No. 14-10086-D

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, and FLORIDA DEPARTMENT OF CORRECTIONS,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida, Case No. 1:12-cv-22958-PAS

BRIEF FOR *AMICI CURIAE* THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF FLORIDA, AND THE BECKET FUND FOR RELIGIOUS LIBERTY

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No. 14-10086-D
United States v. Secretary, Florida Dep't of Corrections

CERTIFICATE OF INTERESTED PARTIES AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for *amici curiae* certifies that the American Civil Liberties Union, the ACLU of Florida, and the Becket Fund for Religious Liberty have no parent corporations, and that no publicly held corporation holds 10% or more of their stock. Counsel further certifies that, in addition to the persons listed in the briefs of Defendants-Appellants and Plaintiff-Appellee, the following persons may have an interest in the outcome of this case:

American Civil Liberties Union, amicus curiae

ACLU of Florida, amicus curiae

Becket Fund for Religious Liberty, amicus curiae

Dvoretzky, Shay, Attorney, Jones Day, counsel for amici curiae

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INTERESTS OF THE *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 500,000 members. The ACLU of Florida is a state affiliate of the national ACLU. For nearly a century, 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 counsel for parties and as *amicus curiae*. As organizations that have long been dedicated to protecting and preserving prisoners' rights and religious freedom, the ACLU and the ACLU of Florida have a strong interest in this case.

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation in the United States and around the world. The Becket Fund has extensive experience defending the free exercise rights of prisoners under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and has represented multiple prisoners seeking religious dietary accommodations. *See, e.g.*, *Rich v. Sec'y, Fla. Dep't of Corrs.*, 716 F.3d

[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part; no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

525 (11th Cir. 2013) (Jewish inmate seeking kosher diet); *Benning v. Georgia*, 391 F.3d 1299 (11th Cir. 2004) (Jewish inmate seeking kosher diet and permission to wear yarmulke); *Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012) (Jewish inmate seeking kosher diet). Based on this experience, the Becket Fund has unique insight into the nuts and bolts of prison dietary accommodations and kosher diets in particular.

STATEMENT OF THE ISSUE

RLUIPA prohibits the recipients of federal funds, including Defendants-Appellants, from imposing "substantial burden[s]" on the religious exercise of prison inmates unless there is no less restrictive means of furthering a compelling state interest. *See* 42 U.S.C. § 2000cc-1(a). The statute expressly recognizes that a government may be required "to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." *Id*. § 2000cc-3(c).

The issue on appeal is whether the District Court abused its broad discretion by finding, after careful review of the factual record, including expert testimony and the experience of other state prisons, that Defendants-Appellants were not likely to satisfy their heavy burden to prove that withholding a kosher diet from inmates whose sincere religious beliefs required such a diet was the least restrictive means of furthering a compelling state interest in cost containment.

SUMMARY OF ARGUMENT

The State concedes that the denial of a kosher diet imposes a "substantial burden" on the religious exercise of prisoners, such as observant Jews, whose religious beliefs prohibit them from consuming non-kosher food. Thus, the central question on appeal is whether the State is likely to satisfy its heavy burden of proving that the denial of such a diet is the "least restrictive means" of furthering a "compelling" governmental interest. In particular, would the cost of providing kosher food be so exorbitant as to excuse the State from providing it?

As the United States argues, the State has fatally undermined its "cost" defense by simultaneously asserting that it *can* and *will* provide kosher food to inmates. (U.S. Br. 31-33.) *Amici curiae* fully agree. But even setting that aside, the State's "cost" defense fails on the present record. RLUIPA itself expressly provides 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). The viability of the State's defense thus necessarily rests on how substantial the cost truly is, and whether any less restrictive alternatives exist for reducing it. That, in turn, rests on contested issues of fact. For two reasons, the District Court's resolution of those factual questions was within its broad discretion, and its grant of a preliminary injunction should accordingly be affirmed.

I. Neither of the key figures offered by the State in trying to prove the cost of a kosher diet—the participation rate in the kosher-diet program, and its per-inmate cost—is remotely credible. *First*, the State absurdly claims that up to 44% of all inmates will need a kosher diet. (State Br. 11.) This is orders of magnitude above the participation rate reported by the Federal Bureau of Prisons and other state prison systems that already provide kosher diets. In practice, when prisons employ ordinary tools of managing kosher diets, participation rates generally stabilize at roughly 1% or less of population. Indeed, Florida's own Jewish Dietary Accommodation ("JDA") Program, which it operated from 2004-2007, had an average participation rate of only 0.25%. The huge disparity between what Florida claims and what other states have observed strongly suggests that Florida is doing something wrong. And, in fact, Florida failed to implement basic tools for managing kosher diets, baselessly blaming the District Court's injunction for those failures and now misleadingly deploying the resulting sky-high participation rate in seeking appellate relief.

Second, the State told the District Court—and now tells this Court—that a kosher diet would cost $7.35 per-inmate per-day. (State Br. 8.) But as soon as the State was faced with an injunction, it admitted that this was for "the Cadillac version" of a kosher diet (DE 105 at 41-45) and quickly found ways to reduce the cost—first to $5.76 per-inmate per-day (DE 132-3), and now to $3.52 (DE 132-

4)—*less than half* of what it first claimed. Yet the State's appellate brief, filed a month *after* these cost-reducing changes, never mentions them. Even with an inflated participation rate four times higher than Florida experienced in its JDA Program, this would result in a total annual marginal cost of under $725,000—less than 1% of the $86,500,000 that the State now claims. (State Br. 11.)

II. More fundamentally, the State lacks credibility on this issue. Its assertions in this appeal, and its professed newfound commitment to providing a kosher diet, should be viewed with considerable skepticism given its frequently shifting positions both in this litigation and as to kosher food in general.

In another recent case challenging Florida's lack of kosher diet, the State tried (unsuccessfully) to moot the prisoner's appeal by proposing—two weeks before oral argument at this Court—to roll out a kosher diet at *only* that prisoner's facility. Likewise, the State argued below that *this* case was moot because it planned to offer kosher meals statewide by mid-2013, even though it did not even mention its intent to adopt that plan during court-ordered mediation. Nonetheless, despite that purported new policy, the State refused to agree to any settlement, balking at the request to execute a consent decree that would be enforceable against it in the future. And, after the District Court expressed doubt about its mootness argument, the State backtracked on that supposed plan, and now muses about a target date two years later than originally proposed.

In short, everything the State has done in this litigation has been focused on avoiding a binding court order to provide a kosher diet, or delaying any such order as long as possible. This only highlights the need for judicial intervention.

STANDARD OF REVIEW

The standard of review in this appeal is important, given the interlocutory posture and rapidly changing factual record in the court below. On interlocutory appeal from the grant of a preliminary injunction, this Court will reverse "only if the district court abused its discretion." *N. Am. Med. Corp. v. Axiom Worldwide, Inc.*, 522 F.3d 1211, 1216 (11th Cir. 2008). Because "the trial court is in a far better position than this Court to evaluate" the record, this Court "will not disturb its factual findings unless they are clearly erroneous." *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002). Review of a preliminary injunction is thus "deferential," in light of both the "limits on the evidence available" and also the "pressure to make difficult judgments without the luxury of abundant time for reflection." *Id.* Those judgments are "the district court's to make and we will not set them aside unless the district court has abused its discretion in making them." *Id.*; *see also Revette v. Int'l Ass'n of Bridge, Structural & Ornamental Iron Workers*, 740 F.2d 892, 893 (11th Cir. 1984) (per curiam) ("Appellate review of such a decision is very narrow."). Here, the State cannot show that the District Court abused its discretion.

ARGUMENT

I. THE STATE'S COST PROJECTIONS ARE VASTLY INFLATED AND GROSSLY OUT OF STEP WITH THE EXPERIENCE IN OTHER PRISON SYSTEMS.

The State does not dispute that failure to provide a kosher diet imposes a substantial burden under RLUIPA. Instead, it argues that denying a kosher diet is the only way to avoid crippling costs. But its cost estimates are grossly out of step with the experience in other states, for two reasons: (i) It inflates the number of inmates who would participate in the kosher-diet program, and (ii) it inflates its per-inmate cost. The District Court rightly rejected the State's contrived figures and found that the true sums are "not of a compelling magnitude." DE 106 at 20.

A. The Vast Majority of States and the Federal Government Provide Kosher Diets to Inmates at Reasonable Cost.

Prisons have been providing kosher diets for decades. In 1975, the Second Circuit held that denying a kosher diet violated the First Amendment. *Kahane* v. *Carlson*, 527 F.2d 492, 496 (2d Cir. 1975). Since *Kahane*, over a dozen courts—including the Seventh, Eighth, Ninth, and Tenth Circuits—have held that denying a religious diet violates the First Amendment or RLUIPA.[2] Today, at least thirty-five states and the federal government offer a kosher diet in their prisons. (U.S. Br. 12.) Their experience shows that doing so need not be complex or expensive.

[2] Each of these cases involved a ruling on the merits that the prison had to provide a religious diet—not just a denial of summary judgment to the prison:

Providing a kosher diet is not rocket science. Most prison systems use prepackaged kosher meals, which are shelf-stable and can be heated in any clean microwave. Such meals are widely available on airplanes, in hotels, from catering companies, and in hospitals. The U.S. military has provided prepackaged kosher rations to Jewish troops for many years. Joe Gould, *Kosher, Halal MREs Feed Religious Diversity*, ARMY TIMES, Mar. 20, 2010, http://www.armytimes.com /news/2010/03/army_passover_032010w/.

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(1) *Koger v. Bryan*, 523 F.3d 789, 801 (7th Cir. 2008) (non-meat);

(2) *Beerheide v. Suthers*, 286 F.3d 1179, 1192 (10th Cir. 2002) (kosher);

(3) *Love v. McCown*, 38 F. App'x. 355, 356 (8th Cir. 2002) (kosher);

(4) *Love v. Reed*, 216 F.3d 682, 691 (8th Cir. 2000) (Sabbath meal);

(5) *Ashelman v. Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997) (kosher);

(6) *Willis v. Comm'r, Ind. Dep't of Corrs.*, 753 F. Supp. 2d 768, 778 (S.D. Ind. 2010) (kosher);

(7) *Hudson v. Dennehy*, 538 F. Supp. 2d 400, 411 (D. Mass. 2008) (halal);

(8) *Toler v. Leopold*, No. 2:05-CV-82, 2008 U.S. Dist. LEXIS 27121, at *10-12 (E.D. Mo. Apr. 3, 2008) (kosher);

(9) *Buchanan v. Burbury*, No. 3:05-CV-7120, 2006 U.S. Dist. LEXIS 48244, at *17-18 (N.D. Ohio July 17, 2006) (kosher);

(10) *Caruso v. Zenon*, No. 95-MK-1578, 2005 U.S. Dist. LEXIS 45904, at *33-45 (D. Colo. July 25, 2005) (halal);

(11) *Thompson v. Vilsack*, 328 F. Supp. 2d 974, 980 (S.D. Iowa 2004) (kosher);

(12) *Agrawal v. Briley*, No. 02-C-6807, 2004 U.S. Dist. LEXIS 16997, at *12-31 (N.D. Ill. Aug. 25, 2004) (no meat or eggs);

(13) *Madison v. Riter*, 240 F. Supp. 2d 566, 569 n.2 (W.D. Va. 2003) (kosher), *overruled on other grounds*, 355 F.3d 310 (4th Cir. 2003);

(14) *Prushinowski v. Hambrick*, 570 F. Supp. 863, 869 (E.D.N.C. 1983) (kosher).

Prepackaged meals are typically supplemented with kosher items from the prison's regular supplies—*e.g.*, vegetables, fruit, eggs, cereal, bread, cheese, tuna, rice, or peanut butter. *See* Joshua Runyan, *Florida Partners With Aleph to Bring Kosher Food to Prisoners*, CHABAD.ORG, July 7, 2010, http://www.chabad.org/news/article_cdo/aid/1246270/jewish/Kosher-Food-Coming-to-FL-Prisons.htm. Nearly half of all supermarket products today are kosher. *New Study: Nearly Half of Supermarket Products are Kosher*, THE MATZAV NETWORK, May 27, 2010, http://matzav.com/new-study-nearly-half-of-supermarket-products-are-kosher. In Colorado, "[m]ore than half of the food items used to create kosher meals are drawn from CDOC's regular supplies." *Caruso* v. *Zenon*, No. 95-MK-1578, 2005 U.S. Dist. LEXIS 45904, at *38 (D. Colo. July 25, 2005).

To control costs, all prison systems use various measures to limit participation in religious diets. Most obviously, prison systems screen inmates for sincerity. For example, when Florida operated the JDA Program, each inmate was interviewed twice and was required to "demonstrate, by a preponderance of the evidence, that the self-identified religious faith is sincerely held." DE 29-3 at 11. Other prison systems use similar measures.[3]

[3] *See, e.g.*, U.S. Department of Justice, Federal Bureau of Prisons, No. P5360.09, *Religious Beliefs and Practices* § 548.20 (2004), http://www.bop.gov/policy/progstat/5360_009.pdf ("*BOP Religious Beliefs*") (chaplains conduct oral interviews); Wyoming Dep't of Corrs., Policy & Procedure No. 5.601, *Religious Diet Program for Inmates* IV.B (2009), http://corrections.

Many states also ensure that the kosher diet is no more desirable than the regular diet, thus eliminating the incentive to make insincere claims. This is not hard to do. Because many foods are not kosher, kosher diets typically have less meat and necessarily have less variety. Wyoming thus warns inmates that, "[d]ue to the strict preparation guidelines and limited kosher product availability, the variety of menus and items available for the Kosher Religious Diet Program may be more restricted than those available to others in the general inmate population." *Wyoming Religious Diet Program*, *supra* n.3, at IV.E.2.i.c. *Cf. Smith v. Mohr*, No. 3:11-CV-2669, 2011 U.S. Dist. LEXIS 148579, at *2 (N.D. Ohio Dec. 21, 2011) (prisoner refused to eat "distasteful" kosher meals); *Moussazadeh v. Tex. Dep't of Criminal Justice*, No. G-07-574, 2011 U.S. Dist. LEXIS 106451, at *37 (S.D. Tex. Sept. 20, 2011) (Texas kosher meals "frequently consisted of highly distasteful tofu and other items that were far less appealing than the regular diet").

Further, prisons often limit the ability of inmates to transfer into and out of the kosher diet program by changing their religious preference. In federal prison, an inmate who voluntarily withdraws from the religious diet may be required to wait up to thirty days before re-approval. *BOP Religious Beliefs*, *supra* n.3, at

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wy.gov/Media.aspx?mediaId=138 ("*Wyoming Religious Diet Program*") (inmate must complete a questionnaire, be interviewed by chaplain, and be verified by religious representative); New Mexico Corrs. Dep't, CD-150901, *Food Service Procedures* Q (rev. 2013), http://corrections.state.nm.us/policies/current/docs/CD-150900.pdf (inmates must be "approved by the facility Chaplain").

548.20(b). Repeated withdrawals "may result in inmates being subjected to a waiting period of up to one year." *Id.* Other states impose similar restrictions.[4]

Finally, prisons use behavioral controls to weed out insincere inmates. For example, an inmate's sincerity can legitimately be questioned if he is caught eating food from the regular cafeteria line, purchasing non-kosher food from the prison commissary, or trading kosher meals for other items.

These types of controls have enabled prison systems to provide kosher diets at a reasonable cost. Texas, for example, with a larger inmate population than Florida, incurred costs of **$28,324** and **$42,475** to provide a kosher diet in 2008 and 2009.[5] In Michigan, the estimated increased cost of providing a kosher diet in 2007 was **$272,000**.[6] In Indiana in 2008-09, it ranged from **$221,253.32** to **$256,894.68**.[7] And when Florida itself provided a kosher diet as part of its later-

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[4] *See, e.g.*, Nebraska Correctional Servs., Admin. Reg. 108.01, *Food Service* at IV.B.5 (2011), http://www.corrections.nebraska.gov/pdf/ar/rights/AR%20108.01.pdf; Vermont Dept. of Corr., Interim Procedure 354.05, *Inmate Alternative Diets* § 3.e.ii (2010), http://www.doc.state.vt.us/about/policies/rpd/correctional-services-301-550/351-360-programs-health-care-services/354-05-inmate-alternative-diets-medical-dental-and-religious-2.

[5] Mot. for Summary Judgment, *Moussazadeh v. Tex. Dep't of Criminal Justice*, No. 3:-07-CV-00574, Dkt. No. 198 at 36 (S.D. Tex. Dec. 10, 2010).

[6] Michigan Office of the Auditor General, *Performance Audit of Prisoner Food Services* 15 (2008), http://audgen.michigan.gov/finalpdfs/07_08/r471062107L.pdf ("*Michigan Audit*").

[7] *See* Mot. for Summary Judgment, *Willis*, 753 F. Supp. 2d 768, Dkt. No. 83-5 at 2-7 & 17 (S.D. Ind. July 19, 2010).

terminated JDA Program, it found that "the cost of maintaining the JDA Program for one year is approximately **$146,000**." DE 29-3 at 17 (emphasis added).

B. The State's Alleged "Participation Explosion" Is Attributable to Its Own Failure To Properly Screen for Sincerity.

The State now claims that a kosher diet could cost $86.5 million per year. (State Br. 11; Appellants' Motion for Partial Stay 19.). This is largely due to the State's claim that participation in the kosher-diet program would be at least 25% of all inmates, and possibly as high as 44%. (*Id.*) But this estimate is wildly out of step with the experience in other states. The unnaturally high rate of requests for kosher food in Florida prisons provides a good reason to improve the State's sincerity screening process, but no reason at all to prevent even unquestionably sincere inmates from adhering to their faith.

1. No state, to our knowledge, has ever come close to a participation rate of 25%, much less 44%. In Michigan, just 131 prisoners out of an average of 51,165 enrolled in the kosher food program, a participation rate of just 0.26%. *Michigan Audit*, *supra* n.5, at 7, 15. In Texas, only 20-some inmates out of approximately 155,000 participated in a kosher-diet program, for a rate of just 0.01%. *See* Mot. for Summary Judgment, *Moussazadeh*, No. 3:-07-CV-00574, Dkt. No. 198 at 32-33 & nn. 46, 48. In the federal Bureau of Prisons, as the District Court found, approximately 1.2% of prisoners are enrolled in the kosher-diet program—a rate that has remained steady for nearly two decades. DE 106 at

14; *see also* DE 68 at 136. And, last but not least, Florida's own JDA Program, which offered kosher meals for three and a half years, had an average enrollment of 250 inmates; at its peak, 364 prisoners were enrolled or sought to enroll. DE 106 at 3. That worked out to an average participation rate of 0.25%. By contrast, the 44% figure offered by the State in this litigation is more than 150 times higher.

The experience in these other prison systems is highly relevant under RLUIPA. *Rich v. Sec'y, Fla. Dep't of Corrs.*, 716 F.3d 525, 534 (11th Cir. 2013). As numerous Courts of Appeals have explained, when other prison systems successfully accommodate a religious practice, a state bears the burden of explaining why unique conditions in its own prison system require a different approach. *See, e.g.*, *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) (defendants failed to explain "why [other] prison systems are able to meet their indistinguishable interests without infringing on their inmates' right to freely exercise their religious beliefs"); *Spratt v. R.I. Dep't of Corrs.*, 482 F.3d 33, 39 (1st Cir. 2007) (emphasizing "absence of any explanation by [defendants] of significant differences between [their facility] and a federal prison that would render the federal policy unworkable"); *Native Am. Council of Tribes v. Weber*, Nos. 13-1401 & 13-2745, 2014 U.S. App. LEXIS 7766, at *24 (8th Cir. Apr. 25, 2014) (citing fact that "other correctional facilities permit inmates to use tobacco for religious purposes" in affirming injunction for RLUIPA plaintiff).

2. Here, the State has made no effort to explain why the participation rate in its kosher-diet program would be 37 times higher than in the federal Bureau of Prisons and over 150 times higher than in Michigan and even its own JDA Program. Obviously, the State is doing something wrong. And in fact, the State has now acknowledged in the District Court that the current reported participation rate is inflated by several factors. *See* DE 268 at 4-5.

First, the State failed to effectively communicate the purpose of the kosher-diet program to prisoners or staff before implementing it. DE 268 at 4. Instead, it simply posted flyers stating that a new diet option would be available, without explaining the type of food offered or the requirements for participation. *Id.* This produced confusion and a surge of insincere applications. *Id.* *Second*, the State started with a "Cadillac" version of a kosher menu, which was perceived to be superior to the regular diet, creating an incentive for insincere claims. *Id.* *Third*, the State did *nothing* to screen out insincere claims—supposedly because it thought the preliminary injunction prevented it from doing so. *Id.* This led to a free-for-all, with hundreds of inmates applying and no controls on participation.

Because the high participation rate is entirely attributable to the State's poor implementation, it provides no basis for refusing a kosher diet to sincere prisoners. Rather, in considering the "costs" of the program, the costs of feeding the insincere inmates should be excluded—because nothing in RLUIPA protects their desire for

kosher food. *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) (observing that "prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic"). The Tenth Circuit did just that in *Beerheide v. Suthers*, 286 F.3d 1179 (10th Cir. 2002). There, Colorado tried to justify restrictions on a kosher diet by citing the experience of Oregon, which had an initial surge in participation when it implemented a kosher diet. But the Tenth Circuit held that Oregon's experience was irrelevant "because, when [Oregon's kosher diet] was introduced, it placed no restrictions whatsoever on who could participate in the program." *Id.* at 1190. It was a "poorly-designed program" and "a model of illogic." *Id.* at 1190-91. So is Florida's program here. The District Court thus properly concluded that the high participation rate is not "representative of the long-term participation rate." DE 106 at 21.

3. The State attempts to defend its poorly designed program on the ground that the District Court's injunction supposedly tied its hands, depriving it of the basic tools it needs to conduct sincerity testing. In its stay motion, for example, the State admits that there are "several ways" that it could "address the burgeoning participation rates by culling out those inmates who were not sincere in their religious dietary beliefs." (Appellants' Motion for Partial Stay 7.) "However," the State claims, the District Court "has enjoined [it] from enforcing any of these control mechanisms." (*Id.*)

That excuse is both irrelevant and wrong. It is irrelevant, because if the District Court had improperly enjoined the State from testing its inmates for sincerity, the solution would be to vacate that portion of the injunction and allow the State to fix its program—not use the resulting inflated participation rate as a "compelling interest" sufficient to withhold kosher food from even the *sincere* inmates. And it is wrong, because the District Court did no such thing. Indeed, even after the District Court clarified its injunction and affirmatively *encouraged* sincerity testing, the State tries to maintain the fiction that its hands are tied—and then feigns surprise at sky-high participation rates.

The District Court's order was not ambiguous. It expressly noted that RLUIPA "does not preclude inquiry into the sincerity of a prisoner's professed religiosity," and it plainly did not enjoin the State from conducting *all* sincerity testing. DE 106 (quoting *Cutter*, 544 U.S. at 725 n.13). Instead, it enjoined two specific defects in the State's policy: (1) the rule conditioning participation in the kosher-diet program on the prisoner's "knowledge of religious dogma," and (2) the "zero tolerance" rule automatically removing any prisoner who was found to have consumed non-kosher food (such as from the prison commissary). As the District Court explained, religious dogma testing violates RLUIPA because inmates can be sincere even if they are not fully knowledgeable about religious dogma. DE 106 at 24-25; *see also Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) ("Religious

belief must be sincere to be protected …, but it does not have to be orthodox."). And the zero tolerance policy violates RLUIPA because it gives the prisoners "no opportunity to explain how the 'non-kosher' selection fits within his or her religious beliefs prior to removal from the Program." DE 106 at 26. Among other things, the prison may erroneously designate an item in its commissary as non-kosher. For example, one Florida prison designated tobacco as non-kosher because it is not certified as such—even though tobacco is not "food" and therefore need not be so certified. DE 67 at 139-42.

To the extent that the preliminary injunction was ambiguous—and it was not—the District Court itself removed any doubt during subsequent hearings and orders. During a status hearing on February 4, 2014, counsel for the United States pointed out that the State appeared to hold a "differing understandin[g] of the Court's order in terms of exactly what the state would be precluded from doing." DE 154-1 at 14. From the perspective of the United States, the only concerns were "dogma testing" and "inmates not having an opportunity to explain their choices and being excluded on one single violation of the policy"—but the State was "no longer removing anyone from the program for disciplinary violations or for any number of violations of the rules that are laid out in the program." DE 154-1 at 14, 17. The District Court then clarified that it was "not precluding the state from instituting some type of overview to make sure that the system is not abused." DE

154-1 at 18. Then, when the State still maintained that its hands were tied, the District Court again clarified—this time in a written order—that "*nothing in its injunction prohibits Defendants from crafting and enacting compliance measures for its religious diet program* which conform with [RLUIPA]. In fact, *the Court encourages the State to formulate a compliance plan complete with suspension and removal procedures that comply with RLUIPA*." DE 162 at 1 (emphases added).

Yet, even in the face of those assurances, the State insists that its hands are tied. Incredibly, just days after the District Court issued its written clarification, the State told this Court that, notwithstanding the District Court's recent order, "[t]he Preliminary Injunction enjoins the FDOC from *all sincerity testing* and *all suspensions from the program* for failing to comply with program [rules]." (Appellants' Motion for Partial Stay 8 (emphasis added).)

Whether or not the State is, as the District Court speculated, intentionally misinterpreting the District Court's injunction and "allow[ing] all of these people to come in" so as to "driv[e] up the numbers and creat[e] a false hardship" (DE 154-1 at 16), the State cannot inflate costs through its own implementation failures and then use those costs to excuse itself from complying with RLUIPA. The District Court was thus well within its discretion in concluding that the true costs of kosher food are not of "compelling magnitude." DE 106 at 20.

C. The State Has Also Dramatically Reduced the Per-Inmate Cost of Kosher Food Through Menu Adjustments.

The other contributing factor to the overall statewide cost of the kosher-diet program is the per-inmate cost of providing kosher food. As to that factor, too, the figures offered by the State are dramatically inflated and unsupported by the State's own record evidence.

1. The State told the District Court, in no uncertain terms, that the cost of providing kosher food, on a per-inmate per-day basis, would be $7.35, which is $5.81 per day more than the cost of the regular meal plan (which costs only $1.54 per day). DE 34 at 5; *see also* DE 35-1 (declaration of Florida Department of Corrections employee stating that cost of "two daily pre-packaged shelf-stable kosher meals supplemented by bread, fruit, beverages, and breakfast items" would be $7.35 per-inmate per-day); DE 67 at 114 (same). The District Court accepted that testimony, yet still found (by considering the likely long-term rate at which inmates would participate in the program) that the costs identified by the State were "not of a compelling magnitude." DE 106 at 20.

On appeal, the State reports the same figures. (State Br. 8 ("The daily cost of kosher meals per inmate was projected to be $7.35," which is "almost five times that for non-kosher meals."). And it projects statewide costs by multiplying that figure by its own expected participation rate. (State Br. 11 (projecting annual costs of $86.5 million if 25% of prisoners participate in kosher program).)

2. Once the State faced a preliminary injunction, however, it quickly found a way to cut the per-inmate cost that it reports to this Court and reported to the court below. In January 2014, less than two months after the District Court entered its injunction, the State modified the kosher menu to provide a cold lunch (namely, sardines) rather than a hot lunch. It also "substituted peanut butter in lieu of the fresh hard-boiled eggs," because of the "cost factor." DE 154-1 at 8; *see also* DE 132-1 at 4 (implementation plan, noting menu change). That change reduced the per-inmate cost of the kosher food to only **$5.76**, which is more than $1.50 less per day than the initial **$7.35** estimate. DE 132-3.

Next, in February 2014, the State revised the menu again, this time to switch to an entirely cold-food menu, eliminating the hot prepackaged meals from the equation. DE 132-1 at 4 (notation on implementation plan). The new menu, which consists exclusively of a combination of peanut butter, cereal, bread, beans, cabbage, sardines, and fruits and vegetables—three meals per day, seven days per week—will cost only **$3.52** per-inmate per-day, which is *less than half* of the figure that the State provided to the District Court and this Court, and only $1.98 more than the ordinary meal plan. DE 132-4. Multiplying the participation rate that the District Court predicted by this new, reduced per-inmate cost results in an annual expense of just under $725,000 for the entire statewide program.

Incredibly, the State's appellate brief—which was filed a month *after* this latest menu change—never mentions the new figures. Instead, it continues to rely on the inflated figures that the State introduced in the District Court, and uses those figures to exaggerate the impact of RLUIPA on the State's budget. (*See* State Br. 8-12.) Even in the State's motion for a partial stay of the District Court's injunction, the new figures are relegated to a footnote, without any explanation of the change or its cause. (*See* Appellants' Motion for Partial Stay 6 n.5.)[8]

3. The revised menu, and the resulting reduced costs for the State, are important to this appeal for at least three reasons. *First*, most obviously, the lower per-inmate cost means that even the District Court's projected statewide cost was more than double the current cost, further undermining the State's defense.

Second, while the State argued below that there was no "less restrictive means" of containing costs and thus that it was permissible to offer *no* kosher option at all, the State's quick fix once the preliminary injunction was imposed proves that it had not undertaken the serious consideration of alternatives that RLUIPA demands. *See Warsoldier*, 418 F.3d at 999 (government must "actually conside[r] and rejec[t] the efficacy of less restrictive measures").

[8] The footnote reports the marginal per-inmate daily cost of the kosher diet as $2.31. That is the $1.98 explained above plus 33 cents per day for the cost of the "paper products required to serve the [kosher] meal." (Appellants' Motion for Partial Stay 6 n.5.) Notably, the State does not adjust that figure to account for the savings of not having to purchase, clean, or replace the trays on which the regular meals are served, but which will not be needed for the kosher meals.

Third, the revision of the menu makes it very likely that insincere inmates will withdraw from the kosher program. As both parties and the District Court acknowledge, Florida's high participation rate was attributable in part to the fact that the State was providing "the Cadillac version" of the kosher meal, perceived to be more attractive than ordinary prison fare. DE 105 at 41-45. Two prepackaged hot meals per day may have been enticing, but never-ending meals of cabbage, peanut butter, beans, and sardines are not.[9] Indeed, in response to the menu change, the United States reports that nearly 1,300 prisoners have already voluntarily withdrawn from the diet. DE 268 at 4-5. Thus, the menu revision will reduce not only the per-inmate cost of kosher food, but also the program's participation rate, resulting in even further savings.

* * *

In short, flaws in the participation-rate and per-inmate cost figures provided by the State confirm that it has not carried its burden to prove that avoiding the costs of a kosher-diet program would be a "compelling" interest, much less that the District Court abused its broad discretion by concluding otherwise. Further factual developments have only confirmed that the District Court's ruling was correct.

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[9] *Amici* express no view on the adequacy of any iteration of Florida's kosher diet. *Cf. Cutter*, 544 U.S. at 721 n.10 (noting that "congressional hearings on RLUIPA revealed that one state corrections system served as its kosher diet 'a fruit, a vegetable, a granola bar, and a liquid nutritional supplement—each and every meal.'").

II. THE STATE'S SHIFTING PLANS AND EFFORTS TO EVADE JUDICIAL REVIEW CAST DOUBT ON ITS CREDIBILITY.

Even apart from its stubborn misreading of the preliminary injunction and its late-breaking (but largely undisclosed) menu revision, the State's conduct in this litigation—and other kosher-food suits—suggests an overriding objective to evade judicial oversight. The State's credibility, and its assurances that it intends to offer a kosher diet statewide, should be viewed with that in mind.

A. This Court recently decided another case challenging Florida's refusal to provide a kosher diet (although the State never even cites it). In that case, *Rich*, a district court granted summary judgment against the *pro se* inmate. The Becket Fund for Religious Liberty, *amicus curiae* here, represented the *Rich* plaintiff on appeal. After briefing was complete, the State announced that it would adopt a kosher-diet program, effective less than two weeks prior to oral argument, at *only* the facility that housed that plaintiff. *See Rich*, 716 F.3d at 530. The State then argued "that Mr. Rich's case should be dismissed as moot." *Id.*

Not surprisingly, this Court disagreed, observing that the policy change was made only "late in the game," *id.* at 532 (quoting *Harrell v. Florida Bar*, 608 F.3d 1241, 1266-67 (11th Cir. 2010)), and "only after Mr. Rich filed his counseled brief to this Court." *Id.* "Notably, Florida implemented the plan at the prison where Mr. Rich is incarcerated, and only at that prison, less than two weeks before the oral argument scheduled in this Court. These facts make it appear that the change in

policy is 'an attempt to manipulate jurisdiction.'" *Id.* (quoting *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents of the Univ. Sys. of Ga.*, 633 F.3d 1297, 1310 (11th Cir. 2011)). Moreover, even as it committed to provide kosher food prospectively, Florida refused to concede that its prior conduct violated RLUIPA and offered "nothing to suggest that Florida will not simply end the new kosher meal program at some point in the future, just as it did in 2007 [as to the JDAP]." *Id.*

B. The proposal that the State floated in *Rich* also called for rolling out a kosher-diet program statewide by September 1, 2013. *See Rich*, 716 F.3d at 530. Yet, even though the United States had by that point already filed this action and the parties were supposedly engaged in mediation, "Defendants did not notify the United States of this new policy." DE 106 at 6. Instead, the United States "first learned of the policy on April 2, 2013 from counsel in [*Rich*]." DE 106 at 6. And even though the State was supposedly committing to provide kosher food at its prisons statewide, it refused to settle this litigation, citing an unwillingness to sign a consent decree that would allow for judicial enforcement. *See* DE 154-1 at 21 ("[The Court:] I do not understand the emotional philosophical resistance to agreeing to something that you agreed to do. … [Counsel:] I'm sorry, Your Honor, but it is the position of the state that if there is going to be a consent decree, that it is a stumbling block."). In other words, the State is willing to commit to providing a kosher diet so long as nobody can hold it to its word.

Rather than use the new policy to settle the litigation, the State—as it did in *Rich*—argued that it mooted the case entirely, requiring dismissal. *See* DE 34 at 8-11. Even as it argued that it had no statutory obligation to provide a kosher diet in light of its unworkable cost, the State simultaneously insisted that it had shown a firm "commitment to providing a kosher diet to inmates despite its substantial, ongoing cost." DE 34 at 11. (That, of course, left the State in the pretzel-like position of arguing that it was committed to taking action that supposedly would undermine its own compelling interests. *See* DE 106 at 19.)

The District Court expressed skepticism about the mootness argument at a hearing in June 2013, noting that "[b]ased on the *Rich* decision, it would appear that mootness is not a viable defense at this particular point in time." DE 67 at 5. Shortly thereafter—*i.e.*, as soon as it became clear that the mootness gambit had failed—the State backtracked on its plan to offer a kosher diet statewide by September 2013. In a status report, the State noted that it had "revisited its plan to go statewide as of September 1, 2013," instead suggesting a "staging process" that would introduce kosher food gradually at a handful of institutions. DE 79 at 2-4. The State claimed that its "current goal" was "statewide implementation by mid-to-late 2014." DE 99 at 6. More recently, the State has proposed "a more tempered expansion" that would not see full implementation until July 2015—nearly two years after the date that formed the basis for its mootness claim. DE 260 at 4-5.

C. In short, the State previously established and then cancelled a kosher-diet program (DE 106 at 3-4), and more recently made bold promises of new statewide initiatives, only to backtrack and postpone when those promises failed to moot active litigation. It committed to providing a kosher diet at its prisons, but balked at signing a consent decree that would compel adherence to that promise. It offered to engage in mediation, but then unilaterally adopted a new policy without informing the other side. These shifting plans, inconsistent positions, and "attempt[s] to manipulate jurisdiction," *Rich*, 716 F.3d at 532, show that the State is not acting in good faith to comply with RLUIPA.

Rather, as the District Court said: "[T]he state has a history now with the Court of Appeals … and to a certain extent with me, that the state wants to give lip service to [RLUIPA], but doesn't want anyone telling it it has to comply with the law." DE 154-1 at 20. The State's conduct powerfully reinforces the need for active judicial review and supervision, of the sort that the able District Judge has been providing below, to ensure that the State complies with federal law and respects the religious rights of its inmates.

CONCLUSION

For these reasons, this Court should affirm the preliminary injunction issued by the District Court.

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Respectfully submitted,

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CERTIFICATE OF WORD-COUNT COMPLIANCE

The undersigned attorney hereby certifies, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), that the foregoing Brief for *Amici Curiae* contains 6,619 words, excluding those sections excluded by Rule 32(a)(7)(B)(iii).

/s/ Shay Dvoretzky
Shay Dvoretzky

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that on May 28, 2014, the foregoing Brief of *Amici Curiae* was served via the Electronic Case Filing (ECF) on all counsel of record, and that seven paper copies were sent to the Clerk of the Court by certified First Class mail.

/s/ Shay Dvoretzky
Shay Dvoretzky