No. 12-11735
THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRUCE RICH,
Plaintiff-Appellant,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ET AL.*,
Defendants-Appellees.

On Appeal from the United States District Court for the Northern District of Florida, Gainesville Division, No. 1:10-cv-00157-MP-GRJ,
Hon. Maurice M. Paul, United States District Judge

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF FLORIDA AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Randall C. Marshall
ACLU Foundation of Florida
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
Tel. (786) 363-2700
Fax. (786) 363-1108
rmarshall@aclufl.org

Daniel Mach
David C. Fathi*
Heather L. Weaver
ACLU Foundation
915 15th St., NW
Washington, DC 20005
Tel. (202) 675-2330
Fax. (202) 546-0738
dmach@aclu.org
hweaver@aclu.org
dfathi@npp-aclu.org

**Not admitted in DC; practice limited to federal courts*

Attorneys for Amici Curiae, ACLU and ACLU of Florida

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amici* certify that persons interested in this case are those listed in the briefs filed in this case and also the American Civil Liberties Union ("ACLU") Foundation , the ACLU, the ACLU Foundation of Florida, and the ACLU of Florida. The ACLU and the ACLU of Florida are non-profit corporations, have no parent corporations, and are not publicly held.

Known persons who have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party are:

1. Rich, Bruce: Plaintiff-Appellant;

2. Goodrich, Luke W.: The Becket Fund for Religious Liberty, counsel for Plaintiff-Appellant;

3. Rassbach, Eric C.: The Becket Fund for Religious Liberty, counsel for Plaintiff-Appellant;

4. Buss, Edwin G.: Defendant-Appellee, Secretary of Florida Department of Corrections;

5. McNeil, Walter: Defendant-Appellee, former Secretary of Florida Department of Corrections;

6. Hicks, Milton: Defendant-Appellee, former retired warden;

7. Robinson, S.T.: Defendant-Appellee, former Assistant Warden of Programs;

8. Andrews, Jeffrey: Defendant-Appellee, Food Service Director;

9. Furman, Kathleen: Defendant-Appellee, Registered Dietician;

10. Deno, Julie: Defendant-Appellee, Food Service;

11. Taylor, Alex: Defendant-Appellee, Chaplaincy Services Administrator;

12. Thigpen, Albert: Defendant-Appellee, Food Service Administrator;

13. Bondi, Pam: Office of the Attorney General, counsel for Defendants-Appellees;

14. Stubbs, Joy A.: Office of the Attorney General, counsel for Defendants-Appellees;

15. Maher, Susan Adams: Office of the Attorney General, counsel for Defendants-Appellees;

16. Belitzky, Joe: Office of the Attorney General, counsel for Defendants-Appellees;

17. Paul, Maurice M.: Senior District Judge;

18. Jones, Gary R.: Magistrate Judge;

19. Mach, Daniel: Counsel for *Amicus Curiae,* ACLU;

20. Fathi, David C., Counsel for *Amicus Curiae,* ACLU;

21. Weaver, Heather L. Counsel for *Amicus Curiae,* ACLU; and

22. Marshall, Randall C. Counsel for *Amicus Curiae,* ACLU of Florida.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT C-1

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

INTERESTS OF *AMICI CURIAE* 1

STATEMENT OF THE ISSUES.....1

SUMMARY OF THE FACTS.....2

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. THE DOC'S BLANKET BAN ON KOSHER MEALS DOES NOT FURTHER A COMPELLING STATE INTEREST.....12

A. The DOC's Speculative and Unsupported Security Concerns Do Not Establish That Its Policy Advances a Compelling Interest. 14

1. Inmate morale.....16

2. Other prisoners' requests for religious diets. 17

3. Rich's request for a kosher diet.....20

B. The DOC's Unsupported and Inflated Claims About Cost Do Not Evince a Compelling Interest. 21

II. THE DOC'S BLANKET BAN ON KOSHER MEALS IS NOT THE LEAST RESTRICTIVE ALTERNATIVE. 26

CONCLUSION.....29

CERTIFICATE OF COMPLIANCE.....30

CERTIFICATE OF SERVICE.....31

TABLE OF AUTHORITIES

Cases

Abdulhaseeb v. Calbone, 600 F.3d 1301 (10th Cir. 2010) 25

Baranowski v. Hart, 486 F.3d 112 (5th Cir. 2007).....13

Beerheide v. Suthers, 286 F.3d 1179 (10th Cir. 2002) 11, 18, 25

Caruso v. Zenon, No. 95-MK-1578, 2005 WL 5957978 (D. Colo. July 25, 2005).....17

City of Boerne v. Flores, 521 U.S. 507, 117 S. Ct. 2157 (1997).....7

Cutter v. Wilkinson, 544 U.S. 709, 125 S. Ct. 2113 (2005) ..... *passim*

Employment Division v. Smith, 494 U.S. 872, 110 S. Ct. 1595 (1990).....7

Glenn v. Brumby, 663 F.3d 1315 (11th Cir. 2011).....8

Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal, 546 U.S. 418, 126 S. Ct. 1211 (2006)..... *passim*

Linehan v. Crosby, 346 F. App'x 471, No. 08-15780, 2009 WL 3042038 (11th Cir. 2009) 13, 14

Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250, 94 S. Ct. 1076 (1974) 22

Miller v. Johnson, 515 U.S. 900, 115 S. Ct. 2457 (1995) 8

Miller-El v. Cockrell, 537 U.S. 322 (2003) 11

Moussazadeh v. Tex. Dep't of Criminal Justice, CIV.A. G-07-574, 2011 WL 4376482 (S.D. Tex. Sept. 20, 2011) 13

O'Bryan v. Bureau of Prisons, 349 F.3d 399 (7th Cir. 2003) 17, 26

Procunier v. Martinez, 416 U.S. 396, 94 S. Ct. 1800 (1974), *overruled on other grounds by*, *Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874 (1989).....9

Rouser v. White, 630 F. Supp. 2d 1165 (E.D. Cal. 2009).....22

Shakur v. Schriro, 514 F.3d 878 (9th Cir. 2008) ..... *passim*

Sherbert v. Verner, 374 U.S. 398, 83 S. Ct. 1790 (1963).....18

Smith v. Ozmint, 578 F.3d 246 (4th Cir. 2009).....10

Spratt v. R.I. Dep't of Corr., 482 F.3d 33 (1st Cir. 2007) ..... *passim*

Turner v. Safley, 482 U.S. 78, 107 S. Ct. 2254 (1987).....21

Udey v. Kastner, 805 F.2d 1218 (5th Cir. 1986) 22

Warsoldier v. Woodford, 418 F.3d 989 (9th Cir. 2005) 10, 11, 26, 28

Washington v. Klem, 497 F.3d 272 (3d Cir. 2007).....14

Willis v. Comm'r, Ind. Dep't of Corr., 753 F. Supp. 2d 768 (S.D. Ind. 2010).....22

Statutes

Religious Freedom Restoration Act, 42 U.S.C. § 2000bb (1993).....7

Religious Land Use and Institutionalized Persons Act,
42 U.S.C. § 2000cc (2000) 1, 8, 10, 21

Other Authorities

11th Cir. R. 36-2 14

11-56 Moore's Federal Practice-Civil § 56.13 10

146 Cong. Rec. S7774, S7775 (2000) 11

Aleph Institute, About Us, http://aleph-institute.org/about-us.html (last visited Aug. 3, 2012) 3

INTERESTS OF *AMICI CURIAE*[1]

The American Civil Liberties Union Foundation ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members. The ACLU of Florida is a state affiliate of the national ACLU. Throughout its 90-year history, the ACLU has been at the forefront of efforts to protect religious liberty, as well as the rights of prisoners, and has appeared before this Court in numerous cases involving those issues, both as direct counsel and as *amicus curiae*. As organizations that have long been dedicated to protecting and preserving prisoners' rights and religious liberty, the ACLU and the ACLU of Florida have a strong interest in the proper resolution of this controversy.[2]

STATEMENT OF THE ISSUES

The issue presented on appeal is whether the Florida Department of Corrections has established, in accordance with its heavy burden under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc (2000), that denying Appellant a kosher diet (1) furthers a compelling government interest and (2) is the least restrictive means of achieving that interest.

---

[1] This brief is submitted with the accompanying Motion of the American Civil Liberties Union and the American Civil Liberties Union of Florida for Leave to File a Brief as *Amici Curiae* in support of Plaintiff-Appellant.

[2] No party's counsel authored any part of this brief, and no person other than the *amici curiae* and their counsel contributed funds to the preparation or submission of this brief.

SUMMARY OF THE FACTS

Plaintiff-Appellant Bruce Rich is an observant Jewish inmate in the custody of the Florida Department of Corrections ("DOC" or "State"). In August 2010, Appellant brought suit *pro se* under RLUIPA, alleging that the DOC violated his rights by denying him kosher meals. R. 8-23 (Doc. 1).[3] As a Jew, Rich sincerely believes that the Torah requires him to consume a kosher diet. *Id.* at 167-68 (Doc. 52). The option provided by the DOC, a vegan or vegetarian meal, does not satisfy Rich's religious needs for two reasons. *Id.* at 171 (Doc. 52). First, diets that do not contain meat are not necessarily kosher. Even though fruits and vegetables are kosher products, they must be kept separate from non-kosher items in order to conform to the Torah's requirements, as Rich understands them. *Id.* at 18 (Doc. 1). Second, Rich believes that the Torah commands him to consume meat during certain meals and that the meat must be certified kosher. *Id.* at 14 (Doc. 1).

Rich's request is generally compatible with the policies and practices of the large majority of U.S. prison systems. The Federal Bureau of Prisons and up to 35 states currently provide prisoners with kosher meals. Appellant's Opening Brief ("Op. Br.") 9 & n.1 (citing nationwide kosher meal surveys commissioned by the Michigan and Florida correctional departments). These meals are typically

[3] Citations to the Record ("R.") include the relevant page number(s) visible in the lower right-hand corner of each, as designated by Plaintiff-Appellant for purposes of this appeal and, in parentheses, the document number from the district court's electronic filing system.

provided in one of two ways: by supplying one or two pre-packaged kosher meals per day, or by maintaining a kosher kitchen in one or several facilities within the state. *See* Op. Br. 10-11.

In 2004, the DOC established its own kosher diet plan, the Jewish Dietary Accommodations ("JDA") Program. R. 14 (Doc. 1); Op. Br. 19-20 (citing to JDA Report). Under the JDA Program, seven kosher kitchens throughout the DOC prepared meals for participating Jewish inmates. *Id.* at 19. The food for the meals came primarily from the prisons' regular food supplies and pantries. *Id.* The JDA Program was discontinued in 2007. R. 92 (Doc. 38-1). The record does not reveal why it was dismantled.

Three years later, however, the DOC established a new kosher diet plan at the South Florida Reception Center ("SFRC"). R. 157 (Doc. 49). A November 11, 2011, letter to Rich from Rabbi Katz, the Director of Prison Programs at the Aleph Institute,[4] which partnered with the DOC to set up the program, explained: "[W]e have been serving kosher meals at SFRC South Unit for the past 15 months with none of the issues the government is claiming in your case. We had no run on the program and many inmates have actually left the program. There has not even been a hint of a security concern at all." *Id*. (Doc. 49). The record is unclear

[4] The Aleph Institute is dedicated in part to "addressing the pressing religious . . . needs of individuals in the military and institutional environments." Aleph Institute, About Us, http://aleph-institute.org/about-us.html (last visited Aug. 3, 2012).

whether that kosher program continues to operate today, as the DOC did not provide any information about it to the courts below.[5]

On August 1, 2011, the DOC filed a motion for summary judgment. R. 72-90 (Doc. 38). The motion was supported by two affidavits from DOC employees. The affidavit of James Upchurch, Chief of Security Operation, addressed the State's alleged security interests in denying kosher meals to inmates. R. 97-100 (Doc. 38-1). The affidavit of Kathleen Fuhrman, Public Health Nutrition Manager, discussed the State's alleged interest in controlling costs. *Id.* at 92-96 (Doc. 38-1). Though there is no dispute that the kosher meal ban substantially burdens Rich's religious exercise, the magistrate judge recommended that the DOC's summary judgment motion be granted. *Id.* at 177 (Doc. 52). Repeating the affidavit testimony of Fuhrman and Upchurch, the court determined that the DOC's policy was permissible under RLUIPA. *Id.* at 176-77 (Doc. 52). The district court affirmed and adopted the magistrate judge's report and recommendation without further comment or analysis. *Id.* at 181 (Doc. 57). Rich filed a notice of appeal on March 26, 2012. *Id.* at 6. (Doc. 59).

[5] Because the State maintains that it is unable to provide kosher meals to any prisoner and does not clarify (or even mention) the status of this program, this brief treats the DOC's policy as a complete ban on the provision of kosher meals for religious purposes.

SUMMARY OF THE ARGUMENT

The Federal Bureau of Prisons and as many as 35 states supply prisoners with kosher meals. Yet, citing security and cost concerns, the State of Florida continues to deny prisoners this basic religious accommodation. The State's refusal to provide Jewish inmates with an appropriate religious diet runs afoul of RLUIPA, which requires courts to apply strict scrutiny to correctional polices that substantially burden prisoners' religious exercise.

Under strict scrutiny, the DOC must show that its kosher meal policy furthers a compelling governmental interest and that it is the least restrictive means of doing so. The DOC may not justify this policy by referencing generalized and speculative concerns. Rather, it must articulate specific and concrete interests and demonstrate that they are of the highest order. Because strict scrutiny is the most exacting form of judicial review, the DOC also must meet a heavy evidentiary burden in proving that its kosher meal ban is necessary to protect its proffered interests and is the least intrusive way of achieving them. The DOC fails on both accounts.

The DOC defends its kosher meal policy on three grounds: (1) Providing kosher meals would incite envy and decrease inmate morale; (2) Prisoners of other faiths might be inspired to claim similar religious accommodations, while others might lie about their religious beliefs to obtain the kosher meal; and (3) Kosher

meals cost more than the DOC's regular, approved diet. In support of these asserted security and cost interests, the DOC submits affidavits that are riddled with conclusory and speculative statements, include few specific details, and attach no documentation for their claims. For example, despite making broad claims about inmate morale and hypothetical attacks on inmates receiving kosher meals, the State does not offer one iota of evidence that the JDA Program, the more recent kosher diet plan at SFRC, or any other religious accommodation caused inmate morale to plunge, prompted complaints of preferential treatment, or led to incidents of violence. Where the State does bother to include particulars, e.g., cost estimates, the information is either incomplete or grossly inaccurate.

Although these deficiencies are readily discernible upon a cursory review of the DOC's affidavits, the courts below accepted them at face value, deferring completely to the State's conclusory and speculative claims. Indeed, in granting summary judgment to the DOC, the lower courts necessarily concluded that no rational factfinder could disbelieve the affidavits. This level of deference is irreconcilable with the strict scrutiny inquiry mandated by RLUIPA. If it is affirmed and adopted by this Court, RLUIPA's heightened legal protections will be effectively nullified, and thousands of prisoners across Florida and the Eleventh Circuit will once again be subjected to the same egregious and unnecessary

violations of religious liberty that prompted Congress to pass RLUIPA in the first place.

The DOC's generic and unsupported excuses for refusing to provide kosher meals are hardly unique to religious diet accommodations and could be used to deny virtually any request for religious accommodation. Prison systems around the country face similar security and cost considerations, but nevertheless accommodate prisoners' right to receive a religious diet. There is no good reason, let alone a compelling one, why Florida cannot do the same.

ARGUMENT

Congress enacted the provisions of RLUIPA at issue here with one aim: to restore heightened legal protections to the religious rights of institutionalized persons in the wake of the Supreme Court's decision in *City of Boerne v. Flores*, 521 U.S. 507, 117 S. Ct. 2157 (1997).[6] In passing RLUIPA, Congress recognized that prisoners' religious liberty is especially vulnerable because prisoners "are unable freely to attend to their religious needs and are therefore dependent on the

[6] *Boerne* invalidated the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb (1993), as applied to the states. 521 U.S. at 536, 117 S. Ct. at 2172. Congress had enacted RFRA to restore strict scrutiny to religious exercise claims after the Supreme Court's decision in *Employment Division v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990). *See Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 424, 430, 126 S. Ct. 1211, 1216-17, 1220 (2006). RLUIPA's application to the states has been upheld, and the RLUIPA analysis is identical to the strict scrutiny inquiry mandated by RFRA. *See Cutter v. Wilkinson*, 544 U.S. 709, 716-16, 125 S. Ct. 2113, 2119 (2005).

government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 721, 125 S. Ct. 2113, 2122 (2005). In particular, Congress found that RLUIPA was necessary because, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways." *Id.* at 716, 125 S. Ct. at 2119 (internal quotation marks omitted).

RLUIPA requires that courts apply strict scrutiny, the most exacting judicial examination,[7] to any state action that imposes a "substantial burden" on the religious exercise of an incarcerated person. 42 U.S.C. § 2000cc-1. Under this standard, once a prisoner demonstrates a substantial burden, the state must prove that the challenged policy (1) furthers a "compelling governmental interest" and (2) is the "least restrictive means of furthering" that interest. *Id.* These provisions must be "construed in favor of a broad protection of religious exercise." *Id.* § 2000cc-3g.

The court below failed to conduct the rigorous inquiry required under RLUIPA. The DOC's alleged security interests – supported by a single, conclusory affidavit – are entirely speculative. Although the DOC previously operated a kosher diet program, and may still offer kosher meals in at least one

[7] *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2457, 2490 (1995) (characterizing strict scrutiny as "our most rigorous and exacting standard of constitutional review"); *Glenn v. Brumby*, 663 F.3d 1315, 1316 n.4 (11th Cir. 2011) ("Strict scrutiny is the most exacting form of review . . . .").

prison, it did not identify even one security incident that could be traced to religious diet accommodations. The State also offers no data or information linking the provision of religious diets to violence and security risks. Indeed, the Federal Bureau of Prisons and numerous states supply prisoners with kosher meals. These programs show that the practice does not pose the insurmountable security hurdle that the State claims.[8] The DOC does not attempt to distinguish these programs or to document unique circumstances in Florida prisons that would engender security risks not associated with the provision of religious diets by other states and the federal government.

Meanwhile, the DOC's alleged cost-controlling interest rests solely on the Fuhrman affidavit, which contains unsupported, inconsistent, and inflated figures—flaws that are apparent on the face of the document. *See infra* pp. 22-25.

[8] Courts routinely look to the policies and practices of other states when adjudicating RLUIPA claims. *See Warsoldier v. Woodford*, 418 F.3d 989, 999-1000 (9th Cir. 2005) (holding that correctional policies in Oregon, Colorado, and Nevada, as well as the Federal Bureau of Prisons, allowing prisoners to have facial hair undermined argument that security concerns justified refusal to grant religious exemptions to hair-grooming policy); *see also Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007) (rejecting claim that ban on inmate preaching was necessary to protect prison security, in light of Federal Bureau of Prisons policy that expressly allowed for inmate-led religious services); *cf. Procunier v. Martinez*, 416 U.S. 396, 414 n.14, 94 S. Ct. 1800, 1812 n.14 (1974) ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."), *overruled on other grounds by, Thornburgh v. Abbott*, 490 U.S. 401, 109. S. Ct. 1874 (1989).

The lower courts' uncritical acceptance of these vague and conclusory affidavits is incompatible with RLUIPA.

Consistent with strict scrutiny, RLUIPA requires that the DOC "bear the burden of persuasion to prove that any substantial burden on [an inmate's] exercise of his religious beliefs is *both* 'in furtherance of a compelling governmental interest' and the 'least restrictive means of furthering that compelling governmental interest.'" *See Warsoldier*, 418 F.3d at 995 (quoting RLUIPA, 42 U.S.C. §§ 2000cc-1, 2000cc-2). The State's evidentiary burden is heavy: "When the moving party also bears the burden of persuasion at trial, to prevail on summary judgment it must show that 'the evidence is so powerful that no reasonable jury would be free to disbelieve it.'" *See Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (quoting 11-56 Moore's Federal Practice-Civil § 56.13); *Smith v. Ozmint*, 578 F.3d 246, 250 (4th Cir. 2009) ("As to those elements on which it bears the burden of proof, a government is only entitled to summary judgment if the proffered evidence is such that a rational factfinder could only find for the government.").

Thus, while Congress certainly contemplated that courts would give "due deference to the experience and expertise of prison and jail administrators," it also warned that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to

meet the act's requirements." 146 Cong. Rec. S7774, S7775 (2000) (internal citations omitted). The government must provide substantial evidence to support its assertions of compelling interest and least restrictive means, and courts must evaluate that evidence with a critical eye, rather than accepting it at face value. *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("[D]eference does not imply abandonment or abdication of judicial review."); *Warsoldier*, 418 F.3d at 1000 (rejecting argument that the "court must completely defer to [DOC's] judgment" and insisting that the DOC meet its "burden of proof"); *see also, e.g.*, *Gonzales*, 546 U.S. at 432, 126 S. Ct. at 1221 (noting that the government "had not carried its burden of showing a compelling interest in preventing" alleged harms of sacramental use of hoasca); *cf. Beerheide v. Suthers*, 286 F.3d 1179, 1189 (10th Cir. 2002) (noting, even in context of rational basis review, that "deference is not absolute" and that "prison officials *must present credible evidence* to support their stated penological goals").

The affidavit evidence presented by the DOC simply does not establish that a complete ban on kosher meals furthers any compelling interest or is the least restrictive means of doing so. *See Shakur*, 514 F.3d at 889-90 (holding that conclusory and unsupported affidavit was insufficient to prove the existence of compelling state interest or least restrictive means in RLUIPA religious diet case); *Spratt*, 482 F.3d at 39 & n.7 (holding that lone affidavit, "which cite[d] no studies

and discusse[d] no research in support of its position," did not provide "sufficient evidence to sustain [DOC's] burden under RLUIPA"). This Court should not allow the strict scrutiny inquiry required by RLUIPA to be reduced to a judicial rubber stamp. *Accord id.* at 40 ("While we recognize that prison officials are to be accorded substantial deference in the way they run their prisons, this does not mean that we will rubber stamp or mechanically accept the judgments of prison administrators.") (internal quotation marks omitted). The district court erred in granting summary judgment to the State, and this Court should reverse and remand the case for further proceedings.

I. THE DOC'S BLANKET BAN ON KOSHER MEALS DOES NOT FURTHER A COMPELLING STATE INTEREST.

According to the DOC, its kosher meal policy is necessary (1) to maintain the safe and secure operation of the prison, and (2) to save money. These claims are based solely on two affidavits, one addressing each asserted interest; no supporting documents accompany the affidavits and no other evidence was provided by the State. Nevertheless, the court below simply accepted these affidavits without requiring more than mere speculation and generalities or examining whether their claims are facially plausible or accurate. This abdication of judicial review does not comport with the strict scrutiny standard or the evidentiary burden imposed by RLUIPA.

Had the court conducted even a superficial independent inquiry of the Upchurch and Fuhrman affidavits, it would have been immediately evident that the affidavits are largely conclusory and based on hypothetical situations, and that they provide either no details to support their claims or information that is incomplete and inaccurate. Instead, after blindly reciting and crediting the DOC's claims, the magistrate judge ruled against Rich, citing to this Court's decision in *Linehan v. Crosby*, 346 F. App'x 471, No. 08-15780, 2009 WL 3042038 (11th Cir. 2009), an unpublished, non-precedential decision. The lower court's reliance on *Linehan* is misplaced, however, because that opinion suffers from the same flaws as the magistrate judge's opinion here. There, in response to the *pro se* plaintiff's request for kosher meals, the DOC asserted the same security and cost concerns as it does here, even submitting nearly identical affidavits from both Upchurch and Fuhrman. *Id.* at 473; Op. Br. 34, 45. And, as here, the Court uncritically accepted the claims made in the affidavits, despite their obvious deficiencies.[9]

[9] The *Linehan* Court and the courts below also cite to *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007), but the court there also accepted, without adequate evidence, the generalized security and cost claims made by the Texas Department of Criminal Justice ("TDCJ"). Indeed, in spite of pleading that it was too poor to afford kosher meals and advancing the same security arguments as Appellees here, the TDCJ was busy setting up its very own kosher meal program *during* the *Baranowski* litigation. *See Moussazadeh v. Tex. Dep't of Criminal Justice*, CIV.A. G-07-574, 2011 WL 4376482, at *10 (S.D. Tex. Sept. 20, 2011) ("In April 2007, TDCJ–CID's policy changed. Chaplaincy Manual Policy Number 07.03, established the Jewish Designated Units, which provide inmates with an opportunity to receive kosher meals.").

Given these defects, the courts below should not have relied on *Linehan*, which is not binding precedent.[10] Nor should this Court. Under *Linehan* and the opinion below, the bar for judicial review of prisoners' religious exercise claims would be set significantly lower than the strict scrutiny Congress required when it passed RLUIPA. Adopting this extremely deferential standard of review would severely undermine *all* prisoners' religious liberty by effectively abrogating the law's heightened protections for religious exercise. This Court should decline the State's invitation to contravene Congress's clear intent.

A. The DOC's Speculative and Unsupported Security Concerns Do Not Establish That Its Policy Advances a Compelling Interest.

The lower courts failed to examine critically the DOC's claim that "serious security issues . . . would arise if a 'Kosher' diet were offered" to Rich and other inmates. R. 98 (Doc. 38-1). In the prison context, security is, of course, paramount, and it can constitute a compelling interest. But generalized and speculative claims of security will not suffice. Prisons must identify particular security risks, establish that they are compelling, and offer credible evidence that the challenged policy addresses those risks. *See, e.g.*, *Gonzales*, 546 U.S. at 438, 126 S. Ct. at 1225 (holding that, under strict scrutiny, the "invocation of general interests," such as safety, "standing alone, is not enough"); *Washington v. Klem*, 497 F.3d 272, 283 (3d Cir. 2007) ("Even in light of the substantial deference given

[10] *See* 11th Cir. R. 36-2.

to prison authorities, the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement. Rather, the particular policy must further this interest. A conclusory statement is not enough.") (internal citation omitted); *Spratt*, 482 F.3d at 39 ("[M]erely stating a compelling interest does not fully satisfy RIDOC's burden on this element of RLUIPA; RIDOC must also establish that prison security is furthered by barring [plaintiff] from engaging in any preaching at any time."). Moreover, courts must "look[] beyond broadly formulated interests justifying the general applicability of government mandates and scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales*, 546 U.S. at 431; 126 S. Ct. at 1211.

The DOC falls far short of the evidentiary burden attendant to a strict scrutiny analysis. The only evidence adduced by the State to support its alleged security interest is the Upchurch affidavit. The security threats identified by Upchurch, however, are framed in vague, speculative, and conclusory terms, with few supporting details. The DOC's security justifications are, in fact, so generic that they would grant the State *carte blanche* to deny any number of accommodations required under RLUIPA. Upchurch also does not present any evidence that Appellant Rich poses a specific security threat or would if he were to receive a kosher diet.

1. *Inmate morale*

According to Upchurch, the "primary security issue . . . is that providing such a special diet would be seen by the rest of the inmates as preferential treatment resulting in a negative impact on inmate morale and subsequently the institutional environment." R. 98 (Doc. 38-1). He further hypothesizes that, in a "worst case scenario . . . *if* inmates believed that the higher cost to provide the kosher diet was somehow impacting in a negative way the quality and quantity of food being served to them in the general population," envious non-kosher inmates could retaliate against kosher prisoners. *Id.* at 100 (Doc. 38-1) (emphasis added).

Upchurch makes no effort to explain the basis for these conclusory and speculative statements and supplies no evidence, anecdotal or otherwise, to support them. Indeed, his affidavit raises more questions than it answers: Why would inmates view a kosher meal as preferential treatment in the first place?[11] How is Upchurch able to measure inmate morale? How would he be able to pinpoint kosher meals as the source of prisoners' diminished spirits? Doesn't inmate morale suffer when prisoners are denied religious accommodations? Is there any evidence that the JDA Program and the more recent SFRC kosher diet plan caused inmate morale to plummet, sparked complaints of preferential treatment, or

[11] As Appellant notes, many court decisions suggest the opposite. *See* Op. Br. 14-15 & n.3 (citing cases in which prisoners described kosher meals as "distasteful," "not particularly appetizing," and inferior to food received as part of the main line diet).

precipitated incidents of violence? Is there any evidence that other types of religious accommodations have resulted in decreased inmate morale or violence? These questions highlight the inadequacies of Upchurch's claims and the need for further scrutiny by the Court.

The lower courts' wholesale acceptance of these generalized and speculative claims runs counter to the strict scrutiny review mandated by RLUIPA. Under Upchurch's reasoning, RLUIPA would be rendered toothless, as officials could claim that all religious accommodations, which inherently necessitate different treatment for some prisoners, create resentment or negatively affect inmate morale. *See, e.g., O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003) (holding that government could not defeat prisoner's religious exercise claim by pointing to other prisoners' potential discomfort or negative reaction because "relying on other inmates' reactions to a religious practice is a form of hecklers' veto"); *Caruso v. Zenon*, No. 95-MK-1578, 2005 WL 5957978, at *14 (D. Colo. July 25, 2005) (rejecting as "speculative" claim that providing halal meat would compromise security by stoking inter-religious hostility because state did not provide evidence linking security problems to religious diets).

2. *Other prisoners' requests for religious diets*

Upchurch also contends that providing kosher meals "would likely result in other inmates attempting to obtain a similar special religious diet especially if the

kosher diet is believed to provide better quality and/or more food." R. 98 (Doc. 38-1). Though he gives no specific details, according to Upchurch, during the DOC's operation of the JDA Program, incidents of "inmates claiming belief in other religious groups with associated dietary claims and others attempting to claim membership in the religious group for whom the preferential diet might be approved" were "extensively reported." *Id.* at 98-99 (Doc. 38-1). In short, the DOC contends that the kosher meal ban is necessary because prisoners of other faiths might seek to enforce their right to religious diets, while others might falsely claim to be religious to obtain the kosher diet.

As an initial matter, the fact that prisoners of other faiths may also seek to vindicate their rights under RLUIPA cannot be a compelling, or even legitimate basis, for denying religious accommodations. Anytime an inmate successfully asserts his religious rights, it might prompt others to do the same. The argument "echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales*, 546 U.S. at 435-36, 126 S. Ct. at 1223. The Supreme Court rightly rejected this "slippery slope" defense because it could be used to deny every request for a religious accommodation or exemption, regardless of the context. *See id.* at 421, 126 S. Ct. at 1215 (citing *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963)); *Beerheide*, 286 F.3d at 1186 n.2 ("Denying protection of a

constitutional right in order to prevent other inmates from seeking recognition and enforcement of their constitutional rights is contrary to the most basic principles of our system of government.").

Similarly, if preventing prisoners from falsely claiming religious accommodations were a recognized compelling interest under RLUIPA, the state would have a free pass to refuse prisoners the right to a variety of religious exemptions as other prisoners might try to obtain the same benefit under false pretenses. Instead, RLUIPA allows prisons, before providing religious accommodations, to examine whether an inmate's professed beliefs are sincerely held. *See Cutter*, 544 U.S. at 725, 125 S. Ct. at 2124 n.13. In his affidavit, Upchurch tries to turn this safeguard for the State on its head, arguing that significant "discord and unrest," including "confrontational incidents involving staff and inmates," would arise if the DOC were to "determine religious entitlement to any special preferred menu and subsequently monitor and enforce any criteria related to such a determination." R. 99 (Doc. 38-1).

Once again, however, Upchurch provides no evidence that the hypothetical discord and subsequent confrontations will actually arise. Though the DOC operated a religious diet program for years, and possibly continues to provide kosher meals at one prison, Upchurch does not point to even one security incident resulting from the DOC's inquiry into the sincerity of an inmate's professed

religious beliefs. Prisons routinely screen inmates seeking religious exemptions or accommodations to ensure that their professed beliefs are sincere without compromising security. *See* Op. Br. 13-14 (citing federal prison and various state policies governing inquiries into sincerity of beliefs). Upchurch offers no reason why the Florida DOC cannot do the same. Like the generalized inmate morale and resentment claims, the DOC's asserted compelling interest in avoiding inquiry into the sincerity of religious beliefs, if countenanced by this Court, would effectively gut RLUIPA's protections.

3. *Rich's request for a kosher diet*

Under RLUIPA, a prison must have a compelling interest not only in the particular policy at issue, but also in its refusal to grant the particular prisoner his requested exemption from that policy. *See Gonzales*, 546 U.S. at 430-31, 126 S. Ct. at 1220 (holding that strict scrutiny requires "the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened"). Thus, even if the DOC had carried its burden of showing that denying kosher meals advanced a compelling interest as a general matter, the DOC has not produced *any* evidence showing a compelling interest in denying Rich an exemption from that policy. The DOC does not contend, for example, that Rich seeks to manipulate the system or obtain a kosher diet under

false pretenses. On the contrary, the State has not disputed that Rich's request is based on his sincerely held religious beliefs. Nor does Upchurch cite any evidence that Rich, himself, poses any security threat. In sum, the State has not produced any proof that providing a kosher meal to Rich would undermine security, and the lower courts erroneously did not demand any.

B. The DOC's Unsupported and Inflated Claims About Cost Do Not Evince a Compelling Interest.

Congress expressly contemplated that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3(c). As the Supreme Court has observed, "[i]n the necessarily closed environment of the correctional institution, few changes will have no ramifications . . . on the use of the prison's limited resources for preserving institutional order." *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262 (1987). While the statute should be applied "consistent with consideration of costs and limited resources," then, the increased cost associated with accommodating a prisoner's religious exercise does not automatically exempt prisons from RLUIPA's requirements. *See Cutter*, 544 U.S. at 723, 125 S. Ct. at 2123 (internal quotation marks omitted). Otherwise, prisons would be able to easily and routinely deny religious exercise accommodations by citing cost—a result incompatible with Congress's intent and RLUIPA's strict scrutiny standard.

Under strict scrutiny, "[t]he conservation of the taxpayer's purse is simply not a sufficient state interest" to override constitutional rights. *See Mem'l Hosp. v. Maricopa Cnty*., 415 U.S. 250, 263; 94 S. Ct. 1076, 1084 (1974). Accordingly, cost should be considered a compelling interest, if ever,[12] only in the most extreme circumstances and only if backed up by substantial and credible evidence. The Federal Bureau of Prisons and as many as 35 states provide kosher meals to religious prisoners. These states surely face substantial budgetary constraints yet nevertheless manage to accommodate religious prisoners' dietary needs. The DOC does not claim that its financial circumstances are any more dire than those of these other prison systems.

The cost figures cited by the DOC are unsupported and clearly inflated. In her affidavit, Fuhrman specifies the alleged costs associated with kosher meals. However, she cites no sources or supporting documentation for that information and provides no details about how or when she researched and determined the costs. R. 92-96 (Doc. 38-1). For example, Fuhrman states that shelf-stable kosher entrées costs between $2.52 and $2.95, but she does not cite any source for these prices. *Id.* at 93 (Doc. 38-1). She also claims that the provision of additional food

[12] Many courts have ruled that cost, alone, is not a compelling interest under strict scrutiny. *See, e.g*., *Mem'l Hosp*., 415 U.S. at 263, 94 S. Ct. at 1083; *Udey v. Kastner*, 805 F.2d 1218, 1220 (5th Cir. 1986); *Rouser v. White*, 630 F. Supp. 2d 1165, 1185 (E.D. Cal. 2009) (RLUIPA case); *Willis v. Comm'r, Ind. Dep't of Corr*., 753 F. Supp. 2d 768, 778 (S.D. Ind. 2010) (RLUIPA case).

items necessary to ensure nutritional and caloric adequacy, such as "eggs, fruits, and vegetables, cereal, juice, peanut butter and similar items," would increase the daily cost to between $4.49 and $5.71, and that the cost of disposable containers adds 81 cents to the total. *Id.* at 93-94 (Doc. 38-1). But she does not itemize or break down these costs or document them through any source.

Even a cursory examination of Fuhrman's numbers reveals that they do not add up. The DOC per diem raw food allowance is $1.60 per inmate. *Id.* at 93 (Doc. 38-1). This presumably covers all food items and meat required to satisfy inmates' daily caloric and nutritional needs. Yet somehow, according to Fuhrman, supplementing kosher meals with many of the same basic items received by other inmates as part of the regular diet is significantly more expensive at an additional cost of $1.97 to $2.76. *See id*. (Doc. 38-1).

Using these unsubstantiated cost figures, Fuhrman multiplies them by 365 to derive the purported annual cost of kosher meals, which she states would range from $1934.50 to $2379.80 per prisoner. *Id.* (Doc. 38-1). She then multiplies that number by 6,383 (the total number of Jewish, Seventh Day Adventist, and Muslim inmates in the Florida DOC), concluding that the provision of kosher meals "would cost an additional" twelve to fifteen million dollars per year. *See* id. at 95 (Doc. 38-1). This calculation is simply wrong. It fails to account for the money saved by *not* providing inmates receiving a religious diet with the full main line fare; the

religious diets will not be provided to inmates in addition to existing meals, but instead of them. Subtracting the *per diem* allowance for raw food ($1.60) automatically reduces Furhman's initial estimates by more than $3.5 million. Basic mathematical errors of this nature call into question the validity of Fuhrman's other calculations, which cannot be verified because she does not attach any supporting documentation to her affidavit. *See* Op. Br. 39 (discussing flaws of Fuhrman's calculations).

Moreover, Fuhrman's assumption that all 6,283 Seventh Day Adventist, Muslim, and Jewish inmates would request kosher diets if given the option is not supported by any evidence. Practitioners of any faith do so with varying degrees of compliance with religious doctrine. There is no indication that every Jew, Muslim, and Seventh Day Adventist would demand kosher meals. *See Shakur*, 514 F.3d at 889, 890 n.8 (rejecting cost as compelling interest and noting that the "DOC has provided no evidence that all 850 Muslims would even request a kosher TV dinner were it made available to them"). Fuhrman's calculations also fail to account for cost-saving measures that could be adopted in the provision of kosher meals. *See infra*, pp. 26-28.

The report of the Religious Dietary Study Group confirms that the figures submitted in Fuhrman's affidavit are likely hyper-inflated. According to the report, the annual approximate cost of the JDA Program per 250 participants was

$146,000. Op. Br. 40-41 (citing JDA Report). This equates to $584 annually per prisoner, or, dividing that figure by 365, $1.60 per prisoner per day. The report also notes that, even if the DOC decided to provide prepackaged meals requiring supplementation, '"[m]any of the food items currently available in food services are certified acceptable for use with kosher meals and may be used to supplement the entrees at lunch and dinner, and to provide breakfast meals.'" Op. Br. 22 (quoting JDA Report). Finally, the report made clear that far fewer inmates than those actually eligible enrolled in the JDA Program. Op. Br. 39-40.

The inadequacies of the Fuhrman affidavit were apparent on its face, but never identified or questioned by the lower court. Such unsupported and inconsistent testimony is far from sufficient to entitle the DOC to summary judgment. *See, e.g.*, *Beerheide*, 286 F.3d 1189-91 (holding that prison officials had presented no reliable evidence that additional cost of providing kosher meals was more than a *de minimis* $13,000); *Shakur*, 514 F.3d at 891 ("On this record, where there is factual dispute as to . . . the extent of the burden that would be created by accommodating [Plaintiff's] request, and the existence of least restrictive alternatives, we cannot conclude that summary judgment on the RLUIPA claim was appropriate."); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1319 (10th Cir. 2010) (holding that grant of summary judgment for the state was improper where the state had not presented any evidence of compelling interests in denying prisoners

halal meals); *Spratt*, 482 F.3d at 39 & n.7. The strict scrutiny standard requires more concrete evidence from the DOC and a much more rigorous inquiry by the court.

II. THE DOC'S BLANKET BAN ON KOSHER MEALS IS NOT THE LEAST RESTRICTIVE ALTERNATIVE.

The DOC also has not shown that its blanket ban on kosher meals is the least restrictive means of protecting security and controlling costs. Under RLUIPA, "[a] governmental body that imposes a 'substantial' burden on a religious practice must *demonstrate*, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest." *O'Bryan*, 349 F.3d at 401. Specifically, a prison "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Shakur*, 514 F.3d at 890 (citing *Warsoldier*, 418 F.3d at 999).

As noted above, the actual per-prisoner cost of operating the JDA Program was substantially lower than Fuhrman's exorbitant estimate. Fuhrman's affidavit fails to disclose this fact or address why the State could not return to a similar model – or, if enrollment in the program expands, use a hybrid model involving kosher kitchens and prepackaged meals – to control costs.

Fuhrman also does not explain why the DOC could not adopt other cost-saving measures. For example, the DOC could eliminate all pork and pork

products from the regular diet, meeting the religious needs of most Muslims and Seventh Day Adventists and thereby drastically reducing potential enrollment in the kosher meal program. The DOC also could expel inmates from the kosher meal program if they miss a certain number of meals, further reducing waste and limiting costs. Indeed, the study group recommended both of these less restrictive measures in its report concluding that the DOC should *resume* the JDA Program. Op. Br. 21-22 (citing JDA Report). Fuhrman does not mention these recommendations or explain why they could not be followed.

Upchurch at least acknowledges that "creating specialized kitchens at only a few designated locations" could serve as a "cost control strategy," but quickly dismisses the idea because (1) it "did, and would no doubt continue to result in inmates, including STG/gang members, attempting to manipulate the system to gain assignment to the special institutions for gang and other associational purposes . . ."; and (2) "securing the kosher area of the general kitchen" would strain staff resources. R. 99 (Doc. 38-1). As discussed above, however, RLUIPA authorizes prisons to conduct an inquiry into the sincerity of the claimant's religious beliefs, providing an important tool for prisons to guard against the manipulation of religious accommodations. Further, the DOC is entitled to deny religious accommodations on a case-by-case basis if doing so is the least restrictive means of promoting prison security. *See Gonzales*, 546 U.S. at 436; 126 S. Ct. at

1223 (reaffirming "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules") (citing *Cutter*, 544 U.S. at 722, 125 S. Ct. at 2122).[13]

Perhaps most tellingly, neither Upchurch nor Fuhrman differentiates the DOC from the Federal Bureau of Prisons or the 35 states that successfully offer prisoners kosher meals in spite of presumably similar concerns about maintaining security and containing costs. The policies and practices of other states and the Bureau of Prisons strongly suggest that, even if the DOC's kosher meal ban furthers compelling interests, it does not use the least restrictive means. *See Warsoldier*, 418 F.3d at 1000 ("[T]he failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means."); *Shakur*, 514 F.3d at 890-91 (noting state's failure to address why Washington state prisons were able to provide the religious diet requested by plaintiff); *Spratt*, 482 F.3d at 33 ("[I]n the absence of any explanation by RIDOC of significant differences between [its prisons] and a federal prison that would render the policy unworkable, the FBOP policy suggests that some form of inmate preaching could be permissible without disturbing prison security."). In

[13] The DOC could also minimize security risks by limiting transfers to join a kosher meal plan, *see* Op. Br. 15-16, and by allowing only those inmates preparing kosher meals to access the kosher kitchens.

light of the success of these other prison systems, as the DOC itself concluded, "it is improbable that the department can satisfy a court's inquiry into whether the department is furthering a compelling interest, let alone that denying inmates' religious accommodation is the least restrictive means available." Op. Br. 62 (quoting JDA Report).

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of defendants' motion for summary judgment and remand the case for further proceedings.

Dated: August 7, 2012

Respectfully submitted,

Daniel Mach
David C. Fathi*
Heather L. Weaver
ACLU Foundation
915 15th St., NW
Washington, DC 20005
Tel. (202) 675-2330
Fax. (202) 546-0738
dmach@aclu.org
hweaver@aclu.org
dfathi@npp-aclu.org

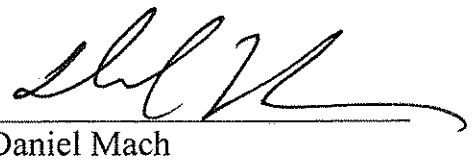
**Not admitted in DC; practice limited to federal courts*

Randall C. Marshall
ACLU Foundation of Florida
4500 Biscayne Blvd., Suite 340
Miami, FL 33137
Tel. (786) 363-2700
Fax. (786) 363-1108
rmarshall@aclufl.org

Attorneys for Amici Curiae, ACLU and ACLU of Florida

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitations set forth in FRAP 32(a)(7)(B). This brief contains 6966 words according to the word processing system used by the American Civil Liberties Union Foundation.



Daniel Mach
ACLU Foundation
915 15th St., NW
Washington, DC 20005
(202) 548-6604
dmach@aclu.org

Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that, on August 7, 2012, I filed the foregoing brief with this Court, by causing a copy to be electronically uploaded and by dispatching the original and six paper copies to be delivered via UPS within three days. I further certify that I caused the brief to be served on August 7, 2012, upon the following counsel by electronic mail and by hard-copy via UPS:

Joy A. Stubbs
Assistant Attorney General
PL-01 The Capitol
Tallahassee, Florida 32399-1050
(850) 414-3300
joy.stubbs@myfloridalegal.com

Luke W. Goodrich
Eric C. Rassbach
THE BECKET FUND FOR
RELIGIOUS LIBERTY
3000 K St., NW, Suite 220
Washington, DC 20007
(202) 955-0095
lgoodrich@becketfund.org



Daniel Mach
ACLU Foundation
915 15th St., NW
Washington, DC 20005
(202) 675-2330
dmach@aclu.org

Attorney for Amici Curiae