No. 12-11735

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

BRUCE RICH,

Plaintiff-Appellant,

—v.—

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, FORMER WARDEN UNION CI, FORMER ASSISTANT WARDEN OF PROGRAMS, FOOD SERVICE DIRECTOR, KATHLEEN FURMAN, Registered Dietician, 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

BRIEF OF AMERICAN JEWISH COMMITTEE AS *AMICUS CURIAE* SUPPORTING APPELLANT AND IN FAVOR OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *amicus* certifies that persons interested in this case are those listed in the briefs filed in this case and also the American Jewish Committee, a non-profit corporation, which certifies that it does not have parent corporations and that no publicly-held corporation owns 10% or more of its stock.

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;
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17. Paul, Maurice M.: Senior District Judge;
18. Jones, Gary R.: Magistrate Judge;
19. National Jewish Commission on Law and Public Affairs ("COLPA");
20. The Union of Orthodox Jewish Congregations of America;

21. Agudath Israel of America;
22. The National Council of Young Israel;
23. Association of Kashrus Organizations;
24. American Civil Liberties Union Foundation;
25. American Civil Liberties Union;
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36. Stern, Marc: Counsel for *Amicus Curiae*, American Jewish Committee; and
37. Lazaroff, Michael: Counsel for *Amicus Curiae*, American Jewish Committee.

STATEMENT OF COMPLIANCE WITH RULE 29

Pursuant to Federal Rule of Appellate Procedure 29(c)(5), the American Jewish Committee states that no party or party's counsel authored any part of this brief or paid any costs associated with its preparation or submission, and no person other than *amicus curiae* or its counsel contributed money that was intended to fund preparing or submitting the brief.

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INTEREST OF THE *AMICUS CURIAE*

The American Jewish Committee ("AJC") is a nonprofit international advocacy organization that was established in 1906 to protect the civil and religious rights of Jews. Over 100 years later, AJC has roughly 170,000 members and supporters, and 26 regional offices, spread across the nation and throughout the world. AJC continues its efforts to promote pluralistic and democratic societies where all minorities are protected. Its mission is to enhance the well-being of Israel and the Jewish people worldwide, and to advance democratic values and the human rights of all citizens in the United States and around the world.

AJC historically has been a strong advocate on behalf of religious liberty for people of all backgrounds. Thus, AJC has participated as *amicus curiae* in numerous cases throughout the last century in defense of religious liberty for all, and has supported many legislative proposals designed to protect the constitutional guarantee of the free exercise of religion. As part of its mission to defend the religious freedoms of all Americans, and of Jews in particular, AJC believes that legislative action to accommodate the religious exercise rights of prisoners is not only constitutional, but commendable and often mandatory.

In accordance with these principles, AJC was instrumental in securing the passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and AJC's current General Counsel served on RLUIPA's drafting committee.

Subsequent to RLUIPA's enactment, AJC filed an *amicus* brief with the United States Supreme Court in support of RLUIPA's constitutionality, together with a diverse coalition of religious and civil liberties organizations, in the case of *Cutter v. Wilkinson,* 544 U.S. 709 (2005).

AJC has a substantial and compelling interest in this case because it pertains to RLUIPA—which AJC supported and which its general counsel, Marc Stern, played an important role in drafting—and the religious liberty of prisoners in the State of Florida, and also implicates important tenets of the Jewish religion, as well as basic democratic values and the free exercise of religion. The position of the State in this case—that the *ipse dixit* of its prison officials satisfies its burden of proof under RLUIPA—is fundamentally at odds with the requirements of the statute and would make it a dead letter. By denying inmates the ability to keep kosher, a fundamental tenet of the Jewish faith, the Florida Department of Corrections ("DOC") has deprived citizens of substantial rights. The court below by affirming the Magistrate Judge's Report and Recommendation (the "Order" found at Record Excerpts ("RE") 167-82) granting summary judgment to the DOC has mistakenly approved this injustice. AJC is concerned that the decision below will have nationwide adverse consequences on the ability of inmates to protect their religious rights.

AJC submits this brief in order to supplement the record and advise the

Court regarding issues within its interest. Appellant Bruce Rich ("Rich") has consented to the filing while the DOC has not so consented. AJC is filing a motion for leave to file its *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29 simultaneously with this brief.

BACKGROUND

A. RLUIPA Is Intended To Protect Prisoners From Frivolous Burdens On Religious Freedom Like Denying Religiously Mandated Diet

RLUIPA's institutionalized persons provision is the result of Congress's efforts "to accord religious exercise heightened protection from government-imposed burdens" in prisons and similar state-run institutions. *Cutter*, 544 U.S. at 714. This protection is important because "institutionalized persons . . . are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Id.* at 721.

Testimony from Congressional hearings held prior to RLUIPA's passage revealed that prisons throughout the country were frivolously and arbitrarily interfering with prisoners' religious rights. *Cutter*, 544 U.S. at 716 (*citing* 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sens. Hatch & Kennedy on RLUIPA)). As a result of these deprivations, Congress found that, "[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions

restrict religious liberty in egregious and unnecessary ways." *Id.* In response to the "egregious and unnecessary" restriction of religious freedom, Congress enacted RLUIPA with the "compelling governmental interest" and "least restrictive means" standard to "secure redress for inmates who encountered undue barriers to their religious observances[.]" *Id*. at 716-17. Congress made it clear that in such circumstances, "'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. S7774-01, 7775 (daily ed. July 27, 2000) (joint statement of Sens. Hatch & Kennedy on RLUIPA) (*quoting* S. Rep. No. 103-111, at 10 (1993)).

Accordingly, RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution." 42 U.S.C. § 2000cc-1(a). When such burdens do exist, the government faces a heavy burden of justification: it must "demonstrate[] that imposition of the burden on that person[:] (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest." *Id.* The legislative history shows that this shifting of the burden once a substantial burden is demonstrated "has important implications" and "facilitates enforcement of the right to religious exercise as defined by the Supreme Court." H.R. Rep. No. 106-219, at 24-25 (2000).

Notably, "[t]he Congress that enacted RLUIPA" was aware that "'[f]or more than a decade, the federal Bureau of Prisons has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners'. . . . The Congress that enacted RLUIPA was aware of the Bureau's experience." *Cutter,* 544 U.S. at 725-26 (citation omitted); *see also* 146 Cong. Rec. at 7776 (letter from Assistant Attorney General to Senator Hatch) ("We do not believe [RLUIPA] would have an unreasonable impact on prison operations. RFRA has been in effect in the Federal prison system for six years and compliance with that statute has not been an unreasonable burden to the Federal prison system").

B. Keeping Kosher Is An Important Tenet Of Judaism

Kashrut is a system of Jewish dietary laws that governs both the foods that observant Jews may eat, as well as how such foods are prepared. The laws of *Kashrut* are more than 2,000 years old. Food that meets the standards of *Kashrut* is commonly referred to as "kosher." One who follows *Kashrut* and eats a kosher diet is said to "keep kosher." The requirements of *Kashrut* are set forth in the Torah (the authoritative text of Judaism), and are further expounded by rabbinical commentaries in the Talmud and the Code of Jewish law.

Courts in this country have long recognized that keeping kosher is an

integral part of the daily life of millions of observant Jews throughout the world. *See, e.g.*, *Kahane v. Carlson,* 527 F.2d 492, 495 (2d Cir. 1975) ("The dietary laws are an important, integral part of the covenant between the Jewish people and the God of Israel"); *see also Shaliehsabou v. Hebrew Home of Greater Wash., Inc.,* 363 F.3d 299, 309 (4th Cir. 2004) ("Jews view their dietary laws as divine commandments, and compliance therewith is . . . important").[1]

C. Basic Principles Of Keeping Kosher

The primary requirements of the ancient laws of *Kashrut* have been well-settled for centuries among Jews who keep kosher,[2] and the basic principles are properly summarized in Appellant Rich's brief dated August 1, 2012 ("Brief" or "Br."). (Br. at 6-7.) Under the laws of *Kashrut*, food is categorized as either meat, dairy, or *pareve*, and different rules govern when and how each can be consumed.

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[1] Law reviews have also recognized the importance of observing *Kashrut* to the Jewish religion, and to Jewish prisoners in particular. *See generally* Jamie Aron Forman, Note, *Jewish Prisoners and their First Amendment Right to a Kosher Meal: An Examination of the Relationship Between Prison Dietary Policy and Correctional Goals*, 65 Brook. L. Rev. 477, 480-81 (1999); Yehuda M. Braunstein, Note, *Will Jewish Prisoners Be Boerne Again? Legislative Responses to City of Boerne v. Flores,* 66 Fordham L. Rev. 2333, 2335-37 (1998). Some authors have noted that keeping kosher also may have beneficial effects on prisoners' attitudes and behaviors. *See* Forman, *supra*, at 484-86; Braunstein, *supra*, at 2385.

[2] In addition to the laws of *Kashrut* set forth in the centuries-old Torah and Talmud, the *Shulchan Aruch*, a more recent sixteenth century commentary written by Rabbi Yosef Karo contains a section on the laws of *Kashrut* (called the *Yoreh De'ah*), which is still relied upon by Jews today. *See* http://en.wikipedia.org/wiki/Shulchan_Aruch.

(*Id.*) Meat is kosher if it comes from a permitted animal and if it is slaughtered and examined by a *shochet*, trained to slaughter animals in accordance with the laws of *Kashrut.* Braunstein, *supra*, at 2336. Kosher dairy products must be from a kosher animal. (Br. at 7.) *Pareve* products neither contain nor are mixed with either meat or dairy. (*Id.*)

Importantly, kosher food must be prepared and served in accordance with the laws of *Kashrut.* (Br. at 7.) This requires use of utensils that have been properly maintained as kosher including by avoiding having non-kosher food or utensils touch kosher food or utensils, and segregating utensils used for meat from those used for dairy products. (*Id.*) A rabbinic supervisor or "mashgiach" is used to ensure "that the laws of Kashruth are enforced." *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.,* 247 F. Supp. 2d 728, 729 n.2 (D. Md. 2003), *aff'd*, 363 F.3d 299 (4th Cir. 2004). A person who adheres to a kosher diet as a matter of religious observance does not consider food to be kosher if it fails any of these requirements. *See* Forman, *supra*, at 478-86.

D. Keeping Kosher In Today's World

Today, given the ubiquitous nature of kosher certifications, keeping kosher is simpler than in the past. Approximately one-third to one-half of the food for sale in a typical American supermarket is kosher. *See* Sue Fishkoff, *Kosher Nation: Why More and More of America's Food Answers to a Higher Authority* 4

(Schocken Books 2010). Furthermore, kosher certification is now so pervasive that approximately 40 percent of the items sold by Wal-Mart are kosher-certified. *See id*. (*citing* Mintel Report, *Kosher Foods—U.S.—January 2009*, *available at* http://store.mintel.com/kosher-foods-US-January-2009.html). Kosher products include mainstream staples of the American diet such as Oreo cookies, Cheerios, Coca-Cola, and other foods manufactured by General Mills, Nestle, Kraft, Nabisco, Entenmann's, and Godiva. *See* Fishkoff, *supra*, at 4-5, 325. Indeed, millions of restaurants, hotels, airlines, and other institutions worldwide provide kosher meal options to accommodate those who observe *Kashrut*. (Br. at 8.)

Kosher food is also readily available in prison systems in the United States. A kosher diet is available in the prison systems of at least thirty-five states, and the nation's largest penal institution—the Federal Bureau of Prisons ("BOP")—provides kosher meals to all Jewish inmates as part of its common fare program. Br. at 9; *see* 28 C.F.R. § 548.20 (federal policy); U.S. Dep't of Justice, Fed. Bur. of Prisons, Program Statement No. 4700.06, *Religious Diet Program,* ch. 4 (Sept. 13, 2011), *available at* http://www.bop.gov/policy/progstat/4700_006.pdf. The different prison systems use varying means for providing kosher food to their inmates, ranging from prepackaged kosher meals to maintaining their own kosher kitchens. (Br. at 9.)

In fact, from April 2004 to August 2007, DOC offered a Jewish Dietary

Accommodation ("JDA") Program, which involved participants preparing kosher meals in separate kosher kitchens. (Br. at 19.) Food for the JDA Program was drawn largely from the regular food supplies. (*Id*.) From 2004 to 2007, 784 inmates participated in the JDA Program; however, by April 2007, 259 inmates were enrolled in the program and only 196 were regularly eating the JDA food. (*Id.* at 20.) The cost of the program for 250 inmates, for one year, was approximately $146,000—insignificant in light of the DOC's overall budget. (*See id.* at 20-21, 36-37, 40.) In 2010, DOC initiated a kosher dietary program at the South Florida Reception Center (Rich is not incarcerated there), which utilized prepackaged kosher meals. (*Id*. at 22-23.) The meals consisted of at least one hot prepackaged meal, supplemented with fruits, vegetables, cereal and other shelf-stable items. (*Id*. at 23.) Notably, this program successfully provides kosher food, and has done so for at least fifteen months, without any problems of cost or security. (*Id*., *citing* RE 157, 173-74)

E. Facts Relevant To Rich's Appeal

1. It is Uncontested that Rich is a Sincere Orthodox Jew to whom DOC has Denied a Kosher Diet

It is undisputed that keeping kosher "is a sincerely held tenet" of Rich's religion. (RE 175.) Rich is an Orthodox Jew by birth, belief, and practice, including receiving an in-depth Jewish education. (Br. at 5, *citing* RE 154.) Rich personally maintained a kosher household as an adult; observes the Sabbath; and

has even acted as a "de facto 'rabbi' to other Jewish inmates" during his incarceration. (Br. at 5-6, *citing* RE 154.) Rich "believes that keeping kosher is fundamental to the Jewish faith and is necessary to conform to God's will as expressed in the Torah." (Br. at 5-6, *citing* RE 155.)

While incarcerated, on February 25, 2009, Rich informed DOC that he would no longer participate in DOC's meal programs because they were not kosher. (RE 30.) Since then, Rich has subsisted entirely on the handful of kosher certified items that he is able to purchase from the inmate canteen, costing Rich financially and physically. (Br. at 23, *citing* RE 154-55.) Rich has been placed in isolation twice, and not permitted to purchase items from the canteen; during both of these times, he went without regular meals for over a month. (*Id.*)

2. DOC Offers Numerous "Special Diet" Menus, None of Which Are Kosher

DOC makes no claim and provides no evidence that it offers any diet menu to Rich that meets the requirements to be considered kosher. This despite the fact that DOC offers several "special diets" including without limitation (a) a vegan meal program that excludes all animal products; (b) an alternate entrée program which includes dairy and eggs but not meat (Br. at 17, *citing* RE 169-70; Fla. Admin. Code Ann. r. § 33-204.002 (2012)); and (c) "therapeutic diets" specially designed to accommodate an inmate's medical or dental needs (*id*. at 18, *citing* Fla. Admin. Code Ann. r. §§ 33-204.002(2), 33-204.003(5)). Therapeutic diets require

special planning, analysis and certification by a licensed registered dietitian and must also be prepared and served separately from the regular diet. (Br. at 18, 56.)

DOC presented no evidence and made no claims that **any** of the alternative menus offered (including the alternative entrée or vegan meal programs) are kosher. DOC does not claim that those meals meet the requirements of Jewish law, including without limitation having kosher ingredients, using special kosher utensils, and being prepared under rabbinic supervision. *See Beerheide v. Suthers*, 286 F.3d 1179, 1187 (10th Cir. 2002) ("A vegetarian meal prepared in a non-kosher kitchen is not kosher"). The Order acknowledged that there is no dispute that the DOC has failed "to provide a kosher diet" to Rich. (RE 175.)

3. Evidence Submitted Below Concerning Cost and Security

Rich submitted an affidavit that, in addition to detailing his commitment to keeping kosher and many of the requirements of kosher food, also describes alternate means available to the DOC to provide him with kosher food. (RE 154-56.) Specifically, Rich says that he "offered to pay for" his meals and that the Aleph Institute, "a recognized, authorized vendor supplier to FDOC", offered to "send shelf stable prepackaged kosher meals." (RE 155.) He also submitted a letter from the Aleph Institute indicating that they are currently running a kosher program in a Florida prison with "none of the of the issues the government is claiming in your case" and "many inmates have actually left the program." (RE

157; *see also* Br. at 24-25.) Rich has provided additional evidence with his appeal that there are numerous options for providing kosher food in prison and there is no history of cost or security problems including in the JDA Program and the kosher dietary program currently running at the South Florida Reception Center. (Br. at 19-23.)

DOC provided affidavits by (i) Ms. Kathleen Fuhrman, a Public Health Nutrition Program Manager in the DOC's central office (RE 92-96) (the "Fuhrman Affidavit")) and (ii) Mr. James Upchurch, Chief of the Bureau of Security Operations for the Florida DOC (RE 97-101) (the "Upchurch Affidavit")). Both affidavits are nearly identical to those provided in a previous litigation (*Linehan v. Crosby*, No. 4:06-cv-225-MP-WCS, 2008 WL 3889604, at *6 (N.D. Fla. Aug. 20, 2008), *aff'd*, 346 Fed. Appx. 471 (4th Cir. 2009)) and provide no particularized information about this case. (Br. at 34, 45.)

Instead, Fuhrman conclusorily contends that it would be "cost prohibitive" to provide kosher meals to inmates. (RE 93.) But rather than use the actual costs incurred by the DOC from the JDA Program, she estimates the costs without providing any concrete basis. (RE 95.) Fuhrman added the supposed cost of prepackaged kosher meals, the cost of "additional" non-itemized food items, and the cost of disposable containers and utensils. (RE 93.) She then multiplied these figures not by the number of prisoners who enrolled in the JDA Program, but by

the total number of Seventh Day Adventist, Muslim, and Jewish inmates, regardless of whether they have indicated a preference for kosher food. (RE 95.) On this basis, Fuhrman estimates that a kosher diet would cost DOC an additional $12,154,463.35 to $14,952,283.40 per year. (*Id*.)

The Upchurch Affidavit also conclusorily asserts that "serious security issues" would arise if DOC offered kosher diets, without citing any specific security incident that has actually occurred in any prison system. (RE 98.) Upchurch claims that the security issues include the fact that other inmates will view kosher food as "preferential treatment resulting in a negative impact on inmate morale[.]" (RE 98, 100.) He also claims that if the DOC was charged with deciding who could receive kosher meals, and monitoring/enforcing such decisions, then "significant" "discord and unrest [] would arise within the inmate population" and that this would divert "[s]ecurity staff attention and focus . . . from primary security functions." (RE 99.) He also claims that "specialized kitchens at only a few designated locations" could result in inmates "attempting to manipulate the system to gain assignment to the special institutions for gang and other associational purposes." (*Id*.) Finally, Upchurch claims that providing a kosher diet "would likely result" in inmates improperly claiming belief in a religious group to obtain the special diet. (RE 98-99.)

SUMMARY OF ARGUMENT

The court below committed significant error in granting summary judgment on a RLUIPA claim in an action brought *pro se*, where there was no dispute that the policy of the DOC substantially burdened Rich. This error undermines the purpose of RLUIPA which specifically requires "strict scrutiny" (the most demanding test) to show that any policy or accommodation that substantially burdens the religious rights of inmates is the "least restrictive means" to further a "compelling governmental interest." The Supreme Court in a different context (not one requiring strict scrutiny) defines a reasonable religious accommodation as one that "eliminates the conflict between employment requirements and religious practices by allowing the individual to observe fully religious holy days." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 70 (1986); *see also Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1293 (11th Cir. 2012).

Here, DOC's position that Rich can eat non-kosher food would not even be considered a reasonable accommodation under that far more permissive standard and certainly cannot survive strict scrutiny. DOC has submitted in support only conclusory hypothetical affidavits that were not even designed for this case; that provide no specific facts related to this case; that ignore the majority of states and the federal prison system that have kosher food programs with no evidence of cost or security issues; and that ignore Florida's very own past and present kosher food

program. These affidavits would not even support summary judgment and certainly cannot meet the strict scrutiny standard. Granting summary judgment on the basis of these *ipse dixit* affidavits would make it easy for prisons to substantially burden the religious rights of prisoners and gut the very purpose of RLUIPA.

Specifically, the court below erred in that there was no basis for finding that the DOC had made a sufficient showing that either cost or security was a compelling governmental interest. Similarly, the court below erred because there was no basis to indicate that DOC analyzed the various alternatives available to it and therefore DOC could not establish that denying kosher food to inmates was the least restrictive means to further any purported compelling governmental interest. At the very least, there were disputed issues of fact about these issues. For these reasons, the decision below should be reversed.

ARGUMENT

"RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens, consistent with [Supreme Court] precedents." *Cutter,* 544 U.S. at 714. Section 3 of RLUIPA prohibits prison officials from imposing "a substantial burden on the religious exercise" of prisoners unless it is "the least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

"Section 3 of RLUIPA applies strict scrutiny to government actions that substantially burden the religious exercise of institutionalized persons." *Benning v. Georgia,* 391 F.3d 1299, 1304 (11th Cir. 2004). The strict scrutiny test is the "most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Once a prisoner demonstrates a "substantial burden" on his religious exercise, the burden shifts to the State to establish that its policy—in this case completely refusing to provide kosher meals—is the least restrictive means to achieving a compelling governmental interest. 42 U.S.C. § 2000cc-2(b); *see Koger v. Bryan*, 523 F.3d 789, 797-98 (7th Cir. 2008) (prison policy not to provide non-meat diet did not further compelling interest nor was it least restrictive means).

I. THE DENIAL OF KOSHER MEALS IMPOSES A SUBSTANTIAL BURDEN ON RICH AND OTHER JEWISH INMATES

DOC has not "disputed that their failure to provide a kosher diet to [Rich] substantially burdens his religious practice." (RE 175.) This Court has explained that a:

> "substantial burden" must place more than an inconvenience on religious exercise; a "substantial burden" is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

DOC's refusal to provide kosher meals to Rich and other Florida inmates

entirely has not only put "substantial pressure" on these prisoners to violate a fundamental tenet of Judaism, but *guaranteed* that violation of their religious beliefs will occur. *Koger*, 523 F.3d at 799. Thus, under the strict scrutiny test, DOC must establish that its policy of denying a kosher diet to Rich and other Jewish inmates furthers (1) a "compelling governmental interest" and (2) is the "least restrictive means to achieving that end." *Smith v. Allen*, 502 F.3d 1255, 1276 (11th Cir. 2007).

II. THE DENIAL OF ALL KOSHER MEALS DOES NOT ADVANCE ANY COMPELLING GOVERNMENTAL INTEREST

The Order granted summary judgment because DOC had allegedly shown two compelling governmental interests as its basis for not providing kosher meals: (i) increased costs associated therewith and (ii) security concerns. (RE 176-77.) As shown below, however, DOC did not meet its burden of establishing that these two interests further *any* "compelling governmental interest" with requisite, factual specificity. *See* 42 U.S.C. § 2000cc-1(a). DOC does not explain and cannot explain how it and the state of Florida differ from the majority of states and the federal prison system, all of which maintain kosher food programs without any evidence of cost and security issues. Accordingly, the Order should be reversed.

A. DOC Has Not Established A Compelling Governmental Interest In Costs

RLUIPA unequivocally states that it "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). This language reflects Congress's intent in enacting RLUPIA to combat "egregious and unnecessary" restrictions on religious exercise "[w]hether from indifference, ignorance, bigotry, ***or lack of resources***." 146 Cong. Rec. at 16699 (emphasis added). Cost alone does not constitute a "compelling governmental interest" sufficient to justify deprivation of fundamental rights. *See, e.g, Memorial Hosp. v. Maricopa Cty.,* 415 U.S. 250, 264 (1974) ("The conservation of the taxpayers' purse is simply not a sufficient state interest to sustain a durational residence requirement which, in effect, severely penalizes exercise of the right to freely migrate and settle in another State"); *cf. Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972) ("[O]nly those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion"); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1186 (10th Cir. 2003) (government cannot satisfy strict scrutiny by citing an "increased need for resources"), *aff'd*, 546 U.S. 418 (2006).

Even if cost could constitute a compelling interest, here DOC failed to show that "it would be cost prohibitive" to provide a kosher diet. DOC has the burden here of showing *specifically* how increased costs are prohibitive here. *See Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal,* 546 U.S. 418, 431 (2006) ("'context matters' in applying the compelling interest test") (citation

omitted); *Koger*, 523 F.3d at 800 ("the governmental interest should be considered in light of the prisoner's request and circumstances at the detention facility"). The only evidence submitted by DOC to support its position with regard to costs is the Fuhrman Affidavit. This affidavit, which is nearly identical to one submitted in the *Linehan* litigation, is insufficient to meet the burden of strict scrutiny. *See, e.g.*, *Smith v. Ozmint*, 578 F.3d 246, 253 (4th Cir. 2009) (conclusory affidavit drafted for use in another case did not satisfy strict scrutiny). The Fuhrman Affidavit does not cite any factual studies or verifiable data. It does not bring any specific data from the JDA Program or the current Florida kosher food program. It provides only cost estimates with no data or support. (RE 93-95.) It provides an estimate based on a baseless assumption not experienced in any prison system that all Jewish, Muslim and Seventh Day Adventist prisoners will be part of any program. (RE 95.) Even then, it purports to compute the "cost" without subtracting the amount that DOC would have paid for regular meals. (Br. at 39.) This type of affidavit is clearly insufficient to meet the heightened requirements of strict scrutiny. *See, e.g., Spratt v. Rhode Is. Dep't of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007) (affidavit that, *inter alia*, "cites no studies and discusses no research in support of its position" is insufficient to satisfy strict scrutiny).

Additionally, the actual data on costs show that there is no basis for the estimates in the Fuhrman Affidavit. The actual data from prison systems that

implemented a kosher meal plan show significantly smaller costs (and significantly fewer prisoners participating). (Br. at 35-37.) The actual data from the JDA Program from Florida shows that annual cost was approximately $146,000 (not the exaggerated millions estimated by Fuhrman) which amounts to less than one half of one percent of the DOC food budget. (*Id.* at 36-37, 43-44.) Any increase in providing a kosher diet would be *de minimis* and cannot be considered a compelling governmental interest. *See Beerheide*, 286 F.3d at 1191 ("de minimis cost" in providing food not "rationally related to the stated penological goals of cost"). Accordingly, DOC has not met its burden of establishing that cost is a compelling governmental interest.

The decisions in *Linehan v. Crosby*, 346 Fed. Appx. 471 (11th Cir. 2009), and *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007) (*see* RE 175-77), do not support the decision at issue here. (*See* Br. at 59-62.) Neither the *Linehan* nor *Baranowski* courts were presented with the evidence here, including that the state was *already* providing special medical diets to inmates and providing a kosher diet to select inmates within the state. Additionally, *Baranowski*, which was also the basis for *Linehan*, is not even followed by Texas's Department of Corrections, since Texas established a kosher kitchen in May 2007. (Br. at 60-61, *citing Moussazadeh v. Texas Dep't of Crim. Justice*, No. G-07-574, 2009 WL 819497 (S.D. Tex. Mar. 26, 2009).)

B. DOC Has Not Established That Security Is A Compelling Governmental Interest

While courts should show "particular sensitivity to security concerns," *Cutter*, 544 U.S. at 722-23, "the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement." *Washington v. Klem*, 497 F.3d 272, 283 (3d Cir. 2007). "'[A] court should not rubber stamp or mechanically accept the judgments of prison administrators'[;] [r]ather, due deference will be afforded to those explanations that sufficiently 'take[ ] into account any institutional need to maintain good order, security, and discipline[.]'" *Couch v. Jabe*, 679 F.3d 197, 201 (4th Cir. 2012) (*quoting & citing Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006)). "A prison official must do more than merely assert a security concern" and "must do more than offer conclusory statements and post hoc rationalizations for the conduct." *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 989 (8th Cir. 2004) (finding that prison officials must provide "some basis for their [security] concern"). "[A]n affidavit that contains only conclusory statements about the need to protect inmate security" is not enough. *Spratt*, 482 F.3d at 40 n.10.

Here, the sole evidence concerning security was the Upchurch Affidavit, which provides not a single concrete example of an actual security situation that has occurred in any of the many prisons—including Florida prisons—that have had kosher food programs. It has no data or studies. This affidavit cannot meet the

DOC's burden to "'do more than merely assert a security concern.'" *Spratt*, 482 F.3d at 39 (citation omitted) (affidavit that, *inter alia*, "cites no studies and discusses no research in support of its position" insufficient to satisfy strict scrutiny); *see also Koger*, 523 F.3d at 800 (finding that while orderly administration of a prison dietary system, and the accommodations made thereunder, are legitimate concerns of prison officials, they have never been found to be compelling government interests); *Smith*, 578 F.3d at 253.

The only somewhat specific issue mentioned concerns "copycat" requests that previously arose during the JDA Program (although Upchurch provides no data for even this contention), but this is not sufficient to establish security as a compelling governmental interest. *See Love v. Reed*, 216 F.3d 682, 690 (8th Cir. 2000) (argument that other inmates would request religious dietary request "'not reasonably related to a legitimate penological request'") (citation omitted); *see also Toler v. Leopold*, No. 2:05CV82 JCH, 2008 WL 926533, at *3 (E.D. Mo. Apr. 3, 2008) ("denying [an inmate] a Kosher diet" due to "the risk of increased religious requests . . . is not rationally related to any legitimate economic or administrative concern").

The *Linehan* decision does not control here because, at the very least, the *pro se* plaintiff in that case did not provide the court with the data and information to consider that the majority of states as well as the BOP, have all implemented

plans without any record of significant security issues. (*See also* Br. at 9, 54-55.)

III. DOC'S POLICY OF REFUSING TO PROVIDE ANY KOSHER MEALS IS NOT THE LEAST RESTRICTIVE MEANS

The court below further erred by finding that DOC's policy denying a Kosher diet and "providing the current vegan and vegetarian diets are the least restrictive means." (RE 178.) As the Supreme Court has explained, "[r]equiring a State to demonstrate a compelling interest and show that it has adopted the least restrictive means of achieving that interest is the most demanding test known to constitutional law." *City of Boerne*, 521 U.S. at 534. DOC bears the burden of proving that its policy is "the 'least restrictive' means available to achieve its interest," and must do so with "'*specific factual information* based on personal knowledge,'" *Spratt*, 482 F.3d at 39, 40-41 (citation omitted; emphasis added), including demonstrating "'that it has *actually considered* and rejected the efficacy of less restrictive measures *before adopting the challenged practice*.'" *Couch*, 679 F.3d at 203 (*quoting Warsoldier v. Woodford*, 418 F.3d 989, 999 (2005)) (emphasis added); *see also Washington*, 497 F.3d at 284 (same); *Spratt*, 482 F.3d at 41 (same). To simply "assert" that there are no feasible alternatives will not suffice. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003); *see also Klein v. Crawford*, No. 3:05-CV-0463-RLH-RAM, 2007 WL 782170, at *7 (D. Nev. Mar. 12, 2007) ("Defendants cannot simply assert that their current policies are the least restrictive way of achieving their compelling interests. Without more,

the court cannot recommend finding in Defendants favor on this issue"). Additionally, "in the absence of any explanation by [defendant] of significant differences between" DOC and other prison systems that provide for kosher meal alternatives, other systems suggest that a less restrictive means of accomplishing DOC's interests "could be permissible without disturbing prison security." *Spratt*, 482 F.3d at 42; *Warsoldier*, 418 F.3d at 1000 ("CDC offers no explanation why these prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs").

DOC asserts that the current dietary policies by the inclusion of "alternative entrée or vegan meal programs, are the least restrictive alternatives available to [DOC] in accommodating [Rich's] religious needs." (RE 73-74.) DOC, though, does not claim that vegan meals or alternative entrées are kosher. Thus, effectively it is, simply refusing to provide Rich with any kosher alternative. Nor could DOC make any such claim that its alternatives are kosher. *See, e.g., Searles v. Dechant*, 393 F.3d 1126, 1131 n.6 (10th Cir. 2004) ("'no state may define "kosher" according to the beliefs of any particular sect of Judaism'") (citation omitted); *see also Hernandez v. Commissioner*, 490 U.S. 680, 699 (1989) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds").

The Fuhrman and Upchurch Affidavits do not state that they considered and

rejected the many alternatives for providing kosher food. Nor do they provide sufficient "specific factual information" to demonstrate that a complete ban on providing a kosher diet is the least restrictive means. *See Spratt*, 482 F.3d at 39, 40-41. In fact, they could not do so because a 2007 Florida DOC report actually recommended that the DOC "retain a kosher dietary program." (Br. at 21.)

Instead, both the Fuhrman and Upchurch Affidavits are conclusory and lack specific support and detailed consideration of the various programs run at other institutions or even in Florida prisons. These programs have numerous means of providing a kosher diet, including (i) offering prepackaged kosher meals supplemented by kosher items from the regular menu; (ii) utilizing JDA kitchens to prepare kosher meals; and (iii) limiting the kosher diet to sincere inmates. (Br. at 63.) For example, Fuhrman admits that "[t]he prices and products offered by vendors vary greatly" (RE 94), but says nothing about whether DOC explored the use of cheaper vendors or any of Rich's proposed options. Similarly, Upchurch addresses only hypothetical "security concerns" pertaining to the maintenance of a separate kitchen and DOC's involvement in identifying sincere inmates, due to additional duties placed on security staff. Not only are these administrative, and not true security concerns, but such general, conclusory, and unsupported statements by DOC cannot support the Order's conclusion that denial of a kosher diet satisfies strict scrutiny, let alone the blanket denial of a kosher diet to the

Jewish inmate population as a whole. (*See supra* § E(3)).

Accordingly, DOC has not and cannot meet its burden of demonstrating that its policy is the least restrictive means and the Order should be reversed.

IV. THERE ARE AT LEAST DISPUTED ISSUES OF FACT AS TO WHETHER THE LEAST RESTRICTIVE MEANS WERE USED TO FURTHER A COMPELLING GOVERNMENTAL INTEREST

The mistake below is heightened because the Order was issued on summary judgment, which is only appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Hall v. Bennett*, 447 Fed. Appx. 921, 922-24 (11th Cir. 2011) (reversing district court's grant of summary judgment against inmate). This Court "review[s] a district court's grant of summary judgment *de novo*, considering the facts and drawing reasonable inferences in the light most favorable to the non-moving party." *Id.* at 923. Summary judgment is improper if "a reasonable fact finder could draw more than one inference from the facts." *Barfield v. Brierton*, 883 F.2d 923, 933 (11th Cir. 1989). Thus, summary judgment ought to be denied in the case of competing affidavits or contradictory evidence. *Id.* at 938 (conflicting affidavits of inmate and prison officials); *Newsome v. Chatham Cty. Det. Ctr.*, 256 Fed. Appx. 342, 346 (11th Cir. 2007) (prisoner's affidavit precluded summary judgment despite conflicting with his medical records).

Here, summary judgment should not have been granted because DOC did

not submit evidence sufficient to meet its burden as described above. *See, e.g.*, *Spratt*, 482 F.3d at 39-40 ("[s]elf-serving affidavits that do not 'contain adequate specific factual information based on personal knowledge' are insufficient to defeat a motion for summary judgment, let alone to sustain one") (citation omitted). In another case examining a prisoner's request for a special diet, the inmate "submitted no evidence in opposition to the defendants' affidavit", and still the Court of Appeals reversed the grant of summary judgment because defendants failed to show "that the danger is plainly so great, or has been so well substantiated in the evidence." *Hunafa v. Murphy*, 907 F.2d 46, 47-48 (7th Cir. 1990); *see also Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1318 (10th Cir. 2010) (denying summary judgment because "'prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet [RLUIPA's] requirements'") (*quoting* 146 Cong. Rec. at 16699 (joint statement of Sens. Hatch & Kennedy)).

Independently, "drawing reasonable inferences in the light most favorable to the non-moving party", Rich's affidavit and the letter from the Aleph Institute raised genuine issues of material fact regarding whether the DOC established a compelling state interest in not providing Rich a kosher diet, and whether it employed the least restrictive means of serving that interest. *See Hall*, 447 Fed. Appx. at 923. Rich's affidavit presented credible evidence of the sincerity of his

religious beliefs, his adherence to fundamental Jewish tenets, and the lack of viability that DOC's current food plans currently provides him. (RE 154-56.) In fact, in the Order, the court below credited Rich's own factual statements, including that he went without food for over a month after being subjected to isolation. (RE 155, 173.) If Rich is "not 100% certain whether or not something is Kosher, [he does] not take a chance. [He does] not eat it." (RE 155.) Rich also offered at least two viable alternatives, one of which was purchasing his own kosher meals including prepackaged kosher meals offered by the Aleph Institute. (*Id.*) The letter provided by the Aleph Institute stated that it was running a program in Florida and that "[t]here has not even been a hint of a security concern at all." (RE 157.) Drawing inferences in favor of Rich, this evidence raises genuine issues of material fact regarding whether DOC's blanket policy is a compelling interest and the least restrictive means. Thus, the court below erred by granting summary judgment to DOC.

CONCLUSION

For the foregoing reasons, the Florida Department of Corrections has violated RLUIPA by depriving a kosher diet to Appellant Rich and similarly situated Jewish inmates who request it. The Northern District of Florida's Order granting summary judgment to the Florida Department of Corrections should be reversed.

Dated: New York, New York
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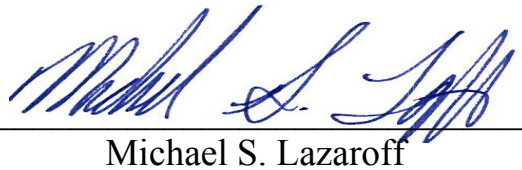
CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief uses a proportionately spaced font and contains 6,770 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

Dated: August 8, 2012

By: 

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2012, the foregoing Brief of the American Jewish Committee as *Amicus Curiae* Supporting Appellant and in Favor of Reversal was served on all counsel of record by CM/ECF and by Federal Express at the addresses listed below:

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