authority over sheriffs and expressly prevents counties from controlling or affecting the sheriff's elective county office.").

The role of sheriffs in Georgia is thus similar to that of Alabama sheriffs. Affirming the Eleventh Circuit, the Supreme Court held in *McMillian v. Monroe County*, 520 U.S. 781 (1997): "Alabama sheriffs, when executing their law enforcement duties, represent the State of Alabama, not their counties." *Id*. at 793.

In order to determine, under existing case law, whether a Georgia sheriff is entitled to Eleventh Amendment immunity from a particular claim, "the proper inquiry is whether [the] Sheriff . . . acts for the State or [ ] County in the particular functions at issue." *Manders*, 338 F.3d at 1309 n.9. The Eleventh Circuit in *Manders* employed four factors in deciding this question:

> In Eleventh Amendment cases, this Court uses four factors to determine whether an entity is an "arm of the State" in carrying out a particular function: (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. (citations omitted).

Before the present case, the Eleventh Circuit had never decided whether a sheriff performs a state function in responding to a request for a "religious" diet or providing food to prisoners.

The court of appeals began its analysis in this case by outlining the structure and duties of the local sheriff's office in Georgia. The court quoted *Manders*: "'Most of those duties are an integral part of the State's criminal justice system and are state functions.'" *Lake*, 840 F.3d at 1338 (*quoting Manders*, 338 F.3d at 1319).

The Eleventh Circuit then summarized the numerous levers of control exercised by the State of Georgia over local sheriffs. The court explained that, although counties must fund their sheriffs' offices, they have absolutely no authority over sheriffs. *Lake*, 840 F.3d at 1339 (*quoting Manders*, 338 F.3d at 1318).

In other cases, the court of appeals has recognized that state functions exercised by a Georgia sheriff include:

- "establishing use-of-force policy at the jail," *Manders*, 338 F.3d at 1305-06;
- preventing "inmate-on-inmate attack[s]," *Purcell*, 400 F.3d at 1325;

- "enforcing the laws and in keeping the peace," *Grech*, 335 F.3d at 1333; and
- "exercising [the] power to hire and fire . . . deputies." *Pellitteri v. Prine*, 776 F.3d 777, 779 (11th Cir. 2015).

The Eleventh Circuit plugged the facts of this case into the four-factor *Manders* test. The *first* factor is "how state law defines" the function. The court recognized that state law, Ga. Code Ann. § 42-4-32, prescribes the number of meals served to inmates and requires that "[a]ll aspects of food preparation and food service shall conform to the applicable standards of the [State of Georgia] Department of Public Health." The court of appeals also recounted, "'Georgia's Constitution precludes the county from exercising any authority over . . . how the sheriff spends [his] budget.'" *Lake*, 840 F.3d at 1340-41 (*quoting Manders*, 338 F.3d at 1311). Thus, the Eleventh Circuit held that the first *Manders* factor "strongly favor[s] immunity." *Lake*, 840 F.3d at 1344.

In denying rehearing, the panel judges explained that the Georgia law labelling sheriffs as "county officers" refers to "their limited geographical jurisdiction" not to the source or nature of their powers. *Lake*, 871 F.3d at 1342 (citation omitted).

The dominant fallacy underlying all of Lake's arguments is the failure to recognize that in the final analysis federal law, which is the source of Eleventh Amendment immunity, determines whether a sheriff acts as an arm-of-the-state. In its twin 2003 en banc

decisions, the Eleventh Circuit, after considering state law, held that the status of a Georgia sheriff for Eleventh Amendment immunity purposes is a question of federal law. In *Manders*, the court ruled: "The issue of whether an entity is an 'arm of the State' for Eleventh Amendment purposes is ultimately a question of federal law. But the federal question can be answered only after considering provisions of state law." 338 F.3d at 1309. In *Grech v. Clayton County*, 335 F.3d 1326 (11th Cir. 2003) (en banc), the court of appeals stated the principle in these words: "[T]he appropriate [42 U.S.C.] § 1983 inquiry under federal law is whether defendant Clayton County, under Georgia law, has control over the Sheriff in his law enforcement function, particularly for the entry and validation of warrants on the CJIS systems and the training and supervision of his employees in that regard." *Id*. at 1331-32.

As to the *second* factor from *Manders*, control over the sheriff, the court of appeals held that the State of Georgia's retention of control over "[a]ll aspects of food preparation and food service" also "strongly favor[ed] immunity." *Lake*, 840 F.3d at 1344. The obligation of counties to pay for the food, without any control over its preparation and service, does not support denial of Eleventh Amendment immunity. *Lake*, 871 F.3d at 1343 (*quoting Manders*, 338 F.3d at 1324, 1323) ("[I]n *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.' ").

As the Eleventh Circuit held in this case, the State of Georgia exercised two forms of control over the response of the CCSO to Lake's request for a branded custom diet, which makes the response a state function. The first form of control was the state's regulation of "food preparation and service." Although counties must pay for the food of prisoners in their jails, Ga. Code Ann. § 42-5-2(a), the state controls "food preparation and food service" in county jails. Under Ga. Code Ann. § 42-4-32(a), "All aspects of food preparation and food service shall conform to the applicable standards of the [Georgia] Department of Public Health." *See* Ga. Comp. R. & Regs. §§ 511-6-1-.01, et seq. (available at http://rules.sos.ga.gov/gac/290-5-14). The state, therefore, governs the manner in which food is prepared and served to prisoners.

The second form of control exercised by the state over the response of the CCSO to Lake's request for a branded custom diet, with a purported religious basis, is its disciplinary and licensing authority over the Cobb County Sheriff and his deputies. According to the Georgia Peace Officer Standards and Training Act (POST), Ga. Code Ann. § 35-8-7.1(a)(7), the Georgia Peace Officer Standards and Training Council (a state agency) has the authority to "discipline a council certified officer," such as Skelton, for "violat[ing] or attempt[ing] to violate a law . . . of the United States." Deputy sheriffs are state-certified peace officers, Ga. Code Ann. § 35-8-2(8)(A). Georgia sheriffs and their

deputies are required by the state to comply with all federal laws, including the Free Exercise Clause of the First Amendment and RLUIPA. In accommodating or responding to a prisoner's purported exercise of federally-protected religious exercise rights, a Georgia sheriff is thus acting, for Eleventh Amendment purposes, as a state official.

The Eleventh Circuit has in other cases recognized discipline of sheriffs as a form of state control. *Manders*, 338 F.3d at 1321-22 n.41 ("[T]he State can discipline directly Sheriff Peterson for any misconduct. That sheriffs act as to state matters (and not as to local government matters) is, in part, why counties, and cities too, have no power, authority, or control over sheriffs."); *Grech*, 335 F.3d at 1347 ("Clayton County does not, and cannot, direct the Sheriff how to arrest a criminal, how to hire, train, supervise, or discipline his deputies"); *Pellitteri v. Prine*, 776 F.3d 777, 781 (11th Cir. 2015) (citing the disciplinary authority of the Georgia Peace Officers Standards and Training Council as supporting the conclusion that a sheriff performs a state function when hiring and firing deputies).

The important point is that the provisions of the Georgia POST Act dangled the threat of state-imposed discipline over the heads of Warren and Skelton if they violated federal law in responding to Lake's request for a religious accommodation. For federal law purposes, that was certainly a form of state control.

The effect of these state controls over Georgia sheriffs in food service and discipline is to impose on them "the orderly administration of the jail," Ga. Code

Ann. § 42-4-4(b), which is indisputably a state function. *See Manders*, 338 F.3d at 1317 (*quoting* Ga. Code Ann. § 42-4-4); *Grech*, 335 F.3d at 1335 (same); *Purcell*, 400 F.3d at 1325 ("a sheriff's 'authority and duty to administer the jail in his jurisdiction flows from the State, not [the] County' ") (*quoting Manders*, 338 F.3d at 1315).

Thus, the response of the CCSO to Lake's religious diet request was, under *Manders*, controlled by the state, whether it is viewed as food service or a religious accommodation. The State of Georgia controlled the actions of the Cobb County Sheriff in both regards and Cobb County had no control.

In our case, we should ask whether the Cobb County Board of Commissioners can tell the sheriff how to respond to a request, based on federal law, for a religious accommodation in the service of food to a prisoner. All available authority points to the conclusion that Cobb County has no say on this matter and the sheriff is acting as a state official in responding to such a request. That Cobb County must pay for food for prisoners in no manner gives the county control over how the sheriff responds to a request for a religious diet. Rather, the sheriff's response is a matter of food preparation and service, which is dictated by the state. And this activity is subject to discipline imposed by the state for failure to respect a prisoner's federal religious exercise rights.

Regarding the *third* factor outlined in *Manders*, source of funds, the Eleventh Circuit followed precisely its en banc decision in *Manders*. On the source of funds,

the court below held: "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.' Under *Manders*, this factor slightly favors immunity." *Lake*, 840 F.3d at 1343-44. The State of Georgia pays for sheriffs' training, disciplinary mechanisms, and housing of state offenders. *Manders*, 338 F.3d at 1323.

As discussed above, the requirement of Ga. Code Ann. § 42-5-2(a) that counties buy food for prisoners in county jails does not mean that the response of the CCSO to Lake's request for a branded custom diet was the performance of a county function. The court of appeals has recognized in its Eleventh Amendment jurisprudence that Georgia counties must pay for all operations of their respective sheriffs. Yet this budgeting obligation does not give counties any control over sheriffs and does not transform them into county officials. *Manders*, 338 F.3d at 1311 ("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."); *Grech*, 335 F.3d at 1339-40 ("We acknowledge that Georgia law grants the county significant control of the 'purse strings' of the sheriff's office. The county governing body sets the total amount of the sheriff's operating budget, pays the sheriff's salary, and pays the premium for the sheriff's official bond. . . . Payment of a sheriff's salary and for equipment from county funds, when required by the state legislature, does not establish county control over the

sheriff's law enforcement conduct and policies."); *Ross v. Jefferson County Dep't of Health*, 701 F.3d 655, 660 (11th Cir. 2012) ("County funding of the [Jefferson County, Ala.] Health Department does not 'tip the balance' against immunity because there is no evidence that the county exerts control over the Health Department.").

The issue that brings us to this Court is not a failure to purchase food for Lake. He was provided nutritionally adequate food during his incarceration at the CCADC in the form of a 3,000 calorie diet. Rather, the issue here is the service of that food and the accommodation, under the Free Exercise Clause of the First Amendment and RLUIPA, of Lake's allegedly religious practice. Lake's request happened to be a purportedly religious request for a vegetarian diet that excluded certain brands and for which no animal products had been allocated. The same analysis would apply if, instead of a supposed religious diet, Lake had requested an accommodation to wear a piece of religious clothing. In either situation, the decision to grant or deny the religious request would constitute a state function, i.e., "administration of the jail," although the county is required to purchase food and clothing for a prisoner.

Consider an analogous situation involving use of force or a high-speed chase. Counties in Georgia purchase equipment for their sheriffs and their deputies. *See Clayton v. Taylor*, 223 Ga. 346, 348-49 (1967); *Keener v. Kimble*, 170 Ga. App. 674, 675 (1984). But 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. *See Manders*, 338 F.3d at 1319 ("The sheriff's authority to use force or the tools of violence, whether deadly or non-deadly force, and the sheriff's obligation to administer the jail are directly derived from the State and not delegated through the county entity."); *Grech*, 335 F.3d at 1335. Thus, although a county may purchase weapons and vehicles for deputy sheriffs, the use by them of a weapon or engaging in a high-speed chase is a state function and deputy sheriffs are protected by Eleventh Amendment immunity for such activities.

And as to the *fourth* factor, responsibility for judgments, the court again followed *Manders*. It recognized that neither a Georgia county nor the state is responsible for judgments, apparently leaving a sheriff "'to pay any adverse federal court judgment against him in his official capacity out of the budget of the sheriff's office,' which 'implicates' 'both county and state funds.'" *Lake*, 840 F.3d at 1344 (*quoting Manders*, 338 F.3d at 1327).

In his anxiety to convince this Court that his petition is worthy of review, Lake cites a reply brief signed by an assistant attorney general for the State of Georgia in an unrelated district court case. This maneuver gives nonsense a bad name. Lake apparently wants the Court to take judicial notice of this unrelated filing, although he has not filed a motion for judicial notice. *See* Fed. R. Evid. 201. Of course, the signature of an assistant attorney general has no effect

on the legal issues raised in this petition. In fact, the Georgia appellate courts do not regard an "Official Opinion" of the Georgia Attorney General as binding, or even necessarily persuasive, authority on issues of state law. *Ferguson v. Perry*, 292 Ga. 666, 670 (2013) ("We therefore do not find the [Georgia] Attorney General opinions persuasive on the issues presented here.").

The difference in immunized and non-immunized conduct in the context presented here is admittedly subtle. But, the Supreme Court reminds us, "For Eleventh Amendment purposes, the line between permitted and prohibited suits will often be indistinct." *Papasan v. Allain*, 478 U.S. 265, 278 (1986) (citation omitted).

The Eleventh Circuit admirably applied this Court's Eleventh Amendment jurisprudence and its own precedents to the response of the CCSO to Lake's bizarre and incomprehensible request for a "religious" diet. There is no reason to second-guess its judgment. And, unlike Lake's argument to this Court, the Eleventh Circuit did not address other functions performed by a Georgia sheriff. Those remain open to a function-by-function analysis, as prescribed in *McMillian v. Monroe County*, 520 U.S. 781, 786 (1997).

IV. The Court of Appeals' Decision Does Not Conflict With the Decisions of Any Circuit Court.

Lake argues fallaciously that the Eleventh Circuit decision conflicts, not only with its own precedents, but also with a decision of the Seventh Circuit. As discussed above, Lake argued in the lower courts that the Eleventh Circuit was wrong for failing to follow its precedent in *Manders* and now suddenly argues that *Manders* should be overturned.

Unlike Lake's arguments to this Court, there is no "intra-circuit" conflict in the Eleventh Circuit's decisions. Lake cites *Abusaid v. Hillsborough Cty. Bd. of Cty. Comm'rs*, 405 F.3d 1298 (11th Cir. 2005), as creating an "intra-circuit" conflict. (Petition for Cert., at 19).

But *Abusaid* does not conflict with the Eleventh Circuit's decision in the present case. In *Abusaid*, the court ruled that Florida sheriffs, whose offices can actually be abolished by counties and who are subject to substantial county control, do not act for the State of Florida in enforcing county ordinances. Thus, the court ruled Florida sheriffs are not entitled to Eleventh Amendment immunity when engaged in the function of enforcing county ordinances. *Id*. at 1310 ("[T]he Sheriff cannot be deemed to be acting under the state's control when enforcing a local ordinance."). The court followed numerous Eleventh Circuit precedents in holding that Florida sheriffs are county officials and not generally entitled to Eleventh Amendment immunity. *Id*. at 1304-05.

The *Abusaid* court also recognized that Florida counties can be liable for judgments against local sheriffs. *Id*. at 1313 ("counties certainly may be – and have been – held liable for a judgment against a sheriff"). In Georgia, on the other hand, counties are not liable for judgments against sheriffs. *Manders*, 338 F.3d at 1326 ("Georgia courts speak with unanimity in concluding that a defendant county cannot be held liable for the tortious actions or misconduct of the sheriff or his deputies and is not required to pay the resulting judgments.").

Lake cites *Franklin v. Zaruba*, 150 F.3d 682 (7th Cir. 1998), decided 20 years ago, as an "inter-circuit" conflict with the Eleventh Circuit's decision in this case. (Petition for Cert., at 22-24). In *Franklin*, which predated *Manders* by five years, the Seventh Circuit reaffirmed previous rulings that Illinois sheriffs do not act as agents of the State of Illinois "when performing their typical law enforcement duties." *Id*. at 685. In Illinois, counties are not liable "under respondeat superior for the actions of their sheriffs," although "the county board often has a statutory duty to indemnify the sheriff for damages awards." *Id*. at 685 & n.5 (*citing* 55 Ill. Comp. Stat. Ann. 5/5-1002). The Illinois indemnification statute provides:

> If any injury to the person or property of another is caused by a sheriff or any deputy sheriff, while the sheriff or deputy is engaged in the performance of his or her duties . . . the county shall indemnify the sheriff or deputy . . . for any judgment recovered against him or

> her as the result of that injury, except where the injury results from the wilful misconduct of the sheriff or deputy.

55 Ill. Comp. Stat. Ann. 5/5-1002.

By contrast, a Georgia county is never obligated to pay a judgment against its sheriff. *Manders*, 338 F.3d at 1326 ("Georgia courts have concluded that counties are not liable for, and not required to give sheriffs money to pay, judgments against sheriffs in civil rights actions.") (citations omitted). The en banc Eleventh Circuit was aware of *Franklin*, which was in fact cited in a dissenting opinion, but appropriately did not consider it pertinent to the entitlement of Georgia sheriffs to Eleventh Amendment immunity. Obviously, *Franklin* does not enlighten the issue of a Georgia sheriff's entitlement to Eleventh Amendment immunity and it certainly does not conflict with the Eleventh Circuit's decision in the present case.

There is thus no conflict in the lower courts that supports the grant of certiorari by this Court.

V. The Eleventh Amendment Bars Only Claims for Damages in Federal Court, Not Injunctive Relief.

Lake states with mock alarm that the Eleventh Circuit's decision will expose 50,000 Georgia inmates to constitutional harm without any remedy. (Petition for Cert., at 21, 26). But this Pandora's Box is not nearly so frightening as Lake portrays.

As the court of appeals stated in denying rehearing, its decision "did not address suits against sheriffs or their deputies in their individual capacities" and it "does not prevent inmates from seeking injunctive relief against sheriffs or their deputies in their official capacities." *Lake*, 871 F.3d at 1344. Indeed, under the exception established in *Ex parte Young*, 209 U.S. 123 (1908), official-capacity suits against state officials are permissible under the Eleventh Amendment when the plaintiff seeks prospective equitable relief to end continuing violations of federal law.

Moreover, the damages remedy Lake seems worried about losing would not be quite so lucrative as he seems to assume. Most inmates who might sue a sheriff for mishandling a "religious" diet request in prison would be subject to the Prison Litigation Reform Act, which does not allow damages for "mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997e. *See Searles v. Van Bebber*, 251 F.3d 869, 872 (10th Cir. 2001) (holding inmate who "sued several prison officials alleging the defendants had violated his First Amendment right to free exercise of religion by denying him approval for a kosher diet" could not recover for mental or emotional harm inasmuch as the jury found no physical injury).

Thus, the court of appeals' decision in this case, which does no more than follow well-established Eleventh Circuit precedent, does not suddenly expose Georgia prisoners to constitutional harm with no

remedy. Remedies that have always existed remain available.

CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari, declining the invitation to unsettle the law of Eleventh Amendment immunity in order to assist a petitioner peddling a patently insincere religious claim. *Manders* and its progeny have provided a very workable and stable framework for application of the Eleventh Amendment to damages claims against local sheriffs. The circumstances of this case present no good reason to undermine this framework.

Respectfully submitted,

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