IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 12-11735

BRUCE RICH,

Plaintiff/Appellant,

vs.

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
1:10-cv-00157-MP-GRJ

APPELLEES' ANSWER BRIEF

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Rich v. Secretary, Florida Department of Corrections, Case No. 12-11735

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for Appellees, hereby certifies that, to the best of his knowledge, the following persons, firms, associations, and government entities have or may have an interest in this case:

1. Gary R. Jones, Magistrate Judge
2. Maurice M. Paul, Senior District Judge

Plaintiff/Appellant:

3. Bruce Rich

Plaintiff/Appellant's Counsel:

4. Luke W. Goodrich, The Becket Fund for Religious Liberty
5. Eric C. Rassbach, The Becket Fund for Religious Liberty

Defendants/Appellees:

6. Edwin G. Buss, Secretary, Florida Department of Corrections
7. Walter McNeil, former Secretary, Florida Department of Corrections
8. Milton Hicks, former retired warden
9. S.T. Robinson, former Assistant Warden of Programs
10. Jeffrey Andrews, Food Service Director
11. Kathleen Fuhrman, Registered Dietician
12. Julie Deno, Food Service

13. Alex Taylor, Chaplaincy Services Administrator

14. Albert Thigpen, Food Service Administrator

Defendants/Appellees' Counsel:

15. Joe Belitzky, Former Assistant Attorney General

16. Pamela Jo Bondi, Attorney General of Florida

17. Joy A. Stubbs, Assistant Attorney General

Others:

18. Nathan Lewin, for the The National Jewish Committee on Law and Public Affairs (:COLPA"); Agudas Harabbanium of the United States and Canada; Agudath Israel of America; the Union of Orthodox Jewish Congregations of America ("Orthodox Union"), National Council of Young Israel ("NCYI"); the Association of Kashrus Organizations ("AKO"); Rabbinical Alliance of America; and Rabbinical Council of America.

19. Randall C. Marshall, ACLU Foundation of Florida

20. Daniel Mach, ACLU Foundation

21. David C. Fathi, ACLU Foundation

22. Heather L. Weaver, ACLU Foundation

23. Kimberlee Wood Colby, Christian Legal Society; Prison Fellowship Ministries; and the National Association of Evangelicals.

24. Roger G. Brooks, Christian Legal Society; Prison Fellowship Ministries; and the National Association of Evangelicals.

25. Joel C. Haims, The Aleph Institute; International Society for Krishna Consciousness; the International Mission Board of the Southern Baptist Convention; and the Hindu American Foundation

26. Michael J. Rosenberg, The Aleph Institute; International Society for Krishna Consciousness; the International Mission Board of the Southern Baptist Convention; and the Hindu American Foundation

27. Jeffrey M. David, The Aleph Institute; International Society for Krishna Consciousness; the International Mission Board of the Southern Baptist Convention; and the Hindu American Foundation

28. Michael S. Lazaroff, American Jewish Committee

29. Marc D. Stern, American Jewish Committee

/s Joy A. Stubbs
Joy A. Stubbs
Counsel for Defendants/Appellees

STATEMENT REGARDING ORAL ARGUMENT

The correctness of the District Court's decision can be adequately demonstrated by the record provided and relevant case law and authorities. Thus, the Court's understanding of this cause would not be enhanced by the appearance of counsel for oral argument. However, the Defendants/Appellees are prepared to present oral argument should the Court think it helpful.

CERTIFICATE OF TYPE/VOLUME

Counsel for appellees certifies that this brief is presented in Times New Roman style, 14-point size, and contains 13,330 words thereby complying with Federal Rule of Appellate Procedure Rule 32(a).

/s Joy A. Stubbs
Joy A. Stubbs
Counsel for Defendants/Appellees

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STATEMENT OF JURISDICTION

This appeal is from final summary judgment in favor of the defendants. The district court had jurisdiction pursuant to 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES
(restatement)

The district court ruled against the Appellant inmate's RLUIPA-based claim that seeks a special Kosher diet by adopting a report and recommendation (R&R) of a United States Magistrate to which no party objected. The two questions for this Court are:

I. Whether the district court clearly erred in granting summary judgment to Appellees based on the R&R, which cited undisputed evidence in support of findings that State Appellees satisfied the RLUIPA's standards; and

II. Whether the Magistrate's decision to deny Appellant's motion for additional discovery, to which Appellant did not object to the district court, constituted clear error or manifest injustice.

STATEMENT OF THE CASE

Appellant Bruce Rich is an inmate of the Florida Department of Corrections (DOC), who filed suit under the RLUIPA to get special Kosher food in prison. He now asks this Court to reverse the District Court's judgment for the State Appellees,[1] even though he offered *nothing* to dispute the DOC's evidence that its decision not to provide him a Kosher diet serves compelling state security and cost interests and is the least restrictive means of serving those interests. In addition, Appellant failed to file *any* objections to the United States Magistrate's findings and conclusions in the report and recommendation to the District Court, even after getting an extension of time to do so.

Only now, for the first time on appeal, the Appellant offers a voluminous brief and extensive extra-record material in attempts to rebut the findings and conclusions made below to which the Appellant did not object to the district court.

A. Appellant's Administrative Grievances and Complaint

Rich began demanding a Kosher diet from Chaplain Hedrick of Union Correctional Institution via Inmate Request in February of 2009. [D1:23][2] Rich stated this was a prelude to further action to seek Kosher meals but not in the form

[1] Mr. Rich sued the Secretary and other officials of Florida's DOC.
[2] Citations to the record on appeal are [D#:*] where # is district court's docket entry number and * is the page number.

of previously offered Jewish Dietary Accommodation Program ("JDAP") meals.[3] Id. In subsequent grievances, Rich complained about the ease with which inmates could self-identify themselves as "Jewish" and take resources intended for true adherents of Judaism. [D1:21][D1:22] Rich asked for "a separation of 'Aleph Institutes' vetted" for the purpose of meals and activities. [D1:21] Rich incorporated a proposal written as a letter to Chaplain Hedrick, calling for criteria that required satisfying lineage or conversion standards set by the Aleph Institute or Rabbinic law. [D1:28-29] [D1:28] Rich knew his criteria would leave many inmates in "limbo" or facing new spiritual choices but said the affected inmates had affiliated with Judaism to eat JDAP food. [D1:31] To Rich, these inmates had "disruptive" and "self-serving" interests. Id.

Rich sued the Department after being advised that the Department had no requirement that an inmate be Jewish by birth or be on a list from the Aleph Institute in order to change his religious preference to Jewish, that inmates determined their own religious preference and are not "vetted" by the state or any other agency, and that inmates were able to select from the vegan and alternative entrées. [D1:17][D1:20]

[3] The Jewish Dietary Accommodation Program existed from 2004-2007 and will be discussed below.

Rich alleged he had offered to obtain pre-prepared "shelf-stable" Kosher meals at his own expense. [D1:9] Because this request was denied on the ground that inmates may not purchase food from unauthorized outside sources, Rich alleged purchasing designated Kosher foods from the inmate canteen vendor at high mark-ups which lacked variety and nutritional sufficiency [D1:9] [D1:12-13] Rich alleged not being able to purchase canteen items while on disciplinary confinement for 38 days. [D1:12 n.15] [D1:12-13]

Rich did not deny that Kosher dietary laws are "complex and extensive," or that Kosher food is more expensive than the food presently served to inmates. [D1:10] [D1:12] Rich also admitted that shelf-stable meals would also require heating, disposable utensils, along with fresh fruits, eggs, and dairy products. [D1:9] However, Rich considered cost an impermissible reason for denying him a Kosher diet and alleged that the Department kept food costs below $1.65 per inmate per day by serving "low-grade food products," leftovers, and small portions. [D1:12] According to Rich, the answer to keeping Kosher diet costs down is for Department to strictly control "who is Jewish." [D1:16] While complaining that the JDAP kitchens were not truly Kosher, Rich recounted that logistics and monetary considerations involved with many inmates claiming to be "Jewish" led to the JDAP abolishment. [D1:7 & 8 n.7] As such, Rich continued

urging the Department to implement strict criteria for participation in a Kosher meal program which would include his proposed strict lineage or conversion criteria. [D1:13-14] [D1:14 n.19]

C. Appellees' Motion for Summary Judgment and Affidavits

Appellees argued that the Department's alternate entrée (meatless diet which includes dairy and eggs) or vegan meal programs were the least restrictive alternatives available to accommodate Rich's religious needs while furthering the state's security and budgetary interests. [D38:2-3] In support, Appellees supplied the affidavit of Department Dietician Kathleen Fuhrman, who had been involved with JDAP and the Religious Dietary Study Group. [D38-1:1-5] Relaying a survey of vendors, Fuhrman stated:

> . . . One vendor provides 10 types of 10-ounce shelf-stable meals which contain 400 calories each at a cost of **$2.75** per meal. A second vendor offers a selection of more than 25 frozen meals that weigh between 12 and 16 ounces and contain 500 calories each for **$4.00** a meal. A third vendor will supply a variety of 16-ounce frozen meals at a cost of **$4.79** for each meal which contain 400 to 500 calories each. A fourth vendor proposes a meal plan that consists of 8 types of frozen entrees that contain between 300 and 400 calories each. The meals of the fourth vendor weigh between 12 and 13 ounces and cost between **$4.50 and $6.00 each.** (emphasis added)

[D38-1:3, ¶ 12]

To ensure adequacy and the caloric equivalency of the regular menus, additional food items would be needed to heavily supplement the Kosher entrée,[4] with separately stored "eggs, fruits and vegetables, cereal, juice, peanut butter and similar items." [D38-1:2] [D38-1:3-4] Adding the cost of supplemental food items to the shelf stable Kosher entrees costing between $2.52 - $2.95 would take the estimated cost range to $4.49 to $5.71 per day. [D38-1:2] Fuhrman also noted that, to comply with Kosher standards, an additional $.81 per day would be needed for disposable containers and utensils. [D38-1:2] Given the current per diem cost for raw food of $1.60, Fuhrman summarized that altogether it would cost almost 3 to 4 times as much to provide Kosher meals. [D38-1:2] Fuhrman concluded that the yearly cost for feeding one inmate shelf-stable meals would be $5.30 to $6.52 per day or $1934.50 to $2379.80 compared to $584.00 per year for regular meals. [D38-1:4] Fuhrman further calculated that if the 6,283 inmates self-identifying as Seventh Day Adventist, Muslim, and Jewish in June 2011 claimed entitlement to Kosher shelf-stable entrees[5] with additional food, the cost would be an additional

[4] The Kosher entrées provided between 400-450 calories per meal. [D38-1:3-4]

[5] Ms. Fuhrman's affidavit contains an apparent scrivener's error in paragraph 14 with the words "frozen entrees" [D38-1:4] and should read "shelf-stable entrees" when viewed in context of paragraphs 7 & 9 which discuss less expensive shelf-stable meals. [D38-1:2]

expense of $12,154,463.35 to $14,952,283.40 per year. [D38-1:2, ¶ 9; D38-1:4, ¶ 14]

James Upchurch, who has held positions in security in three state prison systems, related that the perception of the Kosher diet as preferential treatment for some inmates would result in detrimental impact on inmate morale and subsequently on institutional environment and operation. [D38-1:7] Upchurch stated that, as extensively reported by staff during operation of the JDAP, inmates would attempt to seek a better diet by claiming belief in other religious groups with need for a diet mimicking a Kosher diet or some other diet. [D38-1:7-8] Resultant discord and unrest that would arise within the inmate population would be significant should the Department attempt to determine religious entitlement to any special diet and subsequently monitor and enforce any determinative criteria. [D38-1:8] Moreover, as indicated by Upchurch, the gravity of security concerns increase with the rise in confrontational incidents from such scenarios, as well as the diversion of security staff attention from primary security functions to monitor inmate compliance with religion-related criteria. [D38-1:8] Upchurch warned of a worst case scenario if inmates believed that the higher cost to provide the kosher diet had somehow reduced the quality and quantity of the food being served to everyone else. [D38-1:9] Upchurch stated this would likely lead to retaliation

against inmates receiving Kosher meals and/or disruption of the institution in general by excluded inmates expressing their displeasure. [D38-1:9]

Upchurch also noted that specialized kitchens at select locations did, and would certainly continue to result in inmates, including special threat groups/gang members, attempting to manipulate the system to gain transfers to the special institutions for gang and other associational purposes, and to obtain what was thought to be a preferred diet. [D38-1:8] Upchurch explained that staff responsible for security in the kitchen, already assigned at a bare-minimum level, would be assigned the additional duty of maintaining/securing the Kosher area of the general kitchen for any separate food preparation areas. [D38-1:9] This would distract from the fundamental responsibilities associated with operating a large kitchen utilizing a large number of inmate workers. [D38-1:9] Upchurch found that the suggestion of transporting the food from specialized kitchens to other institutions overlooked the necessity of having appropriate vehicles and food carriers. [D38-1:8-9] Again, a staff would have to be involved and redeployed from other responsibilities. [D38-1:8-9]

In opposition, Rich criticized Appellees for not addressing his offer to personally pay for a Kosher diet. [D49:4] [D49:31] Rich argued that, even if his offer did not eliminate the concern over cost, Appellees failed to demonstrate that

reasonable alternatives did not exist. [D49:5] Rich maintained that the JDAP kitchens could be reconstituted as Kosher, and that Kosher compliance could be monitored in the same way therapeutic diets and the vegan diet were monitored. [D49:7-9] Rich conceded that "there may be 'some' risk of jealousy from other inmates" because his Kosher food would be different from theirs, but labeled Mr. Upchurch's concerns as fear-mongering. [D49:8-9] Rich reported that a pilot program to provide Kosher meals at the South Florida Reception Center, enriched by involvement from the Aleph Institute, had no known incidents. [D49:9-10] Rich exhibited a letter from Aleph's Rabbi Katz, providing information to "help [Rich] with [his] suit", which stated:

> . . .we 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 been a hint of a security concern at all.

[D49:33] Rich neither requested nor related any attempt on his part to request housing at the institution that plays host to the pilot program. [D49:9-10]

D. Disposition

Magistrate Judge Gary Jones found no dispute that a Kosher diet was a sincerely held tenet of Rich's faith, or that Rich's practice of his faith was

substantially burdened. [D52:9] However, the Magistrate found that the same cost and security concerns existed that had previously been expressed in the Northern District case *Linehan v. Crosby*, No. 4:06-cv-00225-MP-WCS, 2008 WL 3889604 (N.D. Fla. Aug. 20, 2008), *aff'd*, 346 F. App'x 471 (11th Cir. 2009). [D52:9-10]

Magistrate Jones found, as Ms. Fuhrman advised, that it would be cost prohibitive to provide Kosher meals for Muslim, Jewish, and Seventh Day Adventist prisoners, who would have to be treated equally. [D52:10] The Magistrate also found that a Kosher meal plan would implicate the serious security issues presented by Mr. Upchurch, including the concerns originating with the perception of certain inmates receiving special treatment, as well as the security and logistical issues associated with special kitchens and transporting food to other institutions. [D52:10] According to the Magistrate, Rich paying for his own meals, while perhaps alleviating some cost concerns over Rich's individual meals, still implicated the cost, security, and logistical concerns regarding special meals. [D52:11]

Concluding that Rich had failed to come forward with evidence to prove his RLUIPA Kosher diet claim, Magistrate Jones recommended that Appellees be granted summary judgment. [D52:14] The Magistrate gave notice that any party was permitted to file written objections to the proposed findings and

recommendations within 14 days after being served with a copy of the R & R. Id. The notice stated that failure to file specific objections would limit the scope of review of proposed factual findings and recommendations. Id.

Expressly acknowledging the notice regarding filing objections, Rich moved for an extension of fourteen days time to object to the R & R. [D54:2-3] The Magistrate granted Rich's motion. [D55] Ultimately, Rich elected not to file objections to the R & R. [D55; D57] District Judge Casey Rodgers adopted the R & R and granted Appellees' summary judgment. [D57]

E. The Case Management Order and Appellant's motion alleging need for further discovery time

The district court scheduled a three month discovery period. [D33:1] The Court advised that there would be no extension of the discovery period except for good cause and upon showing of diligence during the initial period. Id.

Near the end of the discovery period, and having had Appellees' motion for summary judgment for more than two and a half months, Rich moved to extend the discovery cut-off date. [D38] [D46:1] Alternatively, Rich asked that discovery be held in "abeyance". [D46:5] Rich alleged he was only permitted to use the institution's law library in off-duty hours and that his job required him to work weekdays from 7:30 a.m. to 4:00 p.m. and some Saturdays. [D46:3] Rich further

alleged that the law library was closed Sundays and when security issues or severe weather restricted inmate movement. [D46:3-4] Rich, however, did not share his discovery efforts made in the interim, any specific problems serving discovery requests on any defendant, or how the resources of the library were tied to his ability to seek information from defendants. [D46]

Magistrate Jones denied Rich's motion to extend the time for discovery, but provided Rich with 30 days in which to respond to the motion for summary judgment. [D47] The Magistrate instructed Rich that failing to respond to the summary judgment motion would indicate that the motion is not opposed, that all material facts asserted in the motion would be considered admitted unless controverted by proper evidentiary materials such as counter-affidavits or exhibits, and that Rich may not rely solely on the allegations of the issue pleadings (e.g., complaint, answer, etc.). [D47:2]

F. The Final Report of the Study Group on Religious Dietary Accommodation in Florida's State Prison System

Appellant's Initial Brief includes as an addendum the *Final Report of the Study Group on Religious Dietary Accommodation in Florida's State Prison System*

(*Final Report*). While not contained in the record, Appellees will also include relevant portions in their facts and reference it in subsequent argument due to its nature as an official public record of the Florida Department of Corrections.

Tasked with reviewing the Department's religious meal offerings, and specifically the JDAP, the Study Group was to consider factors including data for food purchases and preparation, physical plant requirements, security and classification issues, administrative matters, utilization and participation, and cost. IB Add. A, at1.

"Inmate Participation Statistics" provides the following details:

- Nearly six percent of the inmates enrolled in the JDA Program have become gang members after entering the program. *Id.* at 10.
- "Currently, there are 129 participants in close management" - almost half the total number of inmates enrolled in the JDA Program." *Id.*

With respect to problems, the Study Group detailed the following:

- Due to limitations on which facilities are equipped to prepare JDAP meals in separate kitchens, inmates desiring to participate in the JDA Program who is housed in an institution not equipped to maintain the JDA Program must be transferred to one of the 13 equipped institutions. *Id.*
- Inmates appear to be manipulating the program, possibly to be transferred closer to family or to avoid supervision by particular correctional officers. *Id.*

- "There is some indication that gang members may be manipulating the transfer process to their advantage so that members of a particular gang may be housed in the same institution." *Id.*

- Close management inmates, which make up almost half the number of JDAP participants, "pose a special threat during transfer." Because a limited number of close management housing locations exist, "[i]n order to transfer a close management inmate into a new facility, it is highly likely that a close management inmate already housed at the receiving facility must be transferred away from that facility, thereby virtually doubling the number of necessary transfers." *Id.*

- Security concerns existed due to the occurrence of program trays being used to conceal contraband. *Id.*

- In order to accommodate and serve all eligible inmates, "[e]xtreme reconstruction of virtually all other institution kitchens at astronomical cost would be required." *Id.* at 18.

Finally, the report section on "Opinions Submitted by Institutional Staff" observed:

- "The general sentiment is, simply stated, that the JDA Program is being abused to such an extent that it complicates day to day operation of the institutions." *Id.* at 22.

- Chaplains and classification supervisors are "overwhelmed" by the number of inmates applying to the program, each of which must undergo an extensive interview and assessment. *Id.*

- "Inmates are consistently being removed from the JDA Program due to clear violations of restrictions," and such removals additionally burden the chaplains and supervisors. *Id.*

- The number of grievances filed increases when inmates are denied enrollment in or removed from the program, such that the "proliferation of paperwork sometimes interferes with the ability of the classification supervisor and chaplain to carry out their other duties." *Id.*

- "Officials also indicate concern that inmates are consolidating the locations of gang members by abusing the JDA Program." *Id.*

Ultimately, the Study Group recommended that the Department 1) eliminate all pork and pork products from its menus, 2) retain a Kosher dietary program but restrict participation to inmates who are expertly appraised or vetted by a rabbi as eligible, 3) eliminate the JDAP kitchens and instead use pre-packaged Kosher meals, but only if the stricter vetting process significantly reduces the officially recognized Jewish population, and 4) remove an inmate from the Kosher dietary program for missing 10 percent or more of Kosher meals a month. *Id.* at 2.

F. Standards of Review

This Court reviews de novo the district court's grant of summary judgment, using the same standard of review utilized by the district court and drawing all factual inferences in a light most favorable to the non-moving party. *Miccosukee Tribe of Indians of Fla. v. U.S.*, 566 F.3d 1257, 1264 (11th Cir. 2009); *Johnson v. Bd. of Regents of Univ. of Ga.*, 263 F.3d 1234, 1242-43 (11th Cir. 2001). "No genuine issue of material fact exists if a party has failed to 'make a showing sufficient to establish the existence of an element ... on which that party will bear the burden of proof at trial.' " *Am. Fed'n of Labor & Cong. of Indus. Orgs. v. City of Miami,* 637 F.3d 1178, 1186–87 (11th Cir.2011) (modification in

original)(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, (1986)).

When a magistrate judge notifies a party of his right to object to the magistrate's factual findings, a party's failure to object prohibits an attack on appeal of the factual findings adopted by the district court except on grounds of plain error or manifest injustice. *Resolution Trust Corp. v. Hallmark Builders, Inc.*, 996 F.2d 1144, 1149 (11th Cir.1993) (citing *LoConte v. Dugger*, 847 F.2d 745, 749 -50 (11th Cir. 1988), *cert. denied*, 488 U.S. 958, 109 S. Ct. 397(1988); *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982) (en banc). Questions of law, however, remain subject to de novo review. *Monroe v. Thigpen*, 932 F.2d 1437, 1440 (11th Cir. 1991).

The denial of a motion for an extension of time is reviewed for abuse of discretion. *See Young v. City of Palm Bay, Fla.*, 358 F.3d 859, 863 (11th Cir. 2004); *Keeler v. Florida Dep't of Health*, 324 F. App'x 850, 857 (11th Cir. 2009).

SUMMARY OF THE ARGUMENT

The district court did not clearly err in granting summary judgment to Appellees based on the Report and Recommendation, which cited undisputed

evidence in support of findings that Appellees satisfied RLUIPA's standards. Moreover, the Magistrate's decision to deny Appellant's motion for additional discovery, to which Appellant did not object to the district court, did not constitute clear error or manifest injustice.

ARGUMENT

Appellant failed to rebut and, ultimately, to object to lower tribunal's findings that, as demonstrated by Appellees' cost, security, and logistical evidence, the Department's current meal plans met RLUIPA standards. Nevertheless, Appellant Bruce Rich now seeks reversal with a voluminous brief and extensive extra-record material, making conclusory allegations of misrepresentation of cost and security interests by Appellees and cursory promises of easy alternatives for providing Kosher meals. Yet, not only did Appellant admit that his Kosher meal plan implicated expense and jealousy between inmates, Appellant conceded that his plan would required intra-religion distinctions made between inmates in favor of one religious group. The Department, however, has approximately 95,000 culturally and spiritually diverse inmates of differing custody levels sharing state resources with Rich for the care of their needs while incarcerated in the Florida

Department of Corrections.[6] Not one is any less entitled to protection by RLUIPA[7] or the constitution. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 1683 (U.S. 1982).

The Department, therefore, extends to "*all* inmates the greatest amount of freedom and opportunity for pursuing individual religious beliefs and practices consistent with the security and good order of the institution." Fla. Admin. Code r. 33-503.001(2)(a) (2012) (emphasis added). With respect to religious dietary accommodation, the Department's vegetarian and vegan meal plans which address as many religious dietary needs as possible while furthering the compelling interests unique to operation of the Florida correctional system in the least restrictive manner. As such, the Department's dietary accommodation, as demonstrated below, are wholly in keeping with RLUIPA's deference to the states to fashion appropriate solutions to address the unique issues and circumstances of their institutions. *See Cutter v. Wilkinson*, 544 U.S. 709, 722-23, 125 S.Ct. 2113, 2122 (2005) (stating that "context matters" in the application of this "compelling

[6] *See* IB 40; *see also* Fla. Dep't of Corrs., Chaplaincy Services Quick Facts, http://www.dc.state.fl.us/oth/faith/Facts.html (indicating more than 100 different religious preferences recorded with the Department).

[7] See 42 U.S.C. § 2000cc–3(g) (instructing that the statute be construed in favor of "broad protection of religious exercise").

governmental interest" standard, and that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety.").

I. THE DISTRICT COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT TO APPELLEES ON RELIGIOUS DIETARY ACCOMMODATIONS UNDER THE STANDARD SET FORTH IN RLUIPA

In the case of Rich's kosher diet claim for injunctive relief,[8] the District Court correctly applied the standards of RLUIPA to grant Appellees' motion for summary judgment. [D52;D57]

RLUIPA provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person–
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a)

[8] Claims for monetary damages are not cognizable in RLUIPA cases. *See Sossamon v. Texas*, ––– U.S. ––––, ––––, 131 S. Ct. 1651, 1660, (2011) (holding that RLUIPA does not provide a cause of action for damages against the State).

Below, the District Court found that there was neither a dispute that a Kosher diet was a sincerely held tenant of Rich's faith, nor a dispute that Rich was substantially burdened in his religious practice in not being provided a Kosher diet. Yet, as to the compelling state interest and least restrictive means, the Court found that Appellees had carried their burden of proof under RLUIPA. The Court correctly concluded that the excessive financial costs, security issues, and administrative and logistic difficulties of implementing a Kosher meal plan in the Florida prison system are compelling state interests and that the current vegan and vegetarian diets are the least restrictive means of addressing this compelling interest.

Upon review of the affidavit of the Department's dietician, the Court found that it would "cost the DOC an additional $12,154,463.35 to $14,952,283.40 per year to provide kosher meals diets for Muslim, Jewish, and Seventh Day Adventist prisoner, who would have to be treated equally." [D52:10]. Contrary to Rich's contention on appeal, neither Appellees nor the district court relied on costs alone.

The Court additionally found, "serious security issues" would be implicated if Rich were provided a kosher diet, including decrease in inmate morale and orderly facility operation if certain inmates were seen as receiving special treatment, religious professions of pretext to obtain a special diet, increased

confrontations between staff and inmates as staff judged which inmates were entitled to the diet (and which were not), diversion of security staff from their primary functions to monitor the meal program for abuse, and actions by security threat groups/gangs to manipulate the system to locate in institutions designated for meal programs. [D52:10] The Court further found that logistical issues would be implicated if food were to be prepared in special kitchens and transported to other institutions. [D52:10-11] As to Rich's suggestion that Rich be permitted to pay for his own meals, the Court found that while this might alleviate some of the cost concerns for Rich's individual meals, allowing Rich to receive special meals would still implicate the cost, security, and logistical concerns expressed by Appellees. [D52:11]

A. Rich did not object to the Magistrate's Report and Recommendation; therefore, any review of the Magistrate's findings of facts is limited to the plain error standard.

This Court reviews a magistrate judge's findings of facts, which were accepted and adopted by the district court without objection by either party, under the plain error standard. *Monroe*, 932 F.2d at 1440 (citing *LoConte*, 847 F.2d at 749-50). Purporting to challenge Appellees' evidence of compelling state interest and least restrictive means offered in the affidavits of Kathleen Fuhrman and

James Upchurch, *see* IB 31-66, Rich attacks the Court's factual findings which are based on these affidavits. However, Rich elected not to object to the findings of fact in the Magistrate's Report and Recommendation after receiving notice for doing so.[9] Thus, Rich may not challenge these findings except for plain error or manifest injustice. *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989) (citing *LoConte*, 847 F.2d at 745, and *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982) (en banc)).

"Plain error consists of error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity and public reputation of judicial proceedings." *U.S. v. Russell*, 703 F.2d 1243, 1248 (11th Cir. 1983)(quoting *United States v. Fowler*, 605 F.2d 181, 184 (5th Cir.1979), *cert. denied*, 445 U.S. 950, 100 S.Ct. 1599 (1980). If the district

[9] Notice was given to Rich that any party was permitted to file specific, written objections to the proposed findings and recommendations within 14 days after being served with a copy of this report and recommendation. [D52:14]. The notice provided that "[f]ailure to file specific objections limits the scope of review of proposed factual findings and recommendations." [D52:14]. Expressly acknowledging the notice, Rich moved for extension of time to file objections to the Report and Recommendation. [D54]. Magistrate Jones granted Rich's motion for extension of time. [D55]. Ultimately, however, Rich elected not to file objections.

court's account of the evidence is plausible in light of the record reviewed in its entirety, this Court will not reverse it even if "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Monroe,* 932 F.2d at 1440.

Here, the district court properly granted summary judgment where the Appellees produced evidence that excessive financial costs, administrative and logistic difficulties, and security concerns of implementing a kosher meal plan in the Florida's correctional institutions were compelling state interests and that the Department's vegan and vegetarian diets are the least restrictive means of addressing these compelling interests. [D52:10; D57]

For his part, Rich failed to come forward with evidence to dispute the facts presented byAppellees. Rich's conclusory allegations offered in the lower tribunal based on his subjective beliefs were insufficient to create a genuine issue of material fact and, therefore, failed to suffice to oppose a motion for summary judgment. *Holifield v. Reno,* 115 F.3d 1555, 1564 n. 6 (11th Cir. 1997) (plaintiff's "conclusory assertions ..., in the absence of [admissible] supporting evidence, are insufficient to withstand summary judgment."); *Harris v. Ostrout*, 65 F.3d 912, 916 (11th Cir.1995) (summary judgment in favor of prison staff was appropriate where an inmate produces nothing beyond "his own conclusory allegations"

challenging actions of the defendants); *Fullman v. Graddick*, 739 F.2d 553, 557 (11th Cir.1984) ("mere verification of a party's own conclusory allegations is not sufficient to oppose summary judgment...."). Hence, when a non-moving party fails to set forth specific facts supported by requisite evidence sufficient to establish the existence of an element essential to his case, and on which the plaintiff will bear the burden of proof at trial, summary judgment is due to be granted in favor of the moving party. *Celotex*, 477 U.S. at 322 ("[F]ailure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.").

In the present case, to argue that the district court committed plain error stretches credulity. In *Linehan v. Crosby*, this Court, reviewing similar evidence, found that the Florida Department of Corrections "has a compelling governmental interest in keeping costs down and preventing security risks." 346 F. App'x 471, 473 (11th Cir. 2009) (unpublished opinion). The Court affirmed a similar ruling by the district court, finding that the Department demonstrated through submitted affidavits that "its current policy of providing vegan and vegetarian meals instead of kosher meals was the least restrictive means of furthering the compelling governmental interests of keeping costs down and preventing security risks." *Id.*

Likewise, in *Muhammad v. Sapp*, this Court affirmed denial of a halal diet claim under RLUIPA. 388 F. App'x 892, 899 (11th Cir. 2010). In *Muhammad*, the Court held the expense of complying with Muhammad's dietary requests justified the Department's denial where the Department submitted affidavits establishing that its policy of providing alternative entree meals and vegan meals was the least restrictive means of furthering its compelling governmental interest in cost containment. 388 F. App'x at 897.

In *Baranowski v. Hart*, the Fifth Circuit upheld Texas' former policy of not providing any kosher food and recognized that prisons are not "full-scale restaurants," and that the state's compelling interests in controlling costs and maintaining order superseded whatever burden its former policy imposed:

> The uncontroverted summary judgment evidence submitted by Defendants establishes that TDCJ's [Texas Department of Criminal Justice] budget is not adequate to cover the increased expense of either providing a separate kosher kitchen or bringing in kosher food from the outside; that TDCJ's ability to provide a nutritionally appropriate meal to other offenders would be jeopardized (since the payments for kosher meals would come out of the general food budget for all inmates); that such a policy would breed resentment among other inmates; and that there would be an increased demand by other religious groups for similar diets.

486 F.3d 112, 125 (5th Cir. 2007), *cert. denied*, 552 U.S. 1062, 128 S. Ct. 707 (2007). Other circuits have similar holdings. *Andreola v. Wisconsin*, 211 F. App'x

495, 499 (7th Cir. 2006) ("[T]he defendants were not required [by RLUIPA] to spend an additional $2,000 to provide Andreola with prepackaged kosher meals."), *cert. denied.*, 552 U.S. 852, 128 S. Ct. 118 (2007); *DeHart v. Horn*, 390 F.3d 262, 271-72 (3d Cir. 2004) (denying RLUIPA claim by a Buddhist inmate who requested a religious diet).

Rich, nevertheless, in a conclusory fashion, devalues or attempts to discredit the evidence relied on by the Court, namely the affidavits submitted by Fuhrman and Upchurch. Notwithstanding that Rich has waived attacks on the district court's factual findings by failing to make timely objections to the Magistrate's findings, in *Cutter*, the Court ascribed Congress's forethought in regards to the knowledge and experience of correctional officials as follows:

> Lawmakers supporting RLUIPA . . . anticipated that courts would apply the Act's standard with *due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.*

544 U.S. at 723 (emphasis added); *see also Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1318 (10th Cir. 2010) (quoting *Cutter*, 544 U.S. at 723); *Baranowski*, 486 F.3d at 125. As evidence of Congressional reluctance to bring excessive judicial entanglement or intrusions into prison operations and management, Section 4(e) of

RLUIPA makes the Prison Litigation Reform Act ("PLRA") applicable to cases brought pursuant to RLUIPA. Under the PLRA, prospective relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. 18 U.S.C. § 3626(a)(1).

Rich further appears to fault the trial court for not taking heed of his view of the development of commercial availability of Kosher food in the marketplace or the introduction of enhancements to prison dietary accommodations by other penal systems. In support, and for the first time on appeal, Rich points to select material (i.e. articles in the media, survey abstracts, and agency records of other correctional agencies) supposedly available to the lower tribunal via the internet for the court to conduct its own investigation. However, as this Court very recently reiterated, "the district court evaluates a case by considering the evidence *presented to it*." *Sovereign Military Hospitaller Order of Saint John v. Fla. Priory of Knights Hospitallers of Sovereign Order of Saint John*, No. 11–15101, 2012 WL 3930668, at *13 (11th Cir. Sept. 11, 2012) (emphasis added).

Thus, in evaluating the evidence properly before it and applicable law, the lower tribunal did not commit any plain error.

B. The RLUIPA opinion Rich seeks is not necessary or substantiated by record facts.

Rich improperly re-tries his case before this appellate panel by offering material outside the scope of the record which was not tested or evaluated in the lower tribunal. While this Court has inherent equitable power to supplement the record with information not reviewed by the district court, "[s]uch authority is rarely exercised." *Ross v. Kemp*, 785 F.2d 1467, 1474 (11th Cir. 1986). This is because the district courts are the courts in which cases are to be litigated and decided initially. *Shahar v. Bowers*, 120 F.3d 211, 212 (11th Cir. 1997). Nevertheless—and not waiving any objection to Rich's attempts to insert non-record material into this case at the appellate stage[10]—Appellees' case for summary judgment and the ruling of the district court are not undermined by the record Rich *now* wants.[11]

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[10] *See infra* II.B

[11] There should be little question Rich had access to information similar to what he now chooses to put forth on appeal. While proceeding in the lower tribunal, Rich had access to the Aleph Institute and its information. As early as the filing of his complaint, Rich provided an exhibit of a three week Bureau of Prison menu of certified food copied from what appears to be an Aleph newsletter. [D1:44] During the summary judgment proceedings, Rich shared information provided to him personally from a lead official at the Aleph Institute to "help" Rich with his suit. [D49:33] The Aleph Institute further supports Rich by seeking a position as amicus to Rich in this appeal.

Despite acknowledging in the lower tribunal that "[k]osher food, due to its high standards of processing and handling, is more expensive than that which is presently being served to inmates,"[12] Rich now alleges that the Department vastly exaggerates the estimated cost and security concerns of providing Kosher diets because prison systems elsewhere are purportedly able to do it to the degree Rich expects of Florida. [IB 31-72] However, the compelling interest/least restrictive means analysis examines the conditions and circumstances present in the prison system that is the subject of the analysis. Not the conditions and circumstances somewhere else. Simply because another state has reached a point in time where it can feasibly enhance its religious dietary accommodations to some degree does not mean that Appellees have misled the Court about Florida's inability to do so. The differences between prison systems explain why "[c]ourts have repeatedly recognized that evidence of policies at one prison is not conclusive proof that the same policies will work at another institution." *Fowler v. Crawford*, 534 F.3d 931, 941 (8th Cir. 2008); *cf. Bisby v. Crites*, 312 F. App'x 631, 632 (5th Cir. 2009) (per curiam) (rejecting equal-protection challenge to TDCJ's grooming code and noting

[12] [D1:12]. By his own account, Rich has averred that he was "raised in a Kosher home and personally maintained Kosher homes." [D49:30]

that "[plaintiff] does not indicate how prisoners in other state systems and the federal system are similarly situated to Texas prisoners.").

For Wyoming, Rich provides little discussion, if only to indicate few inmates are interested in the diet which Wyoming warns of having a lack of variety. [IB 15] Rich also has little to say with regard to Michigan, which Rich reports spent $272,000 annually on Kosher diets for 131 inmates *five years ago*.[13] [IB 35] Rich would have the Court assume that there are no costs or security concerns associated with the dietary accommodations currently in place in these states or that none would arise by *further enhancements* such as making the diet more widely available[14] or by making the diet more palatable or varied to ensure inmates receive adequate nutrition.[15]

The dietary practices of the Federal Bureau of Prisons (BOP) cited by Appellant have even less relevance to this case. The BOP's inmate population is

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[13] The math for Kosher diets in Michigan actually worked out to be around $2,076.34 per inmate per year. Thus, contrary to Rich's assertion, Ms. Fuhrman's estimate of $1934.50 to $2379.80 [D38-1:2] to provide a kosher diet per inmate per year in Florida is not "wildly out of step" with Michigan.

[14] Rich reports that Texas provides Kosher meals to only 26 participants at this time. [IB 41]

[15] In the lower tribunal, Rich himself expressly indicated he expects "fresh fruits, eggs, and dairy products." [D1:9] On appeal, however, Rich encourages diets that are limited in variety (or even diets perceived as having inferior quality of food) to solve the problem of demand. [IB14-15]

distinct from the States', consisting of a very different composite of offenders. For example, the BOP's top five offense categories are: drug offenses (47.8%); weapons, explosives & arson (16.0%); immigration (12%); extortion, fraud, bribery (5.6%); and robbery (4.2%). Fed. Bureau of Prisons, *Quick Facts About the Bureau of Prisons*, Types of Offenses, http://www.bop.gov/about/facts.jsp (last visited Sept. 23, 2012). In contrast, Florida's top five offense categories are: drugs (18.4%); burglary (15.9%); robbery (13.2%); murder/manslaughter (13.2%); and violent personal offenses such as carjacking and aggravated assault (12.0%). Fla. Dep't of Corrs., *2010-2011 Agency Annual Statistical Information*, Inmate Population, http://www.dc.state.fl.us/pub/annual/1011/stats/im_pop.html (last visited Sept. 23, 2012). Thus, security interests are different between the federal system and Florida's prison system. Another significant difference is that Florida, like many States, is constitutionally required to balance its budget. Fla. Const. Art. VII, § 1(d). The Federal Constitution has no corresponding provision.

Rich states that Appellees did not provide information below regarding the JDAP, which Rich alleges is inconsistent with Fuhrman's affidavit. [IB 35- 43] Rich is comparing apples with oranges, however. As opposed to shelf-stable meals, the JDAP involved a residential-type kitchen and space for storage separate from the food supply for the general inmate population. *Final Report*, at 11. The seven

JDAP kitchens had a designated food preparation area, including a utensil cleaning area, established exclusively for the preparation of meals. *Id*. Moreover, the costs reported for the JDAP were at the time it was suspended before the costs escalated due to burgeoning inmate demand, requiring extensive renovation of institutional kitchens to accommodate the demand. *See id.*, at 7 & 18.[16] Further, Rich's reliance on the cost of JDAP kitchens as an alternative to shelf-stable meals is suspect in that Rich does not even think enough was done to make the JDAP kitchens what he would consider an acceptable Kosher kitchen.[17]

On appeal, Rich further characterizes the differences in cost estimates between Kathleen Fuhrman's 2011 affidavit in Rich's case and the 2008 *Linehan* case as suspicious because her estimates for Kosher meals and food costs for regular master menu meals[18] for the time period captured for Rich's case are lower than her estimates during the time period in *Linehan*. *See* IB 34-35 (discussing

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[16] The *Final Report*, explained that JDAP had opened eligibility to inmates espousing a belief in Judaism or a religion other than Judaism where the tenets of the faith required them to conform to certain dietary restrictions and no department meal plan other than the one provided by the JDAP was available to satisfy those restrictions. *Final Report*, at 7. It was estimated that, had the program resumed, 6,500 were readily identifiable as eligible to participate. *Id.* at 18.

[17] Rich was emphatic in the lower tribunal that the JDAP was not Kosher and would not alleviate his substantial burden. [1:7, 8 n. 7, 23] Rich has stated that "[t]he laws of Kashruth are complex and extensive." [D1:10]

[18] Yet, in his complaint in the lower tribunal, Rich himself acknowledged that the Department kept food costs below $1.65 per inmate per day. [D1:12]

Fuhrman's estimates for providing Kosher diets per year); 38-39 (discussing Fuhrman's estimates for the cost of food per day for regular master menu meals).[19] Why Appellant would expect estimates to be static across at least three years is not clear; however, it appears Appellant ignores obvious factors such as returning to a self-operated food service after having food service outsourced and other adjustments. *See* Fla. Dep't of Corrs., *Report on the Delivery of Food Services to Inmates* (2010), at 2-3, 5-9;[20] *see also, e.g., Floyd v. McNeil*, No. 4:10cv289–RH/WCS, 2011 WL 6955839, at *1 (N.D. Fla. Dec. 5, 2011) (recommending summary judgment to the Department where the Department added economical, heart healthy soy protein products to the 'master menu' program).

[19] Rich also contends that Fuhrman does not adequately explain how the cost of additional raw food brings the cost of providing a kosher diet up to $4.45 to $5.71 per day. *See* IB 37-38. In order to ensure nutritional adequacy and be equivalent in calories to the regular menu, Fuhrman advised that additional food items would then be needed to supplement the Kosher entrée. [D38-1:2] The record reflects, however, that Fuhrman related that heavy supplementation to shelf-stable kosher entrees would need to come from "eggs, fruits and vegetables, cereal, juice, peanut butter and similar items." [D38-1:3]

[20] From 2001-2009, the complete responsibility for food services was outsourced to two vendors—Aramark Correctional Services and Trinity Services Group. However, in November 2008, the Department began to reassign that responsibility back to a self-operated food service operation. This was primarily due to the need for cost containment and to comply with legislative intent." Fla. Dep't of Corrs., *Report on the Delivery of Food Services to Inmates* (2010), at 2; *see also* http://www.myfloridahouse.gov/sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2457&Session=2010&DocumentType=Meeting%20Packets&FileName=CCJA-Meeting%20Packet%202-9-10Online.pdf

On appeal, Rich argues that Ms. Fuhrman overestimates the number of inmates who would potentially desire a Kosher diet. *See* IB 39; 41. To do so, Rich dismisses the idea that inmates affiliated with Judaism, Islam, and Seventh Day Adventists (or anyone else sincerely holding this belief) will desire a Kosher diet representative to their numbers recorded in the Department. *See* IB 39-40. As support, Rich states that only 250 inmates participated in the JDAP program. *See* IB 39-40. This comes after Rich himself recounted in the lower tribunal that many inmates became "Jewish" for the benefit of the JDAP. [D1:7; D1:31]

As it is, the 250 number was recorded in 2007 when the JDAP was suspended in anticipation of a marked increase in enrollment due to opening eligibility to inmates espousing beliefs that required them to conform to certain dietary restrictions (and no other meal plan was available to satisfy those restrictions). *See Final Report*, at 7, 18. Further, the Report explained that 95 inmates had applications *pending* review for program approval or denial, and that altogether 784 inmates had participated in JDAP since its inception in 2004. *See Final Report*, at 10.

Rich is consistent, however, in promoting some means to limiting kosher diets to certain inmates. *See* IB 66-7. In the lower tribunal, Rich is specific that he would exclude any inmate who did not meet a lineage test or prove conversion

under strict requirements of rabbinic law. [D1:13-14; 1:28] On appeal, Rich frames the issue as one of "insincerity" and offers a variety of measures employed by other prison systems to determine or ensure sincerity at 1) the program entry point (including reliance on Jewish authorities to "vet" the inmate); 2) during program participation; or 3) upon withdrawal from a program. *See* IB 13-17, 21, & 66-7. One thing is certain, as the Supreme Court has noted, " '[a] proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of neutrality toward religion,' favoring neither one religion over others nor religious adherents collectively over nonadherents." *Bd. of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (quoting *Comm. for Pub. Ed. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792–93, 93 S.Ct. 2955, 37 L.Ed.2d 948 (1973)).

To be sure, insincere inmates constitute a problem. However, this ignores or masks the issue of demand and necessary access to a Kosher diet (or comparable provisioning) for *any* inmate claiming a religious requirement to the diet which, in turn, results in escalating food service costs and program logistics. In order to be entitled to a religious accommodation, a person's beliefs need not be "acceptable, logical, consistent or comprehensible to others." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714, 101 S.Ct. 1425 (1981). Indeed, while

RLUIPA does not bar inquiry into the sincerity of a prisoner's professed religiosity, RLUIPA does preclude inquiry into whether a particular belief or practice is 'central' to "a prisoner's religion. *See* 42 U.S.C. § 2000cc–5(7)(A); *Cutter*, 544 U.S. at 725 n. 13, 125 S.Ct. 2113; *Gardner v. Riska*, 444 F.App'x 353, 355, (11th Cir. 2011). As seen in the very fabric of RLUIPA caselaw, belief in eating Kosher is not exclusive to adherents of Judaism (or even Muslims or Seventh-Day Adventists).[21]

[21] *See e.g. Marshall v. Florida Dept. of Corrections*, No. 10–20101–cv, 2011 WL 1303213, at *1 (S.D. Fla. Mar. 31 2011) (Florida inmate contending that he is a "Hebrew [person] of the Torah" and required to follow dietary Kasruth law); *Fegans v. Norris*, 537 F.3d 897, 900 (8th Cir. 2008) (member of the Assemblies of Yahweh claimed that the Arkansas Department of Corrections burdened his abilities to follow Old Testament law by offering a pork-free diet and not a Kosher diet); *De'lonta v. Johnson*, No. 7:11–cv–00175, 2012 WL 2921762, at 11 (W.D.Va. Jul7 17, 2012) (adherent of "Assemblies of Yahweh affiliation of Judaism" alleged she was required her to eat a Kosher diet); *Taylor v. Williamson*, No. 11–CV–3224, 2012 WL 3988206, at *1 (C.D.Ill. Sept. 11, 2012) (Hebrew Israelite complaining that meat was not kosher); *Williamson v. Twaddell*, No. 10–CV–3325, 2012 WL 3836129, at *5 (C.D.Ill. Sept. 4, 2012) (inmate identifying as a Messianic/ Black Hebrew Israelite seeking Kosher diet); *Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008) (finding Muslim inmate's sincere belief that he is personally required to consume kosher meat to maintain his spirituality and the prison's refusal to provide a kosher meat diet implicated the Free Exercise Clause); *Sims v. Wegman*, No. 1:11–cv–00931–DLB PC, 2012 WL 2203017, at *1 (E.D.Cal. June 14, 2012) (Nation of Islam adherent contending his dietary needs can only be met with the Jewish kosher diet); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1314 (10th Cir. 2010) (stating that the issue was not whether the lack of a halal diet that includes meats substantially burdens the religious exercise of any

Moreover, kosher diets associated with Judaism are not the only religious diets sought by prisoners. *See e.g. Nelson v. Miller*, 570 F.3d 868, 879 (7th Cir. 2009) (adherent of Catholicism, seeking diet that allowed him to abstain from all meat on all Fridays and during Lent and to avoid the meat of four-legged animals while still maintaining good health); *Wilson v. Dickie*, 2012 WL 2317065, 2 (S.D.Tex.,2012) (case regarding Rastafarian who represented that Rastafarians do not eat beef, pork, chicken, turkey, shellfish (although fish with fins and scales are acceptable), eggs, and dairy products; that Rastafarians are forbidden to consume tap water or any beverages made with tap water; and that Rastafarians cannot eat from a plate, bowl, tray or any device that had been used to serve any type of meat); *Palermo v. Van Wickler*, 2012 WL 2415556, 7 (D.N.H.,2012) (Adherent of Asatru alleging he was denied access to a religious diet).

On appeal, Rich trivializes the security concerns set forth by Mr. Upchurch, see IB 45, but stated in the lower tribunal that he expected that there may be some risk of jealousy from other inmates over the food he was seeking. [D49:1] Moreover, Rich perceived inmates who affiliated with a faith for purposes of obtaining a diet to come with "disruptive" and "self-serving" interests. [D1:31]

Muslim practitioner, "but whether it substantially burdens Mr. Abdulhaseeb's own exercise of his sincerely held religious beliefs." (emphasis in the original)).

As expressed by Mr. Upchurch, the foremost (but not single) security concern would be a Kosher diet being seen by the rest of the inmates as preferential treatment. [D38-1:7] Mr. Upchurch related that one way inmates would react would be by claiming belief in other religious groups to obtain approval to receive a special diet. [D38-1:7] Such activity was reported extensively by institutional staff during the Department's operation of the JDAP. [D38-1: 8] Discord in the inmate population over actions by staff determining entitlement to the diet or enforcing diet criteria were concerns expressed by Mr. Upchurch. [D38-1: 8] Upchurch stated that, in a worst case scenario of this circumstance, should the Kosher diet be seen as a higher costing diet that was somehow negatively impacting the quality and quantity of food served to the in the general population, this would likely lead to retaliation against the Kosher inmates and/or disruption of the institution in general by the non-diet inmates to express their displeasure. [D38-1:9]

Rich, however, faults Upchurch for not expounding upon a specific incident. In *Lawson v. Singletary*, this Court stated:

> The Court's holding in *Martinez* teaches that the compelling interest test is to be employed by recognizing the special circumstances of the prison context, including recognition of the state's substantial interest in prison security and order and of the substantial deference due the judgment of prison officials with respect thereto. *Martinez*, 416 U.S.

at 404-05, 94 S.Ct. at 1807. The Court noted that although it was applying the compelling interest test,

> This does not mean, of course, that prison administrators may be required to show with certainty that adverse consequences would flow from the failure to censor a particular letter. Some latitude in anticipating the probable consequences of allowing certain speech in a prison environment is essential to the proper discharge of an administrator's duty.

85 F.3d 502, 510 (11th Cir. 1996) (quoting *Martinez*, 416 U.S. at 414, 94 S.Ct. at 1812).

Rich points to the Department's therapeutic diets as support for his contention that the Department's security interests do not survive strict scrutiny. *See* IB 55. Due to the high number of therapeutic diets prescribed in Connecticut (to, wit: 92,024), Rich implies that there must necessarily be a similarly high number of therapeutic diets in Florida. *See* IB 55. There is nothing in the record to suggest that Florida would be issuing therapeutic diets at numbers nearly as high as the inmate population itself. Moreover, Rich on appeal attempts to equate security risks for therapeutic diets with a Kosher diet, without recognizing that therapeutic diets are prescribed as a part of medical care. Necessity is determined by medical judgment involving observance of an objective condition or symptoms. Religious beliefs, on the other hand, are "necessarily subjective." *Agrawal v. Briley*, No. 02

C 6807, 2004 WL 1977581, at *9 (N.D. Ill. Aug. 25, 2004). Moreover, it is difficult to imagine anyone would seek out a diagnosis necessitating treatment by dialysis for the purpose of obtaining a diet such as a pre-dialysis diet.

Further, Rich emphasizes the recommendations made in the *Final Report* concerning the JDA Program, but fails to address the portions of the report detailing security and logistical problems encountered during the program. In its entirety, the comprehensive report provides additional support to the security concerns detailed in the Upchurch affidavit. For example, the report explained that due to the limited number of facilities equipped to prepare kosher meals, participating inmates housed in facilities that were not part of the JDA Program would have to transfer into one of the thirteen facilities capable of providing the dietary accommodation. IB Add. A, at 17. These transfers between institutions created unique security and administrative concerns because inmates could exploit them in order to transfer to an institution to which they would not otherwise be authorized. *Id.* Additionally, "[i]nmates appear[ed] to be manipulating the program, possibly to be transferred closer to family, to avoid supervision by particular correctional officers, or to create additional work for corrections personnel." *Id.*

With regard to enrollment, almost half of the program's participants were in close management. *Id.* at 10. Close management is the "confinement of an inmate apart from the general population, for reasons of security or the order and effective management of the institution, where the inmate, through his or her behavior, has demonstrated an inability to live in the general population without abusing the rights and privileges of others." Fla. Admin. Code r. 33-601.800(1)(d). There are three individual levels (CM I, CM II, and CMIII) associated with close management, with CM I being the most restrictive single cell housing level and CM III being the least restrictive housing of the three levels. *Id.* 33-601.800(1)(e).

The report explained that these close management inmates posed a "special threat during transfer" and, compounding that threat, "[i]n order to transfer a close management inmate into a new facility, it is highly likely that a close management inmate already housed at the receiving facility must be transferred away from that facility, thereby virtually doubling the number of necessary transfers." *Id.*at 17.

With regard to gang activity, the report stated that nearly six percent of inmates enrolled in the program became gang members after entering the program, and there was "indication that gang members may [have been] manipulating the transfer process to their advantage so that members of a particular gang [could] be

housed in the same institution." *Id.* at 10, 17, 22. Further security concerns arose out of occurrences where program trays were used to conceal contraband. *Id.*at 17.

Finally, the report highlighted other logistical and administrative concerns. It noted that in order to accommodate and serve all eligible inmates, "[e]xtreme reconstruction of virtually all other institution kitchens at astronomical cost would be required." [at 18] A section on "Opinions Submitted by Institutional Staff" observed that "[t]he general sentiment is, simply stated, that the JDA Program is being abused to such an extent that it complicates day to day operation of the institutions." [at 22] Chaplains and supervisors were "overwhelmed" by the number of applicants, the accompanying assessment process, and the increased number of grievances when a participating inmate was removed from the program. [at 22] This "proliferation of paperwork sometimes interferes with the ability of the classification supervisor and chaplain to carry out their other duties." [at 22] Rather than being conclusory and self-serving, the security concerns detailed in the Upchurch affidavit were well-reasoned and grounded in past experience with a dietary program aimed at accommodating adherents of Judaism.

Lastly, Rich makes a curious argument that the Department cannot survive strict scrutiny because the Department has cooperatively fostered a small, two-

year-old pilot program[22] to provide Kosher meals at one institution with involvement by the Aleph Institute. [D49:9-10] Simply put, this experimental program is not comparable to a system wide Kosher meal plan that would necessarily have to be available to the whole custody range of incarcerated inmates (including the inmates with greater security risks or requiring close management assignment).

Moreover, the South Florida Reception Center program is heavily enriched by the Aleph Institute of Surfside, Florida. It is unreliable to speculate that the Department can replicate and successfully sustain a system wide program of open eligibility contemplated by RLUIPA in the other vast areas of the state where Aleph has less of a presence. *See Muhammad v. Sapp*, No. 09-14943, 2010 WL 2842756, at * 3 (11th Cir. July 21, 2010) ("inferences based upon speculation are not reasonable.") (quotations and citation omitted)

Further, in the lower tribunal, Rich neither requested nor related any attempt on his part to request to be housed at the institution that plays host to the pilot program. [D49:9-10] This either reinforces the problems with accommodations

[22] That the pilot program has gone beyond the 15-month mark since the lower tribunal proceedings is not necessarily an indication of certain permanence. The JDAP program itself was dissolved after three years.

tied to specifically designated locations or otherwise suggests that Rich does not deem such a program to be an acceptable accommodation.

C. The district court correctly applied the legal standards in keeping with the established decisions of the United States Supreme Court and the Eleventh Circuit.

On de novo review, it is plain that the district court correctly granted summary judgment in favor of Appellees in light of *Cutter*, which instructed that "context matters" in the application of this "compelling governmental interest" standard, and that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." 544 U.S. 709, 722-723, 125 S.Ct. 2113, 2122 (2005). The decision is consistent with the Fifth Circuit's decision in *Baranowski*, which remains good law and is not, as Rich suggests, fatally undermined by virtue of Texas enhancing its dietary accommodation program as it sees fit. Contrary to the suggestion of Rich, the decisions in *Linehan* and *Muhammad*—cases consistent with *Baranowski*—are not flawed or suspect because one party was proceeding pro se. These cases hearken to *Martinelli v. Dugger*, 817 F.2d 1499, 1506 (11th Cir. 1987) (applying a least restrictive means test and concluding that providing kosher meals to Greek Orthodox inmate was too costly), and *Lawson*, 85 F.3d at 510**,** which instructed that the "compelling interest test is to be employed by recognizing the special circumstances of the prison

context, including recognition of the state's substantial interest in prison security and order and of the substantial deference due the judgment of prison officials with respect thereto."

Below, Appellees presented detailed and convincing evidence that the Department's decision not to provide a kosher diet to Rich was the least restrictive means of meeting the compelling state interests of cost and security. Given the varied religious beliefs represented within its inmate population, and the Department's streamlined accommodation to address as many religious dietary needs as possible, the Department constitutionally protects the religious rights of all inmates. *See Bd. of Educ. of Kiryas Joel Village Sch. Dist.*, 512 U.S. at 696. Accordingly, the District Court's decision should be affirmed.

II. THE DISTRICT COURT DID NOT ERR IN DENYING RICH'S MOTION FOR ADDITIONAL DISCOVERY.

Contrary to his contention on appeal, Rich was afforded ample time for discovery and responding to the motion for summary judgment. The Magistrate provided the parties a three month period for discovery. [D33:1] The Magistrate further instructed the parties at the outset of the importance of being able to demonstrate good cause and diligence during the initial discovery period in making

any motions for extension of the discovery process. *Id.* Rich did not present any issue he had with the initial scheduling plan to the District Court Judge.

Near the end of the discovery period, Rich moved to extend the discovery cut-off date. [D46:1] Alternatively, Rich asked that discovery be held in abeyance "until which time the decision regarding summary judgment is rendered in this case." [D46:5] Rich alleged that he worked in the prison dental lab from 7:30 a.m. to 4:00 p.m. Mondays through Fridays and some Saturdays. [D46:3] He alleged that access to the prison law library was limited to off-duty hours and that the library was closed on Sundays or on occasions when movement was restricted due to institutional security concerns or severe weather. [D46:3-4]

Appellant, by not appealing the denial of this motion to the district court judge, waived his right to appeal this issue. *See Farrow v. West*, 320 F.3d 1235, 1249 n. 21 (11th Cir.2003) ("A party failing to appeal a magistrate judge's order in a nondispositive matter to the district court may not raise an objection to it on appeal to a circuit court."). Even assuming this issue was preserved for appeal by seeking timely review of the decision with the District Court, the Magistrate did not abuse its discretion in denying Rich's motion. Rich did not share his discovery efforts made in the interim, any specific problems serving discovery requests on any defendant (or receiving appropriate responses in return), or how the resources

of the library were tied to his ability to seek information from defendants in discovery. [D46] Moreover, the Magistrate provided Rich with 30 days in which to respond to the Defendants' motion for summary judgment. [D47]

A. **Rich's motion to extend the discovery cut-off was not a Rule 56(d) motion**

Rich argues that his motion to extend discovery constituted a request under Federal Rule of Civil Procedure 56(d) (formerly 56(f)). Again, this issue was not brought to the attention of the district court through timely objection. *See* Rule 72(a), Federal Rules of Civil Procedure. Nevertheless, assuming there was no waiver of the issue, Rich simply did not provide the Magistrate with sufficient information to make the motion one under Rule 56(d) even disregarding his format (to wit: affidavit or declaration versus handwritten motion), and giving the motion liberal construction,. *See Williams v. Slack*, 438 F. App'x 848, 849-50(11th Cir. 2011) ("[A]lthough the Supreme Court has 'insisted that the pleadings prepared by prisoners who do not have access to counsel be liberally construed,' the Court has 'never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes by those who proceed without counsel.' " (quoting *McNeil v. United States*, 508 U.S. 106, 113, 113 S.Ct. 1980, 1984 (1993)).

Specifically, Rule 56(d) provides that:

> [i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain affidavits or declarations or to take discovery; or (3) issue any other appropriate order.

Fed. R. Civ. P. 56(d).

In his motion to extend the time for discovery, Rich did not mention difficulties in presenting *facts* to justify opposition to the motion for summary judgment. [D46] Rather, Rich indicated that his difficulty was limited time with the resources in the law library. [D46:3-4] Indeed, Rich alternatively asked that the Court "hold discovery in abeyance". [D46:5 , Π 6] Rich made no mention of difficulties in contacting sources of factual information outside the prison. [D46] Indeed, it is evident that Rich was able to contact Rabbi Menachem Katz of the Aleph Institute and obtain what information Rabbi Katz shared to "help" Rich "with [his] suit" at that time. [D49:33]

Further, the grant or denial of relief under Rule 56(d) lies within the sound discretion of the trial court. *See Barfield v. Brierton*, 883 F.2d 923, 931 (11th Cir.1989) (holding the district court did not abuse its discretion in denying an inmate's request for a continuance, even though the request was accompanied by an affidavit detailing several discovery obstacles, including a claim of privilege concerning Department of Corrections documents, the need to depose several of

the defendants, and the need to propound additional interrogatories and requests for production). Even broadly construing Rich's motion as having been made under Rule 56(d), the Magistrate did not abuse his discretion in denying the request. Rich did not assert any obstacles to discovery such that his ability to oppose Appellees' Motion for Summary Judgment was hindered. Indeed, Appellees' summary judgment motion was filed on August 1, 2011—well before the discovery cut-off date of October 26, 2011—allowing Rich almost three full months to engage in discovery in light of the facts and arguments in Appellees' motion. [D38][D46:1]

Because the Magistrate did not abuse its discretion in denying Rich's motion to extend the period for discovery, the ruling should be affirmed.

B. Rich's attempt to introduce extra-record material into this appeal

Rich includes a considerable amount of material in his Statement of Facts (and elsewhere in the opening brief) which was not presented to the district court during the proceedings below.[23] Such material includes select market reporting, conclusory representations of Kosher diets in other states (i.e. Texas, Michigan, and Indiana), a summary of a survey of state practices taken by the Michigan

[23] Appellees' note that various amici have likewise attempted to inject extra-record material into this appeal.

Department of Corrections containing varied responses and few contextual details. It is not the practice of this Court to consider facts outside the record. *See Turner v. Burnside*, 541 F. 3d 1077, 1086 (11th Cir. 2008). As stated in *Schwartz v. Millon Air, Inc.*,:

> We rarely supplement the record to include material that was not before the district court, but we have the equitable power to do so if it is in the interests of justice. *See CSX Transp., Inc. v. City of Garden City*, 235 F. 3d 1325, 1330 (2000). We decide on a case-by-case basis whether an appellate record should be supplemented. Even when the added material will not conclusively resolve an issue on appeal, we may allow supplementation in the aid of making an informed decision. *See Cabalceta v. Standard Fruit Co.*, 883 F. 2d 1553, 1555 (11th Cir.1989).

341 F. 3d 1220, 1225, n.4 (11th Cir. 2003).

Unlike the case in *Schwartz*, where there was a *problem* with the record, Rich is attempting to retroactively *make* a record. Accordingly, Rich's case is not one which would justify departing from the Court's practice, and his request to supplement the record should be denied.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by CM/ECF or other electronic means this 1st day of October, 2012 to the following service list:

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