No. 12-11735

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

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BRUCE RICH,
*Plaintiff–Appellant*,

v.

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

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

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# PLAINTIFF-APPELLANT'S REPLY BRIEF

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## INTRODUCTION

DOC does not dispute that the federal government and 35 states provide a kosher diet to Jewish prison inmates without problems of cost or security. Nor does it dispute that over a dozen courts—including the Second, Seventh, Eighth, Ninth, and Tenth Circuits—have ordered prison systems to provide religious diets under the First Amendment or RLUIPA.

Instead, it asks this Court to shut its eyes to prison practices across the country, and decide this case based solely on the artificial affidavits of two prison officials. The first affidavit estimates the cost of a kosher diet to be "$12,154,463.35 to $14,952,283.40 per year" (RE 95, 176)—an estimate *100 times* greater than the actual cost of DOC's own Jewish Dietary Accommodation Program ($146,000). The second affidavit offers mere speculation about possible future security issues and common administrative issues—without identifying a single actual security problem attributable to a kosher diet in Florida or any other state.

As explained in our opening brief (at 45-52), the First, Third, Fourth, and Ninth Circuits have all held that such conclusory affidavits are insufficient to satisfy strict scrutiny under RLUIPA. Tellingly, DOC

does not even ***cite*** these cases, much less distinguish them. Nor does it address the fifteen court decisions that have ordered prison systems to provide a religious diet. It simply pretends that they don't exist. That is not enough to satisfy strict scrutiny.

Indeed, the gravity of this case was recently underscored when the United States sued DOC over this same issue. *United States* v. *Secretary, Florida Department of Corrections, et al.*, No. 1:12-cv-22958-PAS (S.D. Fla.) (complaint filed Aug. 14, 2012). To our knowledge, this is the first time in the twelve-year history of RLUIPA that the United States has filed its own suit against a sovereign State. The message is clear: When thirty-five states and the federal government can provide a kosher diet while balancing their interests in costs and security, DOC must explain why it alone cannot. Because DOC has failed to do so here, it cannot satisfy strict scrutiny.

## ARGUMENT

### I. DOC's procedural arguments are meritless.

Before addressing the merits, DOC tries to stack the deck in its favor with three procedural arguments: (1) It claims that the standard of review is "plain error," instead of *de novo* (DOC Br. 20-21); (2) It argues

that Rich "bear[s] the burden of proof" on strict scrutiny (DOC Br. 23); and (3) It asks this Court to ignore the publicly available "records of other correctional agencies" cited by Rich (DOC Br. 26). None of these arguments has merit.

**A. DOC is confused about the standard of review.**

DOC first argues that this Court must apply "plain error" review, because Rich did not object to the "findings of fact" in the magistrate's report. DOC Br. 20-21. But DOC is confused. The magistrate did not make any "findings of fact"; it simply granted DOC's motion for summary judgment. RE 167. As this Court has said, "a district court does not make factual findings in deciding a summary judgment motion, so no question of clear error review even arises." *Wooden* v. *Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1271 n.9 (11th Cir. 2001). DOC should know better. The proper standard of review is *de novo*. *Int'l Union, United Mine Workers* v. *Jim Walter Resources, Inc.*, 6 F.3d 722, 724 (11th Cir. 1993).

**B. DOC bears the burden of proof.**

Next, DOC attempts to distort the burden of proof. It says that Rich "bear[s] the burden of proof" on strict scrutiny, and he therefore must

"set forth specific facts" on the cost and security implications of kosher food to "establish the existence of an element essential to his case." DOC Br. 23. But this argument is doubly wrong.

First, it contradicts the text of RLUIPA, which says that *the government* bears the burden of proof on strict scrutiny: "No government shall impose a substantial burden on the religious exercise of a person . . . unless *the government demonstrates* that imposition of the burden on that person [satisfies strict scrutiny]." 42 U.S.C. § 2000cc-1 (emphasis added). RLUIPA further provides that, once a plaintiff establishes a substantial burden, "*the government* shall bear the burden of persuasion on any [other] element of the claim." 42 U.S.C. § 2000cc-2(b) (emphasis added).

Thus, every court to address the question—including this one—has treated strict scrutiny as an affirmative defense, holding that the burden of proof rests with the government. *See, e.g.*, *Smith* v. *Allen*, 502 F.3d 1255, 1276 (11th Cir. 2007) ("If the plaintiff succeeds in demonstrating a *prima facie* case [of a substantial burden], the government must then demonstrate that the challenged government action [satisfies

strict scrutiny]."); *DeMoss* v. *Crain*, 636 F.3d 145, 150 (5th Cir. 2011) (same).

In any event, DOC is wrong to say that "Rich failed to come forward with evidence to dispute the facts presented by Appellees." DOC Br. 22. To the contrary, Rich presented four critical facts undermining DOC's strict scrutiny defense, each of which was supported by competent summary judgment evidence.

First, Rich noted that the federal government and numerous states provide kosher diets without cost or security problems, RE 132, supporting this fact by attaching a Department of Justice statement and citing cases requiring other states to provide a kosher diet. RE 158-65. Second, Rich highlighted evidence from DOC's own affidavits showing that DOC provided a Jewish Dietary Accommodation Program for several years without cost or security problems. RE 130-32, 92, 98. Third, Rich pointed out that DOC provides specialized medical diets without cost or security problems, RE 133, which was supported by DOC's own exhibits. RE 112-13. Finally, Rich offered a letter from the Aleph Institute showing that DOC currently provides a kosher diet to select inmates without problems of cost or security. RE 133, 157.

In light of this evidence, DOC—not Rich—had the heavy burden of demonstrating that the denial of a kosher diet satisfied strict scrutiny, and that no reasonable jury could conclude otherwise. DOC failed to carry that burden.

**C. DOC cannot exclude official public records.**

Lastly, DOC complains that Rich offered "extensive extra-record material" on appeal, such as "articles in the media, survey abstracts, and agency records of other correctional agencies." Br. 1, 26. According to DOC, the Court must turn a blind eye to this material. This argument fails for several reasons.

First, it ignores the doctrine of judicial notice. Under Federal Rule of Evidence 201(b), this Court may "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Under this rule, as noted in our opening brief (at 9 n.1), this Court "ha[s] not hesitated to take judicial notice of agency records and reports." *Terrebonne* v. *Blackburn*, 646 F.2d 997, 1000 (5th Cir. June 1, 1981) (en banc). In *Terrebonne*, for example, this Court took notice of a report of the Louisiana Department of Corrections. *Id.* Similarly, in

*Hope* v. *Pelzer*, 240 F.3d 975, 979 n.8 (11th Cir. 2001), this Court took notice of a report of the Department of Justice in a lawsuit against the Alabama DOC. Other courts have done the same. *See, e.g.*, *City of Sausalito* v. *O'Neill,* 386 F.3d 1186, 1223 n.2 (9th Cir. 2004) ("We may take judicial notice of a record of a state agency not subject to reasonable dispute.").

Here, Rich relies on official agency reports from Florida (at 9 n.1, 18 n.4), Michigan (at 9 n.1, 35 n.5), Connecticut (at 56), and the Federal Bureau of Prisons (at 12). DOC does not dispute the accuracy of *any* of these reports. Indeed, DOC expressly relies on the JDA Report—which wasn't part of the record below—on the ground that it is "an official public record of the Florida Department of Corrections." DOC Br. 12. If DOC can ask this Court to notice Florida's "official public record[s]," Rich can ask this Court to notice the official public records of other states.

Nor is the doctrine of judicial notice limited to official agency records. As this Court has repeatedly explained, it may also take judicial notice of "the records of inferior courts." *United States* v. *Rey*, 811 F.2d 1453, 1457 n. 5 (11th Cir. 1987); *Nguyen* v. *United States*, 556 F.3d 1244, 1259

n.7 (11th Cir. 2009) (same). This is particularly true when such records are offered *not* "for the truth of the matters asserted," but "for the purpose of determining what statements the documents contain." *Selbst* v. *Coca-Cola Co.,* 262 F. App'x 177, 179 (11th Cir. 2008) (quotation omitted).

Here, Rich cited the records of two federal district courts, in which Texas and Indiana reported the cost of their kosher dietary programs. Br. 35-36. Rich cited these court records *not* for the truth of the matters asserted, but merely for the fact that Texas and Indiana publicly reported the cost of their kosher dietary programs. Indeed, DOC does not deny that Texas and Indiana made these reports, nor does it suggest that the reports are inaccurate. Thus, these court records are precisely the sort of facts that are "not subject to reasonable dispute" and "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Ev. 201(b).

Finally, even if these records were not judicially noticeable—and they are—this Court has equitable authority to supplement the record. Supplementation is appropriate when it will "aid [the Court in] making an informed decision," *Schwartz* v. *Millon Air, Inc.*, 341 F.3d 1220, 1225

n.4 (11th Cir. 2003), when it serves "the interests of justice," *id.*, or when it promotes "judicial economy," *Cabalceta* v. *Standard Fruit Co.,* 883 F.2d 1553, 1555 (11th Cir. 1989). Here, the evidence presented by Rich is publicly available, is not disputed by DOC, and will also assist the Court in "making an informed decision." *Schwartz*, 341 F.3d at 1225 n.4. Particularly when Rich was *pro se* and was improperly denied the opportunity to conduct discovery, *see* Part IV, *infra*, DOC has offered no reason why this Court should shut its eyes to undisputed, publicly available facts about kosher dietary programs in other states.

## II. DOC has failed to prove that the denial of a kosher diet furthers a compelling governmental interest.

On the merits, DOC concedes that Rich sincerely believes in keeping a kosher diet. Br. 19. It also concedes that the denial of a kosher diet has imposed a substantial burden on Rich's religious exercise. *Id.* Thus, under RLUIPA, the burden shifts to DOC to prove its affirmative defense of strict scrutiny. 42 U.S.C. § 2000cc-1. This is "the most demanding test known to constitutional law," *City of Boerne* v. *Flores*, 521 U.S. 507, 534 (1997), and DOC cannot even begin to satisfy it.

### A. DOC has failed to prove that the denial of a kosher diet furthers a compelling interest in controlling cost.

DOC first argues that denying Rich a kosher diet furthers a compelling governmental interest in controlling costs. Br. 36. This argument fails for several reasons.

1. First, as explained in our opening brief, courts have repeatedly rejected cost in the prison context as a compelling governmental interest. Br. 32-34. RLUIPA itself provides that it "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3. Thus, "the fact that [religious diets] may be more costly than non-religious diets *is not alone a compelling governmental interest under the statute*." *Willis* v. *Comm'r, Ind. Dep't of Corr.*, 753 F. Supp. 2d 268, 778 (S.D. Ind. 2010) (emphasis added). DOC does not respond to this point, therefore conceding it. *See also* DOC Br. 19 (stating that "neither [DOC] nor the district court relied on costs alone").

2. Second, even if cost alone could be a compelling interest, DOC has provided no competent evidence of the cost of a kosher diet. It relies entirely on the affidavit of Kathleen Fuhrman, who estimates that a kosher diet would cost an extra "**$12,154,463.35** to **$14,952,283.40** per

year." RE 95, 176. But as we explained, this estimate is wildly out of step with the costs reported in Texas (**$42,475**), Michigan (**$272,000**), Indiana (**$256,895**), and even Florida itself (**$146,000**). Br. 34-37. In fact, Fuhrman's estimate is *55 times greater* than the next most expensive kosher program (Michigan), and *100 times greater* than DOC's own JDA Program. *Id.* DOC does not dispute the accuracy of any of these reports. Nor does it explain how Fuhrman's estimate can be reconciled with them. It simply asks this Court to ignore them.

As explained in our opening brief, Fuhrman's estimate is wrong because Fuhrman made four obvious mistakes on the face of her affidavit. Br. 37-41. First, Fuhrman *overestimated* the cost of kosher food by inflating the cost of prepackaged kosher meals, inflating the cost of supplemental food, and inflating the cost of disposable utensils. Br. 37-38. DOC does not explain the basis for *any* of these estimates.

Second, Fuhrman *underestimated* the cost of regular food—using the appropriated cost instead of the actual cost. Br. 38-39. Again, DOC does not dispute that this was a mistake. Instead, it says that the costs might have gone *down* in later years because DOC "return[ed] to a self-operated food service" in "November 2008 . . . due to the need for cost

containment." DOC Br. 32 & n.20. But there is one problem: The cost in 2009 was *higher* than Fuhrman's estimate in 2007. If anything, this shows that Fuhrman even more grossly underestimated the cost of regular food.

Third, Fuhrman failed to *subtract* the cost of the regular diet from the cost of the kosher diet—effectively assuming that Jewish inmates would consume *two* diets. Br. 39. This is a blatant error that DOC does not even attempt to defend. It is also a very expensive error—inflating Fuhrman's estimate by $3,669,272. *Id.*

Finally, Fuhrman grossly *overestimated* the number of inmates that would receive a kosher diet—assuming, without support, that every Jew (2,136), Muslim (3,745), and Seventh-day Adventist (402) in the prison system would receive a kosher diet, for a total of **6,283** inmates, or **6.61%** of the total inmate population. Rich Br. 39. By contrast, Texas reported that only **0.01%** of inmates participated in its kosher program, and Michigan and Florida's JDA Program reported that only **0.26%** participated. Fuhrman thus inflated the participation rate by over *2,500%*. Br. 40.

In response, DOC says nothing about participation rates in Texas and Michigan. Instead, it picks a fight with its own JDA Report, claiming that the Report failed to capture an expected "increase in enrollment," due to the fact that the Program had recently been opened "to inmates espousing [other religious] beliefs." Br. 33. But this is misleading. As the JDA Report explains, the Program was opened to *all* inmates, including "Muslim. . . and Seventh-day Adventist inmates," in "***July 2006***," JDA Report at 10, and DOC did not freeze enrollment until "***April 26, 2007***." *Id.* at 1. Thus, the Program was open to non-Jewish inmates for over ***nine months***. Yet during those nine months, only "13" non-Jewish inmates enrolled. *Id.* at 10. The flood of non-Jewish inmates DOC predicted never materialized. In fact, the JDA Report specifically found that Muslims and Seventh-day Adventists would *not* need a kosher diet, because existing dietary options "would satisfy Seventh-day Adventist" and "Muslim dietary law." *Id.* at 15-16.

DOC also fails to explain why Fuhrman assumed that all 2,136 Jewish inmates in DOC would require a kosher diet. To the contrary, the JDA report showed that only 246 Jewish inmates were participating.

*Id.* at 10 (noting "259" participants and "13" non-Jews). This erroneous assumption further inflated Fuhrman's estimate by $4,497,822.[1]

3. The actual cost of providing a kosher diet is much less: $146,000 to $337,625 per year, based on Florida's own reports and Fuhrman's own methods. Br. 41-43. This constitutes just 0.16% to 0.38% of Florida's annual food budget. *Id.* As the Tenth Circuit explained in *Beerheide* v. *Suthers*, 286 F.3d 1179, 1191 (10th Cir. 2002), such a *de minimis* cost does not even constitute a "valid penological interest" under the deferential *Turner* test, much less a compelling interest under RLUIPA.

Despite the fact that Rich discussed *Beerheide* extensively (at 3, 31, 44-45, 61 n.17), DOC does not even ***cite*** it, much less try to distinguish it. That is because it cannot: The actual cost of a kosher diet does not come anywhere close to a compelling governmental interest. As we explained (at 45), three other courts have reached the same result. *Shakur* v. *Schriro*, 514 F.3d 878, 890-91 (9th Cir. 2008) (rejecting summary judgment where religious diet was "minimally more expensive than the standard diet"); *Agrawal* v. *Briley*, 2004 WL 1977581, at *8 (N.D. Ill. 2004) ("small amount more per year could not be considered

[1] (2,136 estimated Jewish inmates) - (246 actual Jewish inmates) * ($2,379.80 estimated annual cost per inmate) = $4,497,822 per year.

compelling."); *Willis*, 753 F. Supp. 2d at 778 (rejecting cost objections to kosher diet). DOC does not attempt to distinguish ***any*** of them.

4. Finally, DOC suggests that a kosher diet will produce "escalating food service costs," because DOC will be required to provide the diet to "*any* inmate claiming a religious requirement to the diet." DOC Br. 34-35. But DOC need not provide a religious diet to "*any*" inmate—only those that prove their sincerity. States across the country deny religious diets to inmates who fail sincerity screening, who repeatedly switch their religious preferences, who fail to eat the religious diet, who eat religiously forbidden foods, or who otherwise abuse a religious diet. Br. 13-17. Such restrictions are expressly contemplated under RLUIPA, which "does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter* v. *Wilkinson*, 544 U.S. 709, 725 n.13 (2005).

In any event, DOC's slippery slope argument has been rejected by multiple courts. In *Love* v. *Reed*, 216 F.3d 682, 690 (8th Cir. 2000), Arkansas opposed a religious diet on the ground that "if they extend this 'privilege' to [one inmate], other inmates will demand the same privilege." But the Eighth Circuit rejected this objection as not even a "legitimate penological interest," let alone a compelling interest. *Id.* at 691;

*accord Toler* v. *Leopold*, 2008 WL 926533, at *3 (E.D. Mo. 2008) ("risk of increased religious requests" is "not rationally related to any legitimate economic or administrative concern"); *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 435-36 (2006) ("slippery-slope concerns" "echo[] the classic rejoinder of bureaucrats throughout history: If I make an exception or you, I'll have to make one for everybody, so no exceptions."). DOC does not address *Love*, *Toler*, or *Gonzales*.

### B. DOC has failed to prove that the denial of a kosher diet furthers a compelling interest in maintaining security.

DOC fares no better on the issue of security. As explained in our opening brief (at 45-48), the First, Third, Fourth, and Ninth Circuits have all rejected conclusory affidavits by prison officials as insufficient to satisfy strict scrutiny. *Spratt* v. *R.I. Dep't Of Corr.*, 482 F.3d 31, 39 (1st Cir. 2007); *Washington* v. *Klem*, 497 F.3d 272, 283 (3d Cir. 2007); *Smith* v. *Ozmint*, 578 F.3d 246, 253 (4th Cir. 2009); *Couch* v. *Jabe*, 679 F.3d 197, 197 (4th Cir. 2012); *Shakur*, 514 F.3d at 890. Rather, prison systems must "establish that prison security is furthered" by providing "specific factual information based on personal knowledge." *Spratt*, 482 F.3d at 39-40. Here, despite the fact that thirty-five states, the federal

government, and Florida itself have provided Jewish dietary accommodations for many years, the Upchurch affidavit failed to cite even *one* security problem that *ever* resulted from a kosher diet. The most it offered was speculation about possible future problems, or purely administrative issues that are easily addressed. But "no appellate court has ever found these to be compelling interests." *Koger* v. *Bryan*, 523 F.3d 789, 800 (7th Cir. 2008).

DOC offers very little in response. First, it cites a pre-RLUIPA case, arguing that prison officials should receive "substantial deference" on security issues and need not "show with certainty" that a particular accommodation would cause security problems. DOC Br. 37-38 (quoting *Lawson* v. *Singletary*, 85 F.3d 502, 510 (11th Cir. 1996)). Of course, we agree that DOC receives deference and need not prove with "certainty" that a kosher diet would cause security problems. But other circuits have said the same thing and still struck down policies supported only by conclusory affidavits reciting security concerns. *Spratt*, 482 F.3d at 39; *Washington*, 497 F.3d at 283; *Smith*, 578 F.3d at 253; *Couch*, 679 F.3d at 197; *Shakur*, 514 F.3d at 890. This reflects a happy medium: Prison systems receive deference, but they also must provide more than

"conclusory statements about the need to protect inmate security." *Spratt*, 482 F.3d at 40 n.10. As explained in our opening brief (at 46-52), the Upchurch affidavit offers even *less* support for DOC's policy than the affidavits held insufficient in *Spratt*, *Washington*, *Smith*, *Couch*, and *Shakur*. Tellingly, DOC does not address ***a single one*** of these five appellate decisions, much less distinguish them.

Moreover, DOC is not writing on a blank slate. Prisons across the country have been providing kosher diets for decades without security problems. Given this near-unanimity, DOC bears a heightened burden to explain why it is uniquely incapable of balancing security and prisoner free exercise. Br. 53-54. Indeed, in the very same paragraph where the Supreme Court said that prison systems need not "show with certainty" that an accommodation would compromise security, it also said that "the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." *Procunier* v. *Martinez*, 416 U.S. 396, 414 n.14 (1974). This makes sense. When a prison system denies an accommodation that no other prison system offers, very little justification will be required. But when a prison system denies an accommodation offered in almost every other

state—as here—it cannot rest on conclusory allegations of a security risk.

Tacitly admitting that the Upchurch affidavit is deficient, DOC tries to bolster it with citations to the JDA Report. DOC Br. 39-41. But the JDA Report only undermines DOC's arguments even more. In fact, the Report specifically recommends *keeping* a kosher dietary program—not abandoning it based on faux security concerns. JDA Report at 1. The Report also concludes that it is "improbable that [DOC] can satisfy a court's inquiry into whether the [denial of a kosher diet] is furthering a compelling interest, let alone that denying inmates' religious accommodation is the least restrictive means available." *Id.* at 27.

When the Report does identify a few administrative problems, it also offers solutions. For example, as DOC points out, the JDA Program offered a religious diet at only certain institutions, so some inmates "appear[ed] to be manipulating the program" to obtain a transfer to a different institution. DOC Br. 39 (quoting JDA Report at 17). But the JDA Report did not cite transfers as grounds for canceling the program. Rather, it recommended "replacing the kosher meals prepared in the JDA kitchens with purchased pre-packaged meals," Report at 1, which would

make a kosher diet available at every institution and eliminate the need for transfers. This is precisely what most other prison systems do, Rich Br. 15-16, 51 & n.15, and it is what DOC *already* does for the kosher diet at the South Florida Reception Center, *id.* at 64. Yet DOC still pretends that the issue of transfers is insurmountable.

Next, DOC complains about a "proliferation of paperwork" associated with the "assessment process" for determining an inmate's sincerity. DOC Br. 41 (citing JDA Report at 22). But that is an administrative issue, not a security issue, and other circuits have held that it does not even rise to the level of "a legitimate penological interest." *Love*, 216 F.3d at 691; Br. 49-50. DOC does not cite or distinguish *Love*.

Even if a "proliferation of paperwork" counted as a legitimate interest, the JDA Report offered two solutions for addressing it: (1) DOC could use outside religious authorities to "expertly appraise[]" sincerity in the first instance; and (2) DOC could remove inmates from the diet if they miss "ten percent or more of the kosher meals" in one months. Report at 2. Both of these solutions would reduce administrative burdens, and both have been employed in other states. Br. 13-14, 17, 66-67. Yet DOC simply ignores them.

Finally, DOC claims that "nearly six percent of inmates enrolled in the program became gang members after entering the program," and "gang members may [have been] manipulating the [JDA] transfer process to their advantage." DOC Br. 40 (citing JDA Report at 10, 17, 22). But this "gang" argument is just another variation on the transfer argument, and the JDA Report already offered a solution: DOC could utilize prepackaged meals to eliminate the need for transfers. Report at 2. That would make it *impossible* for gang members to abuse the process. Alternatively, if any inmate abused the kosher diet, DOC can remove the inmate. Both of these solutions are utilized by other prison systems. Br. 16-17, 51-52. DOC addresses neither.

In short, the Upchurch affidavit is woefully inadequate to prove that the denial of a kosher diet is necessary to maintain security. And the few administrative issues that he mentions are not compelling interests and have already been addressed by the JDA Report and other states.

### C. DOC cannot satisfy strict scrutiny in light of the practices of other states.

DOC also fails strict scrutiny because it has failed to explain why the federal government and thirty-five states can provide a kosher diet without problems of cost or security, but DOC cannot. Br. 53. As ex-

plained in our opening brief (at 53-55), several circuits have held that "the policies followed at other well-run institutions" are relevant on strict scrutiny. *Procunier*, 416 U.S. at 414 n.14. These courts have struck down prison policies when only the federal government, or only a handful of states, have adopted a less restrictive policy. *See Spratt*, 482 F.3d at 42; *Warsoldier* v. *Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); *Washington*, 497 F.3d at 285. Here, however, it is not just the federal government or a handful of states that provide a kosher diet, but the federal government and *thirty-five states*. Thus, this case is far stronger than *Spratt*, *Warsoldier*, or *Washington*—none of which DOC even ***cites***.

In response, DOC argues that "evidence of policies at one prison is not *conclusive* proof that the same policies will work at another institution." DOC Br. 28 (quoting *Fowler* v. *Crawford*, 534 F.3d 931, 941 (8th Cir. 2008)) (emphasis added). Of course it isn't "conclusive proof." But it is still strongly persuasive.

In *Fowler*, for example, the inmate cited *one* prison unit that had conducted two sweat lodge ceremonies per year with restrictions; on that basis, the inmate sought to conduct *seventeen* ceremonies per year

with unrestricted access to hot coals and sharp instruments in "an enclosed area inaccessible to outside view." *Id.* at 939. Prison officials identified numerous, concrete security problems with the inmate's request, and numerous concrete differences between the two requests. *Id.* at 939-42. On that basis, the court rightly held that evidence of policies at one prison was "not conclusive proof" that the same policy would work at another prison. *Id.* at 941.

Here, by contrast, it is not just *one* prison facility that provides a kosher diet, but *every* federal prison and thirty-five states. And unlike the prison system in *Fowler*, DOC has failed to identify *any* concrete security problems or differences between itself and other states. In that situation, evidence of other prison systems is highly relevant.

Next, DOC claims that the Bureau of Prisons is different from Florida because it has "a very different composite of offenders." DOC Br. 30. But it offers no *evidence* that a Florida burglar or carjacker is more likely to abuse a kosher diet than a federal arsonist or bank robber; it offers only an *ipse dixit*. Nor does it dispute that the highest security inmates in the Bureau of Prisons and other states already receive a kosher diet. Indeed, it does not attempt to distinguish itself from other states at all.

Thus, like the prison systems in *Spratt*, *Warsoldier*, or *Washington*, it cannot satisfy strict scrutiny.

### D. DOC cannot satisfy strict scrutiny when it already provides therapeutic and kosher diets to select inmates.

DOC also fails strict scrutiny because it is already providing numerous special diets to select inmates, without any problems of cost or security. As explained in our opening brief (at 18, 55-58), DOC provides a wide variety of therapeutic diets that are planned, prepared, and served separately from the regular diet. These diets involve just as much administrative, financial, and logistical resources as a kosher diet would. *Id.* And because they may provide more or better food than the regular diet, they carry the same alleged risk of jealousy. Yet DOC continues to provide these diets without cost or security problems. As the Fourth Circuit has held, a prison system cannot satisfy strict scrutiny when it "fail[s] to explain how the prison is able to deal with. . . medically exempt inmates but could not similarly accommodate religious exemptions." *Couch*, 679 F.3d at 204; *see also* Br. 57-58 (collecting cases).

DOC does not cite *Couch*, much less distinguish it. Nor does DOC dispute that therapeutic diets require just as many administrative, financial, and logistical resources as kosher diets. Instead, it argues that

therapeutic diets are different because they involve "an objective [medical] condition," whereas religious diets are "necessarily subjective." Br. 38-39. In other words, religious diets are harder to police for sincerity. But *no court* has held that a desire to avoid sincerity testing is a compelling governmental interest. In fact, the Eighth Circuit has held just the opposite, concluding that a desire to avoid sincerity testing is not even "reasonably related to a legitimate penological interest." *Love*, 216 F.3d at 691; *see* pp. 15-16, *supra*.

DOC also fails strict scrutiny because it has been operating a kosher dietary program for select inmates for over a year—without any cost or security problems. Br. 22-23, 58-59; Aleph *Amicus* Br. at 14-15. As several circuits have held, when a prison system has a "track record" of accommodating religious exercise without incident, that track record "casts doubt on the strength of the link between [the accommodation] and institutional security." *Spratt*, 482 F.3d at 40; *accord Warsoldier*, 418 F.3d at 1000; *Koger*, 523 F.3d at 800.

DOC does not even attempt to address *Spratt*, *Warsoldier*, or *Koger*. Instead, it argues that its "two-year-old" kosher program is merely "experimental," and "not comparable to a system wide Kosher meal plan."

DOC Br. 41-42. But why? The current kosher program follows the recommendations of the JDA Report, which recommended utilizing outside authorities to help with sincerity testing and utilizing prepackaged kosher meals on a system-wide basis. Other states have adopted the same approach on a system-wide basis with no problems. DOC offers *no reason* to believe it won't work, and DOC bears the burden of proof on strict scrutiny.

DOC also claims that the current program "is heavily enriched by the Aleph Institute." DOC Br. 42. But it provides no evidence on the scope or value of this "enrich[ment]." Indeed, it provides no evidence on the cost of the current kosher diet at all—even though such evidence would be readily available to it, and even though it bears the burden of proof on strict scrutiny. That is likely because such evidence would further expose the Fuhrman estimate as grossly inflated.

Next, DOC says that "Rich neither requested nor related any attempt on his part to request to be [admitted] to the pilot program." DOC Br. at 42-43. But Rich requested a kosher diet in multiple grievances, and DOC never even informed him that a kosher dietary program existed, much less that he was eligible to participate. He found out about the

program in a letter from Aleph Institute *after* DOC had already moved for summary judgment. It is hard to fault Rich for not knowing about a program that DOC did not even disclose to the district court.

**E. DOC cannot satisfy strict scrutiny in light of precedent.**

Finally, DOC cannot satisfy strict scrutiny in light of at least fifteen decisions specifically mandating religious diets under the First Amendment or RLUIPA. Br. at 61 & n.17 (collecting cases). As explained in our opening brief, each decision—including decisions from the Second, Seventh, Eighth, Ninth, and Tenth Circuits—involved a ruling *on the merits* that a prison system was required to provide a religious diet. Incredibly, DOC ***does not even cite*** fourteen of these decisions, and doesn't try to distinguish the one case it cites in passing. DOC Br. at 38-39 (citing *Agrawal*).

Instead, DOC relies on the unpublished opinions in *Linehan* v. *Crosby*, 346 F. App'x 471 (11th Cir. 2009), and *Muhammad* v. *Sapp*, 388 F. App'x 892 (11th Cir. 2010), and the Fifth Circuit's decision in *Baranowski* v. *Hart*, 486 F.3d 112 (5th Cir. 2007). But as we explained in our opening brief (at 59-61), these cases are easily distinguishable. All involved *pro se* inmates who offered no evidence at the summary

judgment stage. None involved evidence on the thirty-five states and the federal government that are already providing kosher diets, evidence that the state provided special medical diets, or evidence that the state was already providing a kosher diet. Moreover, *Baranowski* has been factually discredited, as Texas established a kosher kitchen *the same month* that *Baranowski* was decided and has continued it ever since. Br. 60-61. Thus, the suggestion in *Baranowski* that cost and security concerns prevented Texas from providing a kosher diet is demonstrably false.

DOC does not dispute any of these points; its response is a telling silence. It also mentions three more cases in passing. First is *Andreola* v. *Wisconsin*, 211 F. App'x 495, 499 (7th Cir. 2006), another unpublished decision involving a *pro se* inmate. But there, the inmate offered no evidence on the cost of kosher meals, and the court rejected his claim in a single sentence without analysis.

Second, DOC cites *DeHart* v. *Horn*, 390 F.3d 262 (3d Cir. 2004), and *Martinelli* v. *Dugger*, 817 F.2d 1499, 1506 (11th Cir. 1987). But both of those cases involved highly deferential review under the First Amendment, not strict scrutiny under RLUIPA. Indeed, this Court has ex-

pressly recognized that RFRA and RLUIPA have "changed the standard relied on in *Martinelli*." *Harris* v. *Chapman*, 97 F.3d 499, 503 (11th Cir. 1996). DOC does not acknowledge this point. Rather, it cites outdated First Amendment cases only because the contrary precedent under RLUIPA is overwhelming.

## III. DOC failed to satisfy the least restrictive means requirement.

Even assuming DOC could establish that the denial of a kosher diet furthers a compelling governmental interest—and it cannot—it has also failed to demonstrate that the denial of a kosher diet is the "least restrictive means" of furthering its interests. 42 U.S.C. § 2000cc-1(a)(2). This is a separate requirement of strict scrutiny, and several cases have struck down prison policies under the "least restrictive means" test even after concluding that those policies furthered a compelling interest. *See, e.g.*, *Couch*, 679 F.3d at 197; *Warsoldier*, 418 F.3d at 998-99; *Sossamon* v. *Lone Star State of Texas*, 560 F.3d 316, 334 (5th Cir. 2009).

As explained in our opening brief (at 62-67), DOC has at least three less restrictive alternatives to the denial of a kosher diet: (1) utilizing separate kosher kitchens; (2) offering prepackaged kosher meals; or (3)

limiting the kosher diet to sincere inmates. DOC has failed to demonstrate the inadequacy of any of these alternatives.

DOC rejects the first alternative—separate kosher kitchens—on the ground that it creates "logistical and administrative concerns" and allows inmates to seek manipulative transfers. DOC Br. 41, 39. But DOC successfully employed separate kitchens for over three years during the JDA Program, and the JDA Report ultimately recommended *keeping* a kosher diet—not abandoning the program. Separate kosher kitchens have also been successful in Texas, New York, Michigan, and Wyoming. Br. 11, 65-66. DOC offers no explanation for why other states can manage the logistics of a kosher kitchen, but DOC cannot.

Alternatively, even if DOC could not operate kosher kitchens, it could provide prepackaged kosher meals supplemented by naturally kosher foods from the regular prison menu. Br. 10-11, 64-65. This approach eliminates the need for inmate transfers, was recommended by the JDA Report, and has been successfully used by the vast majority of states and the Bureau of Prisons. Br. 64-65. DOC's only objection to this alternative is allegedly excessive costs. But as explained above, DOC has

offered no competent evidence on cost, and data from other states shows that the cost is minimal.

Finally, DOC could reduce fraud by utilizing outside religious authorities to screen for sincerity, by restricting switching, by removing abusive inmates, and by ensuring that the kosher diet is no more desirable than other diets. Br. at 13-17, 66-67. Other states have done this, and the JDA Report makes similar recommendations (at 2), but DOC has not even tried them.

Instead, DOC suggests that it cannot assess sincerity without violating the requirement of "neutrality" under the Establishment Clause. Br. 34 (quoting *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist.* v. *Grumet*, 512 U.S. 687, 709 (1994)). But if that is the rule, then prison systems across the country are violating the Establishment Clause every day. Of course it is not the rule. As the Supreme Court said, "[RLUIPA] does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter*, 544 U.S. at 725 n.13. Rather, "safeguards to ensure the religious sincerity of inmates who request[] kosher meals . . . [are] appropriate, feasible, and less restrictive than terminating kosher diets altogether." *Willis* 753 F. Supp. 2d at 780.

## IV. The district court erred by denying Rich's request for additional discovery.

The district court also abused its discretion by denying Rich's request for additional discovery under Rule 56(d). Br. 67-72. In response, DOC first argues that Rich waived his right to appellate review by failing to object in the district court. DOC Br. 45. Not so. Although Rich asked for more time for discovery, and the magistrate judge denied his request, Dkt. 47, the magistrate's order did not inform Rich, who was proceeding *pro se*, that he could file objections to the discovery order or what would happen if he did not do so. *Id.* Instead, the order explained that Rich would forfeit rights only if he did not respond to the DOC's motion for summary judgment. *Id.* Rich complied with the text of the order and filed a motion for summary judgment. Dkt. 49.

Under binding Eleventh Circuit precedent, where there is a time limit on the ability to object—as there was here under 28 U.S.C. § 636(b)(1)—the magistrate must notify a *pro se* litigant that there is a time limit for raising objections, or the plaintiff can seek appellate review. *See United States* v. *Schultz*, 565 F.3d 1353, 1361-62 (11th Cir. 2009) (citing *Nettles* v. *Wainwright*, 677 F.2d 404, 409–10 (5th Cir. Unit B 1982)). This rule would not apply if Rich had been represented, or if

the order had given him notice. But in this context, Rich's failure to object did not waive appellate review.

Next, DOC claims that Rich did not really make a Rule 56(d) motion. DOC Br. 46. But "briefs filed by pro se litigants are to be read liberally." *Lawson* v. *Sec'y, Florida Dept. of Corr.*, 454 F. App'x 706, 709 (11th Cir. 2011). As we explained, Rich specifically asked for an extension of the "discovery cut-off date." RE 114. In addition, the timing of his motion made little sense other than as a request to extend discovery. Br. 67-70.

DOC says Rich's motion referred to his limited amount of time in the *law* library, and therefore could not have been seeking additional "*facts*." DOC Br. 47 (emphasis in original). But DOC does not explain why Rich, a prisoner, would not use the law library to conduct additional fact discovery. Indeed, absent a prison "facts library," that seems a far more likely location to work on his case than in his cell.

Finally, denying Rich's Rule 56(d) motion was also an abuse of discretion. As explained in our opening brief (at 70-72), the magistrate abused his discretion in two ways. First, the magistrate made the plain error of mistaking the Rule 56(d) motion for additional time to conduct discovery for a motion to extend the time for filing a response to DOC's

motion for summary judgment. Second, the magistrate made a clear error of judgment by dismissing Rich's motion out of hand. DOC fails to address either point, thus conceding them.

Instead, DOC claims that the magistrate's error was harmless because Rich had three months to conduct discovery. DOC Br. 48. But given the constraints on his ability to litigate, the amount of discovery that needed to be done, and the fact that there was much relevant evidence that could have been found had Rich had the time, three months was not close to enough time to conduct discovery. That is especially so since Rich had to use his limited time to respond to DOC's motion for summary judgment. Thus, the failure to grant additional time for discovery severely prejudiced Rich's ability to present his case.

## CONCLUSION

The district court's decision should be reversed.

Respectfully submitted.

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## CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 6,954, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4, as counted using the word-count function on Microsoft Word 2007 software. I further certify that the brief complies with the typeface and typestyle requirements of Fed. R. App. P. 32(a)(5), (a)(6), because it has been prepared using 14-point Century Schoolbook.

## CERTIFICATE OF SERVICE

I hereby certify that, on November 21, 2012, I filed the foregoing Plaintiff-Appellant's Reply Brief with this Court, by causing a copy to be electronically uploaded and by dispatching the original and six paper copies to be delivered via First Class Mail. I further certify that I caused the brief to be served on November 21, 2012, upon the following counsel by electronic mail and by hard-copy via First Class Mail:

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