

No. 12-11735

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

BRUCE RICH,
Plaintiff-Appellant,

v.

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

On Appeal from the United States District Court
for the Northern District of Florida

**BRIEF AMICUS CURIAE OF THE NATIONAL
JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS (“COLPA”),
AGUDAS HARABBANIM OF THE UNITED STATES AND CANADA,
AGUDATH ISRAEL OF AMERICA, UNION OF ORTHODOX JEWISH
CONGREGATIONS OF AMERICA, NATIONAL COUNCIL OF YOUNG
ISRAEL, ASSOCIATION OF KASHRUS ORGANIZATIONS,
RABBINICAL ALLIANCE OF AMERICA, AND RABBINICAL COUNCIL
OF AMERICA IN SUPPORT OF APPELLANT AND REVERSAL**

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**CERTIFICATE OF INTERESTED PERSONS AND
CORPORATE DISCLOSURE STATEMENT**

Pursuant to Eleventh Circuit Rule 26.1-1, the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of this appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

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6. Hicks, Milton: Defendant-Appellee, former retired warden;
7. Robinson, S.T.: Defendant-Appellee, former Assistant Warden of Programs;
8. Andrews, Jeffrey: Defendant-Appellee, Food Service Director;

9. Furman, Kathleen: Defendant-Appellee, Registered Dietician;
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15. Maher, Susan Adams: Office of the Attorney General, counsel for Defendants-Appellees;
16. Belitzky, Joe: Office of the Attorney General, counsel for Defendants-Appellees;
17. Paul, Maurice M.: Senior District Judge;
18. Jones, Gary R.: Magistrate Judge;
19. National Jewish Commission on Law and Public Affairs (“COLPA”);
20. The Union of Orthodox Jewish Congregations of America;
21. Agudath Israel of America;
22. The National Council of Young Israel;
23. Association of Kashrus Organizations;
24. Agudas Harabbanim of the United States and Canada;

25. Rabbinical Alliance of America; and
26. Rabbinical Council of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, The National Jewish Commission on Law and Public Affairs, The Union of Orthodox Jewish Congregations of America, Agudath Israel of America, The National Council of Young Israel, Association of Kashrus Organizations, Agudas Harabbanim of the United States and Canada, Rabbinical Alliance of America, and Rabbinical Council of America, certify that they do not have parent corporations and that no publicly-held corporation owns 10% or more of their stock.

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INTEREST OF THE AMICI*

- The National Jewish Commission on Law and Public Affairs (“COLPA”) is an organization of volunteer lawyers that advocates the position of the Orthodox Jewish community on legal issues affecting religious rights and liberties in the United States. COLPA has filed *amicus* briefs in the Supreme Court of the United States in 28 cases since 1968. It has also supported laws prohibiting misrepresentation in the sale of kosher food and was involved in early litigation over the right of Jewish prisoners to be given kosher food in federal prisons.

- Agudas Harabbanim of the United States and Canada is the oldest Orthodox rabbinical organization in the United States. Its membership includes leading scholars and sages, and it is involved with educational, social and legal issues significant to the Jewish community.

- Agudath Israel of America, founded in 1922, is a national grassroots Orthodox Jewish organization. Agudath Israel articulates and advances the position of the Orthodox Jewish community on a broad range of legal issues affecting religious rights and liberties in the United States. Agudath Israel intervenes at all levels of government – federal, state, and local; legislative, administrative, and judicial – to advocate and protect the interests of the Orthodox

* All parties have consented to the filing of this amicus brief. The assistance of Mr. Aryeh Mellman in gathering data for this brief is gratefully acknowledged.

Jewish community in the United States in particular, and religious liberty in general. Agudath Israel played a very active role in lobbying for the passage of the Religious Land Use and Institutionalized Persons Act, and receives requests from prisoners for assistance in ensuring that their religious observances, particularly their ability to have kosher meals, are accommodated.

- The Union of Orthodox Jewish Congregations of America (“Orthodox Union”) is the largest Orthodox Jewish umbrella organization in the United States. The Orthodox Union represents nearly 1,000 synagogues throughout the United States, which collectively represent hundreds of thousands of individual Jews. The Orthodox Union participates in various federal and state litigations, largely through the submission of amicus briefs that relate to matters of concern to the Orthodox Jewish community. The Orthodox Union is also the world’s largest non-profit agency providing supervision and certification of kosher food. The Orthodox Union’s “OU” symbol is ubiquitous, and its far reaching work in this realm has made it possible for kosher-observant Jews readily to access kosher food almost anywhere in the world. From the Orthodox Union’s perspective, access to kosher food is a necessary component of a Jew’s exercise of his religious freedom - an exercise to be protected even in prison. Hence the Orthodox Union was among the broad coalition of advocacy groups that developed and led to RLUIPA’s enactment.

- The National Council of Young Israel (“NCYI”) is the umbrella organization for over 200 Young Israel branch synagogues with over 25,000 families within its membership. It is one of the premier organizations representing the Orthodox Jewish community, its challenges and needs, and is involved in issues that face the greater Jewish community in North America and in Israel. NCYI assists its branches in programming and planning through its Departments of Synagogue Services, Rabbinic Services, Women’s Programming, Jewish Education, Youth Services, and Publications. It participates in kosher food certification on local and national levels.

- The Association of Kashrus Organizations (“AKO”) was established in 1985 and has a membership of 85 kashrus (kosher certification) organizations. Its primary goal is to unite the different kashrus agencies around the globe under one umbrella, serving the Jewish community to raise and maintain the highest level of kashrus possible. To that end, the leading authorities in the world today have a medium where they can discuss the numerous situations that arise in the kashrus industry, create a plan for emergency kashrus situations, construct basic guidelines for mutually acceptable standards, and present a unified voice in kashrus. Both in public forums and behind closed doors, AKO has become the nucleus of international kashrus administration. While the AKO organization itself does not

give any kosher endorsements, its members work together to provide the kosher community with the utmost in kosher supervision.

- Rabbinical Alliance of America is an Orthodox Jewish rabbinical organization with more than 400 members that has for many years been involved in a variety of religious, social, and educational causes affecting Orthodox Jews.

- Rabbinical Council of America is the largest Orthodox rabbinical organization in the world with a membership that exceeds 1,000 rabbis, and it is deeply involved in issues related to religious freedom.

QUESTIONS PRESENTED

1. Whether the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) permits Florida prison officials to deny a kosher diet to an Orthodox Jewish prisoner on the ground that avoiding the added expense of kosher food is a “compelling governmental interest.”

2. Whether the five allegedly “serious security issues” enumerated by the District Court constitute a “compelling governmental interest” that justifies Florida prison officials’ refusal to provide kosher food to an Orthodox Jewish prisoner.

ARGUMENT

INTRODUCTION

This appeal concerns a central tenet of Jewish religious observance. The Jewish dietary laws – known as *kashrut* in Hebrew – have occupied a most prominent place in the history of the Jewish people. The *Encyclopedia Judaica* reports that in Second Temple times “Jews endangered their lives by their faithful adherence to the dietary laws” and that “[d]espite the difficulties, and even dangers, inherent in the observance of the dietary laws during subsequent periods of severe persecution, the Jews steadfastly remained faithful to *kashrut*.” 5 *Encyclopedia Judaica* 656 (2d ed. 2007) (Exhibit A). Although modern technology has made it practical for authentically kosher pre-packaged food to be provided to patients in hospitals, military personnel on bases and in the field, and inmates in prisons, Florida’s prison officials have determined that state prisoners may be deprived of this mandatory religious observance because it is too costly for the State of Florida to provide it and because there are five alleged “security concerns” that have been asserted as justifying the denial of this accommodation to kosher-observing prisoners.

That judgment conflicts not only with the governing federal statute – the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) – and with strong statements by respected courts defending the right to kosher food in prison,

but it runs counter to the best traditions of America. Ever since the founding of the Republic, government has granted the greatest latitude to religious observance by all individuals, even at substantial financial sacrifice by the public treasury.

Government has been particularly solicitous of the conscientious convictions and practices of those who are not free to fend for themselves, such as military personnel and prison inmates.

I.

RELIGIOUS OBSERVANCE IS SO IMPORTANT IN AMERICA THAT GOVERNMENT INCURS SUBSTANTIAL FINANCIAL COST TO PROTECT IT

A. Federal and State Tax Exemptions and Tax Credits for Churches and Religious Education Demonstrate That Thrift Is Not a “Compelling Interest” Justifying Denial of Religious Rights.

The concern of Florida’s prison officials that satisfying the *bona fide* religious observance of inmates in Florida’s penal institutions is too expensive conflicts with the fiscal generosity that has always marked this Nation’s policy towards religious observance. Although the First Amendment’s Establishment Clause has been held to prohibit direct monetary aid to religious institutions, America’s respect for religion and government’s willingness to expend public funds to protect private religious observance cannot be denied. In *Walz v. Tax Commission*, 397 U.S. 664, 90 S. Ct. 1409 (1970), Chief Justice Burger reviewed

the history of property-tax exemptions for religious institutions and recognized that “[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit” and that “[a]ll of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees.” 397 U.S. at 674, 676, 90 S. Ct. at 1415. The total national cost of these tax exemptions is obviously immense, but Congress and all the States have borne this cost as part of the “national attitude toward religious tolerance.” 397 U.S. at 678, 90 S. Ct. at 1416.

The Supreme Court has re-affirmed the generous financial “national attitude” of government towards an individual’s observance of religion in cases such as *Zelman v. Simmons-Harris*, 536 U.S. 639, 122 S. Ct. 2460 (2002). The majority opinion in *Zelman* noted that it “was not relevant to the constitutional inquiry” to calculate “the amount of government aid channeled to religious institutions by individual aid recipients.” 536 U.S. at 651, 122 S. Ct. at 2466. And Justice O’Connor’s concurring opinion in *Zelman* particularized the substantial cost to Colorado (more than \$40 million annually), Maryland (more than \$60 million annually), Wisconsin (approximately \$122 million annually), and New Orleans, Louisiana (over \$36 million annually) resulting from state property tax exemptions for religious institutions. 536 U.S. at 665-666, 122 S. Ct. at 2474.

As for the federal government, Justice O'Connor observed that "it is reported that over 60 percent of household charitable contributions go to religious charities." 536 U.S. at 666, 122 S. Ct. at 2474. The Congressional Joint Committee on Taxation estimated in a January 2010 Report that the total charitable-contribution deductions over the five years between 2009 and 2013 will be \$235.6 billion. Table 1, *Estimates of Federal Tax Expenditures for Fiscal Years 2009-2013*, Prepared for the House Committee on Ways and Means and the Senate Committee on Finance (Government Printing Office 2010). On this basis, the federal government will effectively be spending \$28.3 billion per year in supporting the maintenance of churches and other religious institutions.

When contrasted with these figures, the additional costs of providing kosher meals to Florida's prison inmates is the proverbial drop in the bucket. It is both unseemly and unlawful, in light of the American tradition of encouraging religious observance with substantial economic incentives, for Florida's prison authorities to save relatively minute amounts at the expense of prisoners' religious observance. In any event, it is plain from the massive cost to the federal and state governments of encouraging and promoting religious worship and education that cost is not a "compelling interest" under federal law.

The language of the federal statute makes that entirely clear. Section 5(c) of RLUIPA, 42 U.S.C. § 2000cc-3(c), provides that the law "may require a

government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.”

B. Many Millions of Dollars Are Spent by the Federal and State Governments for the Salaries of Military and Prison Chaplains.

Very substantial financial commitments are made routinely by federal and local governments to provide religious services to military personnel and prisoners because they do not have the access to churches, synagogues, mosques, and other places of worship that ordinary civilians have. Published reports show that there are currently 2,900 chaplains in the U.S. Army, 850 Navy, Marine, and Coast Guard chaplains, and 500 Air Force chaplains

(<http://www.airforcetimes.com/news/2010/11/air-force-to-cut-chaplains-112710w/>). The average annual salary for civilian officers in the U.S. military is \$67,000 (<http://www.goarmy.com/benefits/total-compensation.html>).

Consequently, it is fair to approximate the total annual salaries of military chaplains as almost \$285 million.

There are approximately 1,724 chaplains in the federal prison system (<http://www.pewforum.org/Social-Welfare/prison-chaplains-appendix-c.aspx>). If they are paid at the GS-12 level, their annual salary is approximately \$70,000. Hence the United States expends annually over \$120 million for the salaries of chaplains in federal prisons. The relative additional cost of providing meals to

military personnel and prisoners that do not violate their religious convictions is minor.

II.

GOVERNMENT HAS AN INCREASED CONSTITUTIONAL BURDEN TO MEET RELIGIOUS NEEDS OF PRISON INMATES

In *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985), the Second Circuit upheld the federal government's constitutional authority to provide and pay for chaplains in the military services. The Court of Appeals for the Second Circuit noted that it was obligatory "to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them." 755 F.2d at 234. The Supreme Court's opinion in *Abington School Dist. v. Schempp*, 374 U.S. 203, 226 n.10, 83 S. Ct. 1560, 1573 n.10 (1963), referred to a "situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths." In his concurring opinion Justice Brennan compared military chaplains with chaplains in penal institutions: "Since government has deprived such persons of the opportunity to practice their faith at places of their choice . . . government may, in order to avoid infringing the free exercise guarantees, provide

substitutes where it requires such persons to be.” 374 U.S. at 297-298, 83 S. Ct. at 1611.

On this account, the Supreme Court held in *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254 (1987), and in *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 107 S. Ct. 2400 (1987), that unless their restrictions are related to compelling penological objectives, prison authorities are obliged to afford prisoners an opportunity to engage in religious observance. The Florida prison officials’ denial of kosher food to prisoners violated the duty owed to the prisoners by government officials.

Various Courts of Appeals have confirmed this constitutional duty. The Second Circuit said in *McEachin v. McGuinnis*, 357 F.3d 197, 203 (2d Cir. 2004), “courts have generally found that to deny prison inmates the provision of food that satisfies the dictates of their faith does unconstitutionally burden their free exercise rights.” And in *Moorish Science Temple of America v. Smith*, 693 F.2d 987, 990 (2d Cir. 1982), the Court said “the denial of kosher food to a Jewish inmate is not justified by an important or substantial government objective.” See also *Makin v. Colorado Dep’t of Correction*, 183 F.3d 1205 (10th Cir. 1999); *Ashelman v. Wawrzaszek*, 111 F.3d 674, 677 (9th Cir. 1997); *LeFevers v. Saffle*, 936 F.2d 1117 (10th Cir. 1991); *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987); *Kahane v. Carlson*, 527 F.2d 492, 495 (2d Cir. 1975).

The Indiana Department of Correction took a position similar to Florida's in the District Court in *Willis v. Commissioner, Indiana Department of Correction*, 753 F. Supp.2d 768 (S.D. Ind. 2010). The Indiana officials appealed to the Seventh Circuit from the District Court's ruling rejecting their contention that the additional cost of kosher meals was a "compelling governmental interest" that justified denying kosher meals to Indiana's prison inmates (although the inmates' religious convictions were assertedly respected by providing them vegan meals prepared in non-kosher utensils).

After briefs were filed (including an *amicus curiae* brief from many of the same *amici* who have joined in this brief), the Indiana Department of Correction dismissed its appeal. *Willis v. Buss, et al.*, Seventh Circuit Court of Appeals No. 11-1071 [Dkt. No. 25].

The Fifth Circuit's contrary decision in *Baranowski v. Hart*, 486 F.3d 112, 122 (5th Cir. 2007), was based on rulings that Court made before the enactment of RLUIPA – *i.e.*, the Fifth Circuit rulings in *Kahey v. Jones*, 836 F.2d 948 (5th Cir. 1988); and *Udey v. Kastner*, 805 F.2d 1218 (5th Cir. 1986). In light of the language of RLUIPA, the earlier Fifth Circuit rulings should not have been followed in *Baranowski*.

This Court's summary affirmance in 346 Fed. Appx. 471 (11th Cir. 2009), of *Linehan v. Crosby*, 2008 WL 3889604 (N.D. Fla. 2008), should also be rejected

in this case. The District Court’s findings in *Linehan* paralleled the inadequate justifications for refusing to provide kosher food in this case – “[t]he cost would be far too great, special treatment for Plaintiff would generate unrest among other prisoners, and would create a significant security risk.” *Linehan* at p. 9. Those reasons do not withstand scrutiny.

III.

RELIGIOUS DIETARY NEEDS THAT CAN PRACTICALLY BE SATISFIED BY PRISON OFFICIALS CANNOT BE AVOIDED BECAUSE OF THEIR COST

The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) protects the religious observances of inmates in state prisons by the standards that the Supreme Court applied in *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963), and the decisions that followed that landmark opinion. The District Court erroneously held that a prison’s failure to provide the diet that is religiously obligatory may be excused if the cost seems excessive because avoiding additional cost – estimated by the State’s expert to be between \$12 million and \$15 million annually – is a “compelling governmental interest.”

The estimated additional cost is a wild exaggeration that is not borne out by the actual cost of providing kosher meals to prisoners. This is cogently demonstrated in Plaintiff-Appellant’s Opening Brief. Modestly priced pre-

packaged kosher meals are now available under many brand names, and they are shelf-stable and may be heated while retaining their kosher status. Attached as Exhibit B is an affidavit by Menachem Lubinsky. Mr. Lubinsky is the foremost authority in the United States on the commercial availability of kosher pre-packaged foods. His estimate of the increased daily cost of such food per prisoner is \$4.00- \$4.50.

In any event, even if the estimate provided by Florida's witness were correct, cost of kosher meals does not qualify as a "compelling governmental interest" to justify burdening religious observance, particularly not in light of the explicit provision in RLUIPA that a government may be required "to incur expenses in its own operations to avoid imposing a substantial burden." 42 U.S.C. § 2000cc-3(c).

There is, to be sure, some added expense in providing kosher food to prison inmates. Federal authorities report that the kosher meals routinely provided in federal prisons each cost \$2.33, as compared with \$0.99 for a non-kosher meal (<http://forward.com/articles/155363/not-just-jews-eat-kosher-food-in-prison/?p=all>). In California, a non-kosher meal is reported to cost \$0.97 while a kosher meal costs \$2.83 (<http://www.capitolweekly.net/article.php?xid=zric39jepa957j>). The comparable figures reported for Florida are \$0.89 for a non-kosher meal and \$1.57 for a kosher meal (<http://www.foxnews.com/story/0,2933,29>

4349,00.html). The record fails to reflect that the Florida authorities did any comparison shopping to secure kosher meals at the cheapest prices.

Notwithstanding the additional cost, 26 out of 34 States that responded to a 2007 survey said that they provided kosher food to prisoners in their institutions (<http://www.foxnews.com/story/0,2933,294349,00.html>). Among these States are Arizona, California, Colorado, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Washington, and Wisconsin. If the additional expense is not “compelling” enough to prevent the federal government and at least 26 States (we agree with the Appellant that the accurate current number is 35) from making this accommodation to the religious needs of some Jewish prisoners, it surely cannot qualify as “compelling” in Florida.

IV.

THE PURPORTED “SERIOUS SECURITY” CONCERNS ARE FLIMSY RATIONALIZATIONS

In addition to increased cost, the District Court asserted that “serious security issues” would result if kosher meals were provided to Jewish prisoners. None of these “security issues” withstands scrutiny. The First, Third, and Eighth Circuits have clearly held that simply stating that a “security concern” exists is not sufficient. Prison authorities must establish that there is substance to the asserted “security concern.” *Spratt v. Rhode Island Department of Corrections*, 482 F.3d

33, 38-39 (1st Cir. 2007); *Washington v. Klem*, 497 F.3d 272, 283-284 (3d Cir. 2007); *Murphy v. Missouri Dep't of Correction*, 372 F.3d 979, 988 (8th Cir. 2004). They cannot do so in this case.

A. Decreased Morale Because of “Special Treatment.”

Experience with kosher diets in the federal system and in many State prisons that provide kosher diets disproves the supposed concern that “morale” in the prison will be damaged if the religious diets of particular prisoners are accommodated. Moreover, many individual distinctions are drawn in prison among individual prisoners based on various personal considerations. Prisoners with medical conditions, for example, receive “therapeutic” diets that differ from those given to prisoners who have no medical conditions. It would not be an acceptable justification for denying medical accommodations to say that such accommodations may harm prison “morale.”

B. False Profession of Belief.

The likelihood that non-Jewish prisoners would consistently relinquish fresh cooked and prepared meals in order to obtain pre-packaged kosher meals is very small. Kosher pre-packaged meals are offered by airlines, but extremely few non-kosher passengers choose them in place of the freshly prepared meals. By the same token, if Florida authorities satisfied the religious requirements of kosher-observing prisoners with the meals described in Mr. Lubinsky’s affidavit, there can

be no serious expectation that “inmates might profess belief to a religious group to obtain a special diet.”

Moreover, the prison authorities are capable of distinguishing between those who have legitimate and sincere need for kosher food and charlatans who claim to be religious. *E.g.*, *Jackson v. Mann*, 196 F.3d 316 (2d Cir. 1999); *Theriault v. Silber*, 453 F. Supp. 254 (W.D. Tex. 1978) (“a masquerade designed to obtain First Amendment protection”), *appeal dismissed*, 579 F.2d 302 (5th Cir. 1978). Denying kosher food to legitimate believers because scoundrels take advantage of that right meets the proverbial description of discarding the baby with the bath-water.

C. Determining Religious Entitlement Would Cause “Discord and Unrest.”

If, contrary to expectations, many prisoners claimed “entitlement” to kosher meals, it would not be difficult to distinguish between those who consistently maintain a kosher diet (as the appellant in this case has concededly done) and other prisoners who choose to keep a kosher diet not out of sincere religious conviction but as – and when – the spirit moves them. Drawing this distinction does not appear to have excessively burdened either the federal prison authorities (who provide kosher food in their institutions) or cause “increased confrontational incidents” in the many jurisdictions where prisoners are given the option of receiving kosher food.

D. Diversion of Security Staff to “Issues Related to the Kosher Diet.”

The District Court did not specify how these “diversions” would occur or what the “issues related to the kosher diet” might be. There is no basis in the record to believe that such “diversions” amount to a “compelling government interest” or, indeed, to any “interest” whatever beyond ordinary administration of a penal facility.

E. Manipulation for “Gang Activity.”

This “security concern” is the least comprehensible of all. Is the District Court suggesting that if more than one prisoner requests kosher food, providing several prisoners with kosher meals will lead to the formation of a “gang?” What “activity” by this “gang” generates concern? Are Florida’s prison authorities concerned that the “gang” might recite a blessing before the meal and recite Grace afterwards?

CONCLUSION

Praiseworthy as thrift and frugality may be, Florida’s prison officials may not save their pennies at the cost of *bona fide* religious observance by the State’s prison inmates. If prison authorities may save money at the expense of Jewish inmates today, they may, with equal ease, demonstrate the same indifference tomorrow to the faith and observance of Christians.

Prison authorities may conclude that communion wafers and wine are too expensive to be used in Sunday church sacraments at prison chapels. Affirmance of the District Court's rationale would mean that they could also deny, in the interests of economy, the sacrament altogether, or substitute potato chips and apple juice during church services because they are cheaper.

The lesson of *Devarim* (Deuteronomy 15:7-8) should be their guide: "Thou shalt not harden thy heart, nor shut thy hand from thy needy brother. Thou shalt surely open thy hand unto him, and shalt surely lend him sufficient for his need in that which he wanteth."

The judgment of the District Court permitting Florida to deny kosher meals to its prison inmates should be reversed.

August 8, 2012

Respectfully submitted,

Of Counsel
DENNIS RAPPS
NATIONAL JEWISH COMMISSION
ON LAW AND PUBLIC AFFAIRS
("COLPA")

/s/ Nathan Lewin
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, I hereby certify that this brief uses a proportionately spaced font and contains 3,938 words exclusive of those portions that are excluded under Rule 32(a)(7)(B)(iii).

By /s/ Nathan Lewin

Dated: August 8, 2012

CERTIFICATE OF SERVICE

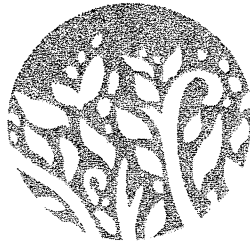
I hereby certify that on August 8, 2012, the foregoing *Brief Amicus Curiae of the National Jewish Commission on Law and Public Affairs, Agudath Israel of America, Union of Orthodox Jewish Congregations of America, National Counsel of Young Israel, Association of Kashrus Organizations, Agudas Harabbanim of the United States and Canada, Rabbinical Alliance of America, and Rabbinical Council of America in Support of Appellant for Reversal* was served on all counsel of record by CM/ECF and by Federal Express at the addresses listed below:

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By /s/ *Nathan Lewin*

EXHIBIT A



ENCYCLOPAEDIA JUDAICA

S E C O N D E D I T I O N

VOLUME 5 Coh-Doz

FRED SKOLNIK, *Editor in Chief*
MICHAEL BERENBAUM, *Executive Editor*

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2:6). This ensures both that no other substances have been added to the milk, and, more particularly, that no milk of an unclean animal has been added. However, since such practices are today generally forbidden by state laws, and since, furthermore, "unclean" milk is more expensive than "clean," many authorities permit the consumption of milk which has not been supervised.

The dietary laws are exceedingly complex and a great deal of material in the Talmud is devoted to them. The tractate *Hullin* deals mainly with the subject and the *Yoreh De'ah*, one of the four sections of *Jacob b. Asher's *Tur* and the *Shulhan Arukh*, deals exclusively with dietary laws.

History

IN PROPHETIC LITERATURE. The Hebrew prophets repeatedly refer to *kashrut*. *Isaiah (66:17) warned that those "eating swine's flesh and the detestable thing and the mouse, shall be consumed together." *Ezekiel (4:14), in his vision, claimed, "Ah, Lord God; behold my soul hath not been polluted, for from my youth up, even till now, have I not eaten of that which dieth of itself, or is torn of beasts; neither came there abhorred flesh into my mouth." *Daniel, together with his companions Hananiah, Mishael, and Azariah, refused to partake of the "king's food" and of the "wine which he drank" (Dan. 1:8).

THE SECOND TEMPLE TIMES. Jews endangered their lives by their faithful adherence to the dietary laws during the Syrian rule of Erez Israel, especially in the reign of *Antiochus IV Epiphanes. I Maccabees (1:62-63) records, "Many of the people of Israel adhered to the law of the Lord. They would not eat unclean things, and chose rather to die." The eating of the "unclean things" was literally equated with apostasy: "*Eleazar, one of the principal scribes, a man already well stricken in years, was compelled to open his mouth and to eat swine's flesh. But he, welcoming death with renown, rather than life with pollution, advanced of his own accord to the instrument of torture" (II Macc. 6:18). During the same period, *Hannah and her seven sons chose martyrdom rather than contravene the dietary laws. "We are ready to die," they proclaimed, "rather than transgress the laws of our fathers" (*ibid.* 7:2). In the epic story of *Judith and Holofernes, Judith affirms, "I will not eat thereof, what I have brought with will be enough for me" (Judith 12:2).

The Book of *Tobit states that the dietary laws were specifically designed to set the children of Israel apart from their neighbors: "All my brethren, and those that were of my kindred, did eat of the bread of the gentiles, but I kept myself from eating of the bread of the gentiles" (Tob. 1:10-11).

Some tolerant gentile rulers not only permitted, but even facilitated, the observance of the dietary laws. Thus, in 44 B.C.E., Dolabella, the Roman governor of Syria, exempted the Jews of Ephesus from military service so that they would not be compelled to desecrate the Sabbath or eat forbidden food (Jos., Ant., 14:223-30). However, as Josephus' documentation of the barbarities committed during the Jewish revolt

reveals, such remarkable instances of Roman tolerance were unfortunately rare. The *Essenes, on the contrary, were singled out for special savagery. "They were racked and twisted, burnt and broken, and made to pass through every instrument of torture in order to induce them to blaspheme their lawgiver and to eat some forbidden thing; yet they refused to yield to either demand, nor even once did they cringe to their persecutors or shed a tear. Smiling in their agonies, mildly deriding their tormentors, they cheerfully resigned their souls, confident that they would receive them back" (Jos., Wars, 2:152-3).

IN MEDIEVAL TIMES. Despite the difficulties, and even dangers, inherent in the observance of the dietary laws during subsequent periods of severe persecution, the Jews steadfastly remained faithful to *kashrut*. A Jewish chronicler of the period of the Crusades writes: "It is fitting that I should recount the praises of those who were faithful. Whatever they ate or drank, they did at the peril of their lives. They would ritually slaughter animals for food according to Jewish tradition and remove the fat and inspect the meat in accordance with the prescription of the sages. Nor did they drink the wine of the idol worshippers" (Chronicle of Solomon b. Samson, in: A.M. Habermann, *Gezerot Ashkenaz ve-Zarefat* (1945), 57). The heroism of the medieval *Marranos in defense of the dietary laws was matched by the devotion of the *Cantonists and the inmates of the Nazi concentration camps.

Attempts to Explain the Dietary Laws

Throughout the ages, many attempts have been made to explain the dietary laws. The Pentateuch itself does not explain them, although in three separate passages in the Bible they are closely associated with the concept of "holiness." Thus, Exodus 22:30 states: "And ye shall be holy unto Me; therefore ye shall not eat any flesh that is torn of beasts in the field; ye shall cast it to the dogs." Leviticus repeats the idea: "For I am the Lord your God; sanctify yourselves therefore, and be ye holy, for I am holy; neither shall ye defile yourselves with any manner of swarming thing that moveth upon the earth" (Lev. 11:44-45). Finally, Deuteronomy 14:21 states: "Ye shall not eat of any thing that dieth of itself; thou mayest give it unto the stranger that is within thy gates, that he may eat it; or thou mayest sell it unto a foreigner; for thou art a holy people unto the Lord thy God." The Pentateuch classifies the dietary laws as *hukkim*, "divine statutes," which by definition are not explained in the text (Yoma 67b). It has been variously suggested that the underlying motivation for the dietary laws are hygienic and sanitary, aesthetic and folkloric, or ethical and psychological.

MORAL EFFECTS. In Ezekiel 33:25, the prophet equates the eating of blood with the sins of idolatry and murder. One interpretation of this verse teaches that the dietary laws are ethical in intent, since abstention from the consumption of blood tames man's instinct for violence by instilling in him a horror of bloodshed. This is the view expressed in a letter by *Aristeas, an unknown Egyptian Jew (probably of the first

century B.C.E.), who states that the dietary laws are meant to instill men with a spirit of justice, and to teach them certain moral lessons. Thus, the injunction against the consumption of birds of prey was intended to demonstrate that man should not prey on others (Arist. 142-7). *Philo, the Alexandrian Jewish philosopher, also suggests that creatures with evil instincts are forbidden lest men, too, develop these instincts (Spec. 4:118).

The rabbis of the Talmud rarely attempted to find rational explanations for the dietary laws, which they generally regarded as aids to moral conduct. "For what does the Holy One, Blessed be He, care whether a man kills an animal by the throat or by the nape of its neck. Hence its purpose is to refine man" (Gen. R. 44:1; Lev. R. 13:3). Commenting on the verse "and I have set you apart from the peoples, that ye should be mine" (Lev. 20:26), the *Sifra* (11:22), a halakhic Midrash on Leviticus, states, "Let not a man say, 'I do not like the flesh of swine.' On the contrary, he should say, 'I like it but must abstain seeing that the Torah has forbidden it.'"

EFFECTS ON THE SOUL OF MAN. Such mystics as Joseph *Gikatilla and Menahem *Recanati maintained that food affects not only the body but also the soul, clogging the heart and dulling man's finer qualities. Isaac b. Moses *Arama stated that, "The reason behind all the dietary prohibitions is not that any harm may be caused to the body, but that these foods defile and pollute the soul and blunt the intellectual powers, thus leading to confused opinions and a lust for perverse and brutish appetites which lead men to destruction, thus defeating the purpose of creation" (*Akedat Yizhak, Sha'ar Shemini*, 60-end).

Samson Raphael *Hirsch wrote, "Just as the human spirit is the instrument which God uses to make Himself known in this world, so the human body is the medium which connects the outside world with the mind of man ... Anything which gives the body too much independence or makes it too active in a carnal direction brings it nearer to the animal sphere, thereby robbing it of its primary function, to be the intermediary between the soul of man and the world outside. Bearing in mind this function of the body and also the fact that the physical structure of man is largely influenced by the kind of food he consumes, one might come to the conclusion that the vegetable food is the most preferable, as plants are the most passive substance; and indeed we find that in Jewish law all vegetables are permitted for food without discrimination" (*Horeb*, section 454, Eng. tr. by I. Gruenfeld (1962), 328).

HYGIENIC EXPLANATIONS. Maimonides (Guide, 3:48) noted that "These ordinances seek to train us in the mastery of our appetites. They accustom us to restrain both the growth of desire and disposition to consider the pleasure of eating as the end of man's existence." He also maintained, however, that all forbidden foods are unwholesome: "All the food which the Torah has forbidden us to eat have some bad and damaging effect on the body ... The principal reason why the Law for-

bids swine's flesh is to be found in the circumstances that its habits and its food are very dirty and loathsome" (*ibid.*, 3:48). He gives an explanation entirely based on hygienic considerations, for the injunction against the consumption of sacrificial fat (*helev*): "The fat of the intestines is forbidden because it fattens and destroys the abdomen and creates cold and clammy blood." Concerning the proscription of *basar be-halav*, Maimonides states: "Meat boiled in milk is undoubtedly gross food, and makes a person feel overfull." He adds, however, "I think that most probably it is also prohibited because it is somehow connected with idolatry. Perhaps it was part of the ritual of certain pagan festivals. I find support for this view in the fact that two of the times the Lord mentions the prohibition, it is after the commandment concerning our festivals. 'Three times a year all your males shall appear before the Lord God' (Ex. 17:23-24; 23:17). That is to say, 'When you come before Me on your festivals, do not prepare your food in the manner in which the heathens do'" (*ibid.*, 3:48). Ancient inscriptions unearthed by archaeologists (e.g., at Ras Shamra-*Ugarit) tend to confirm that this was a fertility rite. J.G. Frazer, quoting a Karaite medieval author, writes: "There was a custom among the ancient heathens, who when they had gathered all the crop, used to boil a kid in its mother's milk" (*Folklore in the Old Testament*, 3 (1919), 117).

Abraham *Ibn Ezra maintained that the reason for the prohibition of *basar be-halav* was "concealed," even from the eyes of the wise, although he added "But I believe it is a matter of cruelty to cook a kid in its mother's milk" (Commentary to Ex. 23:19; see: *Animals, Cruelty to). A contemporary interpretation, advanced by A.J. *Heschel, explains that the goat provides man with the perfect food - milk, which is the only food that can sustain the body by itself. It would, therefore, be an act of ingratitude to take the offspring of such an animal and cook it in the very milk which sustains us.

Many other scholars, however, followed in the footsteps of Maimonides. They pointed out that certain animals harbor parasites that create and spread disease. It was a fact that during the Middle Ages Jews were less prone than their neighbors to the many epidemics of the time. R. *Samuel b. Meir declared that "All cattle, wild beasts, fowl, fishes, and various kinds of locusts and reptiles which God has forbidden to Israel, are indeed loathsome and harmful to the body, and for this reason they are called 'unclean'" (Commentary to Lev. 11:3).

Commenting on the verse "Whatsoever hath fins and scales in the waters, in the seas, and in the rivers, them may ye eat" (Lev. 11:9), Nahmanides states: "Now the reason for specifying fins and scales is that fish which have fins and scales get nearer to the surface of the water and are found more generally in freshwater areas ... Those without fins and scales usually live in the lower muddy strata which are exceedingly moist and where there is no heat. They breed in musty swamps and eating them can be injurious to health." Many modern scholars give hygienic reasons for the dietary laws, since it is known that bacteria and spores of infectious diseases circulate through the blood.

EXHIBIT B

**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
RICH v. SECRETARY, FLA. DEP'T OF CORRECTIONS
No. 12-11735
AFFIDAVIT OF MENACHEM LUBINSKY**

MENACHEM LUBINSKY hereby declares under penalty of perjury:

1. I am the president & chief executive officer of LUBICOM Marketing Consulting ("LUBICOM").
2. LUBICOM is a full-service public relations, advertising and marketing, and special events management firm, specializing in kosher food products and kosher food events. It cosponsors "KosherFest" – the annual trade show that it founded twenty-three years ago that showcases kosher food product and introduces new kosher food products from all over the world -- and publishes "Kosher Today," a weekly trade publication.
3. I have occupied this position since 1989.
4. In this position I am very familiar with kosher supervisory organizations whose certification is generally accepted by the kosher-consuming public.
5. These generally accepted kosher supervisory organizations include those popularly known by their respective trademarks, such as "OU," "Kof-K," "Star-K", "Triangle-K," and others.
6. In this position I am also very familiar with shelf-stable packaged meals that have been certified by these organizations to be kosher.
7. Certified-kosher, shelf-stable packaged meals are made, are distributed, and sold commercially to the public under at least the following brands, as shown on the attached chart:
 - a. Meal Mart – 25 or more varieties
 - b. LaBriute – 15 or more varieties
 - c. Tuv Taam – 9 or more varieties
 - d. Sun Meadow
 - e. Main Menu.

8. Some of the above products may be purchased in bulk for less than \$3.00 per meal.

Pursuant to 28 USC § 1746 I hereby declare under penalty of perjury that the foregoing is true and correct.

Brooklyn, New York

August 7, 2012

x

MENACHEM LUBINSKY

List of Companies with Prepared Kosher Meals

Frozen

KJ Poultry

Meal Mart, Frozen List:

http://www.alleprocessing.com/alle/MealMart/hos_dinners.htm

Shelf Stable

1) Meal Mart Meals

A.

<http://kosher.com/kosher-travel-meals.html?manufacturer=5>

BEEF STUFFED CABBAGE
CHEESE RAVIOLI IN TOMATO SAUCE
CHICKEN SOUP WITH MATZA BALLS
BONE IN CHICKEN RICE AND VEGETABLES
BONE IN CHICKEN WITH POTATO
CHOLENT WITH BEEF (SLICED KISHKA AND KUGEL)
SLICED SALMON
BEEF RIB STEAK
EGGPLANT PARMESAN
BAKED ZITI

B.

<http://allfreshkosher.com/kosher-grocery/meals-on-the-go/heat-serve-meals.html>

BEEF AND LAMB KABOB
BEEF SOUP WITH POTATOES AND CARROTS
BEEF STUFFED CABBAGE
ONION SOUP

2) LaBriute meals

Vegetarian Stuffed Shells
Beef Stew
Cheese Ravioli
Chicken Primavera
Meatballs and Spaghetti
Vegetarian Honolulu Nuggets
Vegetarian Pepper Steak
Vegetarian Stuffed Cabbage

Link to order: <http://labriutemeals.com/about.htm>

3) Tuv Taam:

www.tuvtaamonline.com/productlist.php?listid=82&cat_code=B

Beef Ravioli with Vegetable Sauce
Turkey Lasagna
Penne & Beef Sausage
Beef Moussaka
Italian Style Meatballs
Beef Meat Loaf
Beef Stuffed Shells

Cocktail Franks with Goulash Sauce
Turkey Meatballs
Beef Ravioli with Marinara Sauce

Link to order:

www.tuvtaamonline.com/productlist.php?listid=82&cat_code=B

4) Sun Meadow:

Tuna, with Mayo and Relish Packet, Fruit Cup, Apple Juice,
Whole Wheat Crackers (4) Packets, Oatmeal Cookie, Nonfat Dry
Milk

Salmon, Fruit Cup, Apple Juice, Saltines (2) Packets, Fortified
Cereal, Raisin Packet, Nonfat Dry Milk

Link to order: <http://www.sunmeadow.com/content/46/Sun-Meadow-Kosher.aspx>

5) A & B Fish

Frozen Loaves

<http://www.gefiltefish.com/category.asp?categoryID=61>