No. 14-10086-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS;
FLORIDA DEPARTMENT OF CORRECTIONS,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AS APPELLEE

JOCELYN SAMUELS
Acting Assistant Attorney General

DENNIS J. DIMSEY
MARK L. GROSS
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-9115
Chris.Wang@usdoj.gov

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for appellee United States certifies that in addition to the persons and entities identified in the defendants-appellants' brief, the following persons may have an interest in the outcome of this case:

Blumberg, Jeff, Attorney, United States Department of Justice, Civil Rights Division, Special Litigation Section, counsel for the United States

Dimsey, Dennis J., Deputy Chief, United States Department of Justice, Civil Rights Division, Appellate Section, counsel for the United States

Mygatt, Timothy, Special Litigation Counsel, United States Department of Justice, Civil Rights Division, Special Litigation Section, counsel for the United States

Samuels, Jocelyn, Acting Assistant Attorney General, United States Department of Justice, Civil Rights Division, counsel for the United States

The Honorable Patricia A. Seitz, Judge, United States District Court for the Southern District of Florida

The Honorable Andrea M. Simonton, United States Magistrate Judge

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: May 21, 2014

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STATEMENT REGARDING ORAL ARGUMENT

The United States has no objection to the appellants' request for oral argument in this case.

STATEMENT OF JURISDICTION

The United States brought this suit against the appellants, the Secretary of the Florida Department of Corrections (Secretary) and the Florida Department of Corrections (FDOC), to enforce the Religious Land Use and Institutionalized

Persons Act of 2000 (RLUIPA), 42 U.S.C. 2000cc *et seq.*, pursuant to 42 U.S.C. 2000cc-2(f). The district court had jurisdiction under 28 U.S.C. 1331, 1345. The district court entered its order granting the United States' motion for a preliminary injunction on December 6, 2013. The appellants filed a timely notice of interlocutory appeal from the district court's order on January 6, 2014. This Court has jurisdiction under 28 U.S.C. 1292(a)(1).

STATEMENT OF THE ISSUE

Whether the district court acted within its discretion in granting the United States' motion for a preliminary injunction that ordered the appellants to provide a certified kosher diet to all prisoners with a sincere religious belief for keeping kosher and enjoined the appellants from implementing aspects of their newly-adopted Religious Diet Plan that the court determined violated RLUIPA.

STATEMENT OF THE CASE

1. Nature Of The Case

This is an interlocutory appeal from the district court's grant of the United States' motion for a preliminary injunction in a case the federal government brought against the appellants to enforce Section 3 of RLUIPA. Section 3 prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the government shows that the burden furthers "a compelling governmental interest"

and does so by "the least restrictive means." 42 U.S.C. 2000cc-l(a). The statute thus "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter* v. *Wilkinson*, 544 U.S. 709, 721, 125 S. Ct. 2113, 2122 (2005).

2. Course Of Proceedings And Dispositions In The Court Below

On August 14, 2012, the United States filed a complaint for declaratory and injunctive relief in the Southern District of Florida, alleging that the FDOC's refusal to offer kosher meals violated the rights of hundreds of its prisoners under RLUIPA. Doc. 1.[1] After the district court denied the appellants' motion to dismiss or to transfer venue, the parties entered mediation. Doc. 13-14. While mediation was ongoing, and without informing the United States, the appellants adopted a new Religious Diet Program (RDP) procedure on March 22, 2013. Doc. 29 at 4-5. The RDP would ostensibly offer a kosher diet in most FDOC facilities by September 2013, but imposed several conditions on participation that the United States believes violate RLUIPA. Doc. 29, Ex. F.

[1] This brief uses the following abbreviations: "Doc. __ at __" refers to the document number assigned on the district court's docket sheet; "Ex. _" for an exhibit attached to a document; and "Br. __" for the appellants' amended opening brief filed with this Court.

In April 2013, the United States moved for a preliminary injunction seeking an order requiring the appellants to provide kosher meals to all prisoners with a sincere religious belief for keeping kosher, and enjoining the implementation of the aspects of the RDP that the United States asserted violated RLUIPA. Doc. 29. The district court held a two-day hearing on the United States' motion in June 2013, and a second hearing in November 2013. Doc. 62-63, 105. On December 6, 2013, the district court issued an order granting the United States' motion for a preliminary injunction. Doc. 106. The district court ordered the appellants to provide a certified kosher diet to all prisoners with a sincere religious belief for keeping kosher no later than July 1, 2014, and preliminarily enjoyed them from implementing certain provisions of the RDP to the extent that those provisions violated RLUIPA. Doc. 106 at 31-32. This interlocutory appeal followed. Doc. 120.

STATEMENT OF THE FACTS

1. The FDOC's History Of Providing Kosher Meal Plans

In 2004, the FDOC adopted a kosher meal program known as the Jewish Diet Accommodation Program (JDAP) after settling a lawsuit brought by a Jewish prisoner. See *Cotton* v. *Department of Corr.*, No. 1:02-cv-22760 (S.D. Fla.); Doc. 106 at 2. The FDOC offered the JDAP in 13 of its facilities; prisoners eligible to participate in the program were transferred to one of these facilities. Doc. 67 at 29-

30; Doc. 68 at 114; Doc. 106 at 3. Although the JDAP was initially open to Jewish prisoners only, in 2006 the FDOC opened the program to prisoners of all faiths. Doc. 68 at 86, 88; Doc. 106 at 3. In August 2007, the FDOC terminated the JDAP due to several alleged security issues. See *Young* v. *McNeil*, No. 4:08-cv-44–SPM/WCS, 2009 WL 2058923, at *2-3 (N.D. Fla. July 13, 2009); Doc. 52 at 2. The FDOC made this decision against the advice of its own Study Group on Religious Dietary Accommodation in Florida's State Prison System, which advised the FDOC that discontinuing the program would violate RLUIPA, because a prisoner desiring to keep kosher "is substantially burdened" by the denial of kosher food and "it is improbable that [the FDOC] can satisfy a court's inquiry into whether the department is furthering a compelling interest, let alone that denying inmates' religious accommodation is the least restrictive means available." Doc. 29 at 3 (citation omitted); Doc. 67 at 55; Doc. 106 at 3.

Three years later, in August 2010, the FDOC initiated a pilot kosher diet program (the Pilot Program) at the South Unit of the South Florida Reception Center near Miami. Doc. 29 at 3, Ex. B; Doc. 67 at 44, 56. In contrast to the JDAP that the FDOC discontinued in 2007, which averaged approximately 250 prisoners per day, the Pilot Program began with 11 prisoners and has accommodated between 8 and 18 prisoners during its operation. Doc. 29 at 3, Ex. B; Doc. 67 at 56, 152; Doc. 68 at 88. The FDOC agreed in October 2010 to

expand the Pilot Program, but never did so. Doc. 67 at 58-59; Doc. 68 at 13; Doc. 106 at 4. Thus, from 2007 to 2013, the FDOC did not offer a kosher diet to any prisoners except for the small number of participants in the Pilot Program. Doc. 67 at 56; Doc. 106 at 4.

In May 2011, the United States Department of Justice opened up a formal investigation into the FDOC's food operations pursuant to RLUIPA. Doc. 29 at 4, Ex. C. The 15-month investigation concluded that the FDOC could provide a kosher diet consistent with its penological interests, and that its failure to do so violated RLUIPA. Doc. 29 at 4. The United States notified the FDOC of its conclusion on August 1, 2012, and offered to negotiate a mutually agreeable plan to make kosher meals available at FDOC facilities. Doc. 29 at 4, Ex. E. The FDOC rejected the offer to negotiate, which led the United States to bring suit against the appellants on August 14, 2012. Doc. 29 at 4.

2. The FDOC's Implementation Of Its New Religious Diet Program

On March 4, 2013, while the parties were in mediation, the appellants presented the RDP proposal to the United States. Doc. 29 at 4-5. On March 20, 2013, the appellants presented to the United States a revised proposal, which the parties discussed but on which they could not reach an agreement. Doc. 29 at 5. One day later, without notifying the United States, the appellants issued the new RDP policy, Procedure 503.006, which they pledged to implement statewide by

September 2013. Doc. 29 at 5, Ex. F at 2; Doc. 67 at 47. The new policy stated that it would go into effect at Union Correctional Institution (UCI) on April 5, 2013, and statewide on September 1, 2013. Doc. 29 at 5, Ex. F at 2. The United States learned about the new policy on April 2, 2013, from counsel in separate litigation against the appellants' dietary policies involving a Jewish prisoner at UCI. Doc. 56 at 5-6. One week after learning about the new policy, the United States moved for a preliminary injunction. Doc. 56 at 6.

The RDP the appellants issued in March 2013 imposed several conditions on participation that violate RLUIPA, warranting preliminary injunctive relief. First, the RDP required as a threshold matter that a potential participant pass a "sincerity test" that examines the prisoner's "basic knowledge of the religion and the requirements of keeping a religious diet" (religious dogma testing).[2] Doc. 29, Ex. F at 4; Doc. 67 at 148; Doc. 68 at 54, 92. Second, the RDP included the requirement (since removed) that all admitted participants eat non-kosher food exclusively for 90 days prior to joining the program (the 90-day rule). Doc. 29, Ex. F at 5-6; Doc. 67 at 147; Doc. 68 at 54-55, 106. Finally, the new RDP also

[2] A later version of the RDP, promulgated on October 21, 2013, required prisoners to identify the "specific laws" that formed the basis for their religious diet request. Doc. 99 at 2-4; Doc. 99-8; Doc. 105 at 13-17, 43-45.

established several bases for removing prisoners from the CFO[3] for increasing lengths of time depending on the number of previous infractions, including a prisoner's electing not to eat ten percent of his or her meals (the ten-percent rule), or bartering a kosher food item or consuming a single item that FDOC officials deem to be non-kosher (the zero-tolerance rule).[4] Doc. 29, Ex. F at 7-8; Doc. 67 at 122, 143-144, 150; Doc. 68 at 57-58, 99, 107. The policy made these removals mandatory – *i.e.*, prison officials had no discretion to allow the prisoner to remain in the CFO and continue to receive kosher meals – and provided no prior opportunity for the prisoner to explain the circumstances. Doc. 29, Ex. F at 8; Doc. 67 at 155-156; Doc. 68 at 99-101.

At the district court's first preliminary-injunction hearing in June 2013, the appellants' witnesses described the implementation of the CFO in detail. The rollout for the CFO would begin at UCI on July 1, 2013, and would expand statewide to approximately 60 facilities by September or October 2013. Doc. 67 at 47-48, 116, 119-121; Doc. 68 at 70; Doc. 106 at 7. In place of the JDAP's

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[3] The RDP's kosher meal program is known as the certified food option (CFO). See Doc. 67 at 107-108.

[4] In the original version of the RDP, the Compliance and Termination section was set forth in Procedure 503.006(7). See Doc. 29, Ex. F at 7-8. Following removal of the 90-day rule, this section became Procedure 503.006(6). See Doc. 162 at 1 n.1.

requirement that a separate kosher kitchen be constructed, the CFO would consist of shelf-stable, double-wrapped, prepackaged, certified kosher entrees, as well as kosher items from the FDOC's normal food service operations. Doc. 67 at 48, 54, 111; Doc. 106 at 7. FDOC assistant secretary for institutions James Upchurch conceded that this process avoided the issues that had purportedly plagued the JDAP. Doc. 67 at 48-49, 53-54. FDOC operations manager Shane Phillips testified that the CFO would cost the FDOC approximately an extra $5.81 per prisoner each day, or $2100 per prisoner each year, while FDOC chaplaincy service administrator Alex Taylor testified that "[i]t wouldn't be unreasonable" to expect that 500 inmates statewide out of 100,000 prisoners total would participate in the CFO. Doc. 67 at 114-115; Doc. 68 at 113. The FDOC's annual budget is approximately $2.1 billion, about $50 million of which currently is allotted to food services. Doc. 68 at 3-4, 22.

Several of these witnesses also testified that the FDOC could provide a statewide kosher meal plan consistent with its interests. Upchurch acknowledged that it was "fair to say" that the FDOC had determined that it could "provide a statewide kosher diet plan consistent with its interests." Doc. 67 at 52. He also conceded that the FDOC "has been able to successfully manage any issues relat[ing] to providing these special diets [such as vegan, medical, and therapeutic] to certain prisoners for at least a number of years." Doc. 67 at 60. Taylor similarly

admitted that the FDOC had determined that it could "provide a kosher diet in every facility using certified prepackaged kosher meals" and could do so "even with the burden[s] on the chaplains that might entail." Doc. 68 at 80. Phillips expressed his personal disagreement with the statement that the FDOC could "provide kosher meals consistent with its budgetary interests," but testified that he was told by the FDOC's executive leadership team that the FDOC "will make the necessary sacrifices to make sure this [CFO] program is implemented." Doc. 67 at 153.

The appellants' witnesses also testified as to the RDP provisions that the United States believes violate RLIUPA. Phillips acknowledged that the FDOC had not conducted any analysis as to whether removing a prisoner from the CFO for 30 days for a single act of consuming a non-kosher item would save the FDOC money, and that he did not know "off of the top of [his] head" how much money the zero-tolerance rule would save the FDOC. Doc. 67 at 144. Phillips also conceded that he was not aware of any savings the RDP's current sincerity testing provision would generate. Doc. 67 at 148. With regard to the ten-percent rule, Upchurch testified that the purposes of this rule are (1) to save costs on meals that are prepared and discarded because they are not eaten, and (2) to gauge sincerity. Doc. 67 at 49-50. Phillips reiterated Upchurch's concern about waste. Doc. 67 at 156-157. Phillips also testified that the ten-percent rule existed because it was

difficult to project the number of inmates who would miss kosher meals due to the small population of inmates participating in the CFO compared to the overall prison population and the fluctuations in the numbers of inmates interested in the CFO. Doc. 67 at 124, 146, 158. Phillips conceded, however, that the FDOC has successfully tracked inmate participation in the FDOC's medical and therapeutic diets. Doc. 67 at 146-147. Neither Phillips nor Upchurch attempted to quantify the magnitude of this alleged waste or the amount of money the ten-percent rule would save the FDOC.

The United States offered evidence of how the Federal Bureau of Prisons (BOP) and other state correctional institutions implement kosher meal programs. The BOP instituted a kosher meal program at one facility in 1979 and introduced a pilot "common fare program" to accommodate the dietary requirements of several different faiths in 1983; the common fare program went nationwide in 1995. Doc. 67 at 82-83; Doc. 68 at 119-121. The participation rate in the BOP's common fare program started off between 2% and 2.5% of the total prison population and decreased to 1.2% to 1.3% of the total prison population by 2000. Doc. 68 at 123. As of 2013, the BOP is administering a "[c]ertified [r]eligious [m]enu" for religious meals, in which 1.3% of the total prison population is participating. Doc. 56 at 9; Doc. 68 at 136, 141. The BOP offers this menu in all of its facilities, including the maximum security facilities and all federal facilities in Florida. Doc.

56 at 9; Doc. 68 at 134-135. At least 35 state departments of corrections, including the New York Department of Correctional Services, the California Department of Corrections and Rehabilitation, the Texas Department of Criminal Justice, and the Illinois Department of Corrections, also offer kosher meals to their inmates. Doc. 56 at 9.

The United States also presented evidence that the kosher meal programs of the BOP and other state correctional institutions do not contain the same RDP provisions that the United States finds problematic. Former BOP assistant director John Clark testified that the BOP does not have a sincerity test that examines knowledge of religious dogma for admission to the BOP's religious meal program because "there's no nexus between being able to articulate a knowledge and whether or not there's a sincere religious belief." Doc. 67 at 90. Eight of eleven state correctional institutions surveyed by the appellants reported using no sincerity testing at all for fear that such a test might violate RLUIPA; the New York state correctional institution provides a kosher diet to all prisoners who self-identify with a qualifying religion. Doc. 56 at 9; Doc. 68 at 101-104; Doc. 106 at 26. Former BOP regional food director Dennis Watkins testified that the BOP has never imposed sanctions on participants in the common fare kosher diet program who failed to eat a certain percentage of their meals, and that he has not encountered any facilities that had such a provision. Doc. 68 at 127, 139; see also

Doc. 68 at 107 (acknowledgement of Taylor that the BOP has no equivalent of the ten-percent rule). According to Watkins, the kitchen knew from past service roughly how many inmates would show up for each meal, and in the event the kitchen did not prepare enough meals, it "wasn't a major issue" to pull an additional kosher meal from the freezer and reheat it in the microwave. Doc. 68 at 127. Moreover, the BOP's policy is to provide prisoners with the opportunity to speak with the chaplain about alleged violations before they are removed or suspended from the kosher meal program. Federal Bureau of Prisons Program Statement, Religious Beliefs and Practices 19, http://www.bop.gov/policy/progstat/5360_009.pdf (BOP Program Statement).

The FDOC implemented the CFO at UCI beginning on July 1, 2013. Doc. 67 at 47, 119; Doc. 75 at 1. In August 2013, the appellants submitted to the district court an opposition to the United States' preliminary-injunction motion purportedly showing a participation rate of 41% of UCI's overall population in the CFO if all the pending applications were approved – a percentage that if extrapolated statewide would result in 41,000 participants statewide. Doc. 75 at 2-3. The FDOC filed a status report with the district court in October 2013 revisiting its plan to implement the RDP statewide beginning on September 1, 2013, due to the "overwhelming response" from UCI inmates, in favor of a "more gradual staging process" that would extend the program to six additional FDOC

institutions. Doc. 79 at 1-4. The FDOC delayed its target date for full statewide implementation of the RDP to mid-to-late 2014. Doc. 99 at 6.

The United States responded that the appellants' status report made clear that an injunction was both appropriate and necessary. Doc. 88 at 1. First, the United States contended, an injunction was appropriate because the appellants' voluntary decision to offer a kosher diet and admission that they could do so consistent with their interests vitiated any argument that they have a compelling interest in not providing a kosher diet. Doc. 88 at 1. Second, the United States asserted, an injunction was necessary to ensure that the appellants would keep the promise they made at the preliminary injunction hearing to provide a kosher meal statewide by September 2013, because the appellants had made several promises to provide a kosher diet in the past which they had not fulfilled. Doc. 88 at 2; see also *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525, 532 (11th Cir. 2013) ("There is nothing to suggest that Florida will not simply end the new kosher meal program at some point in the future, just as it did in 2007."). The United States dismissed the alleged participation rate at UCI as probative of the appellants' ability to implement the CFO, observing that this "anomalous" rate "is evidence that the Religious Diet Program is attractive to prisoners, but it is not evidence that implementing a kosher diet program is necessarily costly or that the FDOC has a compelling interest in denying kosher food to sincere prisoners." Doc. 88 at 2.

The court held a second heading on the preliminary injunction motion on November 22, 2013. At the hearing, counsel for the appellants conceded that the participation rate was artificially inflated for reasons that had nothing to do with the accommodation of sincere religious belief, including its current food contract that provides inmates with the "Cadillac" version of the kosher meal. Doc. 105 at 42-45.

3. The Decision Below

On December 6, 2013, the district court issued an order (the December 6 Order) granting the United States' motion for a preliminary injunction. After reciting its factual findings and disposing of the appellants' jurisdictional arguments, the district court held that the United States was entitled to preliminary relief. Doc. 106 at 17. Applying the first element of the four-factor preliminary-injunction test, the district court found that the United States was likely to succeed on the merits of its RLUIPA claim. The district court first determined that the appellants' blanket denial of a kosher diet and the four provisions of their RDP cited above (sincerity test focusing on specific religious laws, 90-day rule, ten-percent rule, and zero-tolerance rule) substantially burdened the religious exercise of Florida's prisoners. Doc. 106 at 17-18.

The district court then held that the appellants failed to carry their burden under RLUIPA to show that the challenged dietary policies were the least

restrictive means of furthering a compelling government interest. Doc. 106 at 18. The district court first determined that the appellants' admission that they can provide a kosher diet consistent with the interests vitiated their argument that they have a compelling interest in not providing such a diet. Doc. 106 at 19-20 & n.6. The district court then added that the appellants failed to identify a compelling government interest furthered only by a blanket denial of kosher diets because the costs they identify "are not of a compelling magnitude." Doc. 106 at 20. In this regard, the district court first observed that using the JDAP's average enrollment figure of 250 prisoners per day, and the FDOC's estimate that kosher meals would cost an extra $5.81 per prisoner each day, yields a total cost of providing kosher meals (above the cost of preparing regular meals) of approximately $530,000 per year. Doc. 106 at 20. The district court then determined that using FDOC chaplaincy service administrator Alex Taylor's estimate that 500 prisoners may participate in the CFO results in a total cost of $1.06 million per year, or .0005 of the FDOC's budget. Doc. 106 at 20. Finally, even assuming that the kosher meal program served four times as many inmates as the JDAP, the total cost of the program would be only $2.12 million, a small fraction of the FDOC's budget. Doc. 106 at 20. The district court concluded that "[n]o compelling interest is furthered by avoiding such a relatively minor expense." Doc. 106 at 20.

The district court also expressed doubt that the initial high participation rate at UCI the appellants cited would continue unabated. In this regard, the court noted that the appellants "admit[ted] that the high participation rate is not based on religious reasons." Doc. 106 at 21. The court further observed that high participation rate has dropped off as the meal plan was implemented, and that RLUIPA does not require that a kosher meal plan be more attractive than the standard meal option. Doc. 106 at 21. Based on these observations, the court concluded that "the high participation rate will not be maintained as the RDP continues and the 'bugs' in the system * * * are worked out," and that the appellants "have not shown that the high participation rate is representative of the long-term participation rate." Doc. 106 at 21. Finally, the district court concluded that the ability of the Federal Bureau of Prisons and more than 30 state correctional facilities to offer a kosher diet option demonstrated that the FDOC could do the same "consistent with its penological interests." Doc. 106 at 22-23.

The district court then rejected the appellants' asserted justifications for the four RDP provisions the United States challenged. First, the district court found that the appellants did not identify any compelling interest the 90-day rule furthered, and in fact, announced that they were removing this provision after briefing on the United States' motion had concluded. Doc. 106 at 23-24. Second, the district court determined that precedent from other courts of appeals and the

experience of other correctional institutions repudiated the appellants' religious dogma testing, which impermissibly "exclud[ed] prisoners from a kosher diet based on clergy interpretations of religious doctrine or on prisoners' knowledge of religious laws and doctrine." Doc. 106 at 24-26. Third, the district court concluded that precedent from other circuits also contradicted the RDP's zero-tolerance rule, and moreover, that the appellants failed to present any evidence of how much money this rule would save or to identify any other institution that imposed a similar restriction. Doc. 106 at 26-27. Finally, the district court determined that the appellants' waste-avoidance rationale for the RDP's ten-percent rule was impermissible "mere speculation" because they failed to provide any evidence of savings attributable to this provision, much less that this rule was the least restrictive means to avoid waste. Doc. 106 at 27-28.

The district court then concluded that the United States satisfied the three remaining preliminary-injunction factors. The district court first found that the RDP's unlawful restrictions on FDOC inmates' religious exercise constituted irreparable injury. Doc. 106 at 28-29. The district court then determined that the irreparable harm to prisoners outweighed any harm to the appellants, who conceded that providing a kosher diet is consistent with their interests and would not be harmed in any meaningful way by the enjoining of any of the challenged RDP provisions. Doc. 106 at 29-30. Finally, the district court concluded that "[a]n

injunction that vindicates religious freedoms protected by federal law is in the public interest." Doc. 106 at 30-31. Accordingly, the district court ordered the appellants, no later than July 1, 2014, to provide a certified kosher diet to all prisoners with a sincere religious belief requiring them to eat a kosher diet. Doc. 106 at 31-32. The district court also preliminarily enjoined the appellants from implementing the four provisions of the RDP the district court determined violated RLUIPA. Doc. 106 at 32.

4. Post-Order Proceedings And Developments

After granting the United States' preliminary-injunction motion, the district court held regular status conferences to monitor compliance with its grant of relief and to resolve any issues that arose. During status conferences in February and March 2014, the parties expressed disagreement on the correct interpretation of the district court's preliminary injunction. In particular, the parties disagreed about the scope of the injunction as it relates to RDP suspensions and removals from the CFO. Doc. 148 at 1. The appellants argued that the injunction prevented them from implementing *any* suspension or removal provisions in the RDP, while the United States argued that the injunction merely enjoined "zero tolerance" suspensions and removals – *i.e.*, automatic, mandatory suspensions from the CFO for bartering kosher food or consuming a non-kosher item with no opportunity for

a prisoner to discuss the violation with a chaplain before suspension. Doc. 148 at 1-2.

In response, the district court issued an order (March 24 Order) granting the parties leave to file a statement of clarification. Doc. 147. On March 26, 2014, the appellants filed a response to the March 24 Order asserting that the court lacked jurisdiction to clarify its order, and moved for a partial stay of the provisions in dispute pending this Court's decision on this appeal. Doc. 149-150. On the same date, the United States filed a motion to clarify memorializing its understanding of the injunction. Doc. 148. On April 3, 2014, the district court issued an order (the April 3 Order) granting the United States' motion, clarifying that the injunction is consistent with the United States' understanding, and denying the appellants' motion to stay the preliminary injunction.[5] Doc. 162.

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[5] Even after the district court clarified the scope of the preliminary injunction, the appellants continued to assert that they cannot use basic screening and monitoring provisions (see, *e.g.*, Doc. 246 at 2), thus increasing participation in the CFO. On May 1, 2014, the district court issued an order (Doc. 237) requiring the appellants to "file a proposed order which sets forth the options still available to the State and its authority to exercise those options to ensure that only those with sincere religious beliefs receive the benefits of the Religious Diet Program." Following an exchange of pleadings (Doc. 246, 251-252), the parties reached substantial – but not complete – agreement concerning the steps the RDP permits the appellants to take to assess the sincerity of program applicants and to monitor participant compliance. See, *e.g.*, Doc. 251 at 1 ("The United States interprets the Court's Preliminary Injunction to permit the Defendants to implement nearly all of the proposed policy changes and encourages the

(continued…)

STATEMENT OF STANDARD OF REVIEW

To prevail on a motion for a preliminary injunction, a movant must establish: "(1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction is issued; (3) the threatened injury to the moving party outweighs whatever damage the proposed injunction might cause the non-moving party; and (4) if issued, the injunction would not be adverse to the public interest." *Keeton* v. *Anderson-Wiley*, 664 F.3d 865, 868 (11th Cir. 2011). A district court's grant of a preliminary injunction is reviewed for abuse of discretion, its underlying legal conclusions are reviewed de novo, and its factual determinations are reviewed for clear error. See *Lebron* v. *Secretary, Fla. Dep't of Children & Families*, 710 F.3d 1202, 1206 (11th Cir. 2013). "This scope of review will lead to reversal only if the district court applies an incorrect legal standard, or applies improper procedures, or relies on clearly erroneous factfinding, or if it reaches a conclusion that is clearly unreasonable or incorrect." *Schiavo ex rel. Schindler* v. *Schiavo*, 403 F.3d 1223, 1226 (11th Cir. 2005).

(…continued)
Defendants to implement those that are consistent with the Court's Injunction immediately.").

SUMMARY OF ARGUMENT

The district court acted well within its discretion in granting the United States' motion for a preliminary injunction. The United States established the first factor of the preliminary injunction test – a substantial likelihood of success on the merits of its claim under Section 3 of RLUIPA. The district court found, and the appellants do not dispute, that the United States satisfied its burden of proving that the FDOC's blanket ban on a kosher diet, and the disputed provisions of the RDP, "substantially burden[ed]" the religious exercise of FDOC inmates who have a sincere belief that their faith requires kosher meals. 42 U.S.C. 2000cc-1(a).

After the United States satisfied its burden of proof under Section 3, the burden of proof shifted to the appellants to show that their policies not only further "a compelling governmental interest," but do so by "the least restrictive means." 42 U.S.C. 2000cc-1(a). The district court correctly held that the appellants could not show that the FDOC's blanket denial of a kosher diet furthers compelling governmental interests, because of their concession that – consistent with their interests – they are capable of, and committed to, providing kosher meals statewide. The district court also reasonably determined that the projected costs of implementing a statewide kosher meal plan were not sufficiently high to make avoiding them a compelling governmental interest. Furthermore, the ability of comparably sized correctional institutions to offer a kosher diet, and the FDOC's

failure to distinguish its operations from the operations of these institutions, demonstrate that the FDOC's blanket denial of a kosher diet is not the least restrictive means to further the cost interest it asserts.

The appellants also failed to show that the disputed provisions of the RDP are the least restrictive means of advancing a compelling governmental interest. The appellants failed to present any evidence that the aspects of the sincerity test that tested a prisoner's knowledge of religious dogma furthered the FDOC's claimed interest in containing costs, and the experience of other correctional institutions indicates that this type of testing is not the least restrictive means to further this interest. The appellants also failed to present any evidence that the zero-tolerance rule furthered the interest in containing costs, and failed to present evidence that they could not implement less restrictive alternatives, such as the alternative employed by the BOP that makes removals discretionary and gives inmates the prior opportunity to explain the circumstances. Finally, the appellants failed to present any evidence of the costs the ten-percent rule would save, and failed to present evidence that they could not implement less restrictive alternatives, such as the BOP's alternative of tracking average participation in the kosher meal program and adjusting the food order and its alternative of microwaving a kosher meal when needed.

The United States also satisfied the remaining factors for preliminary injunctive relief. Indeed, the appellants do not contend otherwise. Because RLUIPA enforces First Amendment freedoms, the FDOC's blanket ban on kosher meals and its implementation of the RDP provisions that violate RLUIPA will inflict irreparable harm on FDOC inmates who wish to exercise their faith freely by keeping kosher. Balanced against this irreparable harm to inmates if an injunction does not issue is the ordinary cost of compliance with RLUIPA that the FDOC will sustain if the injunction is granted pending the end of this litigation. The public interest weighs heavily in favor of the district court's preliminary injunction, as RLUIPA passed both houses of Congress unanimously as "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter* v. *Wilkinson*, 544 U.S. 709, 714, 125 S. Ct. 2113, 2117 (2005).

Finally, contrary to the appellants' contentions, the district court acted well within its discretion in preliminarily enjoining provisions of the RDP that it determined violated RLUIPA. The court's preliminary enjoining of subsections (b) through (e) of the RDP's section of its Specific Procedures titled Sincerity Assessment Process for the Certified Food Option was narrowly drawn to correct the RLUIPA violation, as it barred a detailed investigation into the inmate's fidelity to his claimed faith and ability to specify the religious laws that formed the

basis of his diet needs, but allowed a chaplain to conduct an in-person assessment of an inmate's sincerity. The court's preliminary enjoining of subsection (c) of the RDP's section of its Specific Procedures titled Compliance and Termination also was narrowly drawn, because the December 6 Order prohibited the automatic and mandatory (non-discretionary) removal of a CFO participant who missed ten percent of his CFO meals in one month. The court's preliminary enjoining of subsections (e)(2) through (3) of the RDP's Compliance and Termination section was narrowly drawn, because it forbade the automatic and mandatory suspension of a prisoner for a single act of bartering CFO food items or consuming non-kosher food without giving him the opportunity to explain the circumstances prior to removal, but permitted the FDOC to monitor participants, to suspend them for violating terms of the CFO, and to discipline them for bartering CFO food items.

ARGUMENT

THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ORDERING PRELIMINARY INJUNCTIVE RELIEF

All four factors for granting a preliminary injunction weigh strongly in the United States' favor. First, the United States demonstrated a likelihood of success on the merits of its RLUIPA Section 3 claim. After the United States demonstrated that a blanket ban on kosher diets and the disputed provisions of the RDP substantially burdened the religious exercise of FDOC inmates who have a sincere

belief that their faith requires kosher meals, the appellants failed to carry their burden of showing that their policies furthered a compelling governmental interest by the least restrictive means. The United States also showed, and the appellants do not dispute, that religiously sincere inmates would suffer irreparable injury unless the injunction is issued; that this threatened injury outweighs whatever damage the proposed injunction might cause the appellants; and that the injunction would serve the public interest. The district court's injunction was narrowly drawn to enjoin only conduct that violated RLUIPA.

A. The United States Demonstrated A Substantial Likelihood Of Success On The Merits Of Its RLUIPA Section 3 Claim

The United States established the first factor of the preliminary injunction test – a substantial likelihood of success on the merits of its RLUIPA Section 3 claim. Section 3 prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." 42 U.S.C. 2000cc-1(a). This Court has recognized that "section 3 affords confined persons 'greater protection of religious exercise than what the Constitution itself affords.'" *Smith* v. *Allen*, 502 F.3d 1255, 1266 (11th Cir. 2007) (quoting *Lovelace* v. *Lee*, 472 F.3d 174, 186 (4th Cir. 2006)), abrogated on other grounds by

Sossamon v. *Texas*, 131 S. Ct. 1651 (2011). The district court correctly concluded that the appellants did not satisfy their heightened burden of showing that a blanket ban on kosher meals and the disputed provisions of the RDP further a compelling governmental interest by the least restrictive means.

1. General Standards For Applying Section 3

Under Section 3 of RLUIPA, the United States bore the initial burden to show that the FDOC's blanket ban on a kosher diet, and the disputed provisions of the RDP, substantially burdened the religious exercise of FDOC inmates who have a sincere belief that their faith requires kosher meals. See 42 U.S.C. 2000cc-2(b). The district court found (Doc. 106 at 17-18), and the appellants do not dispute, that the United States satisfied this burden. Accordingly, the burden of proof shifted to the appellants to show that their policies not only further a compelling governmental interest, but do so by the least restrictive means. See 42 U.S.C. 2000cc-2(b), 2000cc-5(2). RLUIPA's legislative history establishes that the appellants cannot satisfy this burden with "policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations." 146 Cong. Rec. 16,699 (2012) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA) (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993)).

RLUIPA does not define "compelling governmental interest" or "least restrictive means," but case law from the Supreme Court and this Court provides

guidance on the meaning of these terms.[6] In the First Amendment context, the Supreme Court has defined a "compelling governmental interest" as an "interest[] of the highest order," *Wisconsin* v. *Yoder*, 406 U.S. 205, 215, 92 S. Ct. 1526, 1533 (1972), and an "overriding state interest," *McIntyre* v. *Ohio Elections Commission*, 514 U.S. 334, 347, 115 S. Ct. 1511, 1519 (1995). This Court has recognized that "safety and cost *can* be compelling governmental interests" for purposes of Section 3, but a state prison must satisfy its burden of showing that the policy in question "in fact furthered these two interests." *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013) (emphasis added); see, *e.g.*, *Yellowbear* v. *Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) ("[T]he deference this court must extend the experience and expertise of prison administrators does not extend so far that prison officials may declare a compelling governmental interest by fiat."); *Lovelace*, 472 F.3d at 190 (prison defendants who asserted a "legitimate interest in removing inmates from religious dietary programs" for violations of prison rules without presenting any evidence of security or budget considerations that justify this policy failed to establish compelling governmental interests) (citation omitted). The

[6] Several courts have observed that in RLUIPA, Congress sought to restore the compelling interest standard that the Supreme Court set forth in *Sherbert* v. *Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963), but later abandoned in *Employment Division* v. *Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990). See, *e.g.*, *World Outreach Conference Ctr.* v. *City of Chi.*, 591 F.3d 531, 534 (7th Cir. 2009); *Pugh* v. *Goord*, 571 F. Supp. 2d 477, 504 n.11 (S.D.N.Y. 2008).

prison fails to carry its burden where the evidence the prison submits in support of its position is insubstantial, the policy at issue singles out religious exercise for disfavored treatment, or the record as a whole raises doubt as to "whether cost control and security are furthered by" the policy. *Rich*, 716 F.3d at 533.

Supreme Court precedent in the First Amendment area also provides insight into the meaning of the phrase "least restrictive means." This standard requires the defendant to "demonstrate that no alternative forms of regulation would [accomplish the governmental interest] without infringing First Amendment rights." *Sherbert* v. *Verner*, 374 U.S. 398, 407, 83 S. Ct. 1790, 1796 (1963); see also *Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 666, 124 S. Ct. 2783, 2791 (2004) (least restrictive means test in free speech context requires court to compare challenged regulation to available, effective alternatives). In other words, "the imposition by the government on religious worship must be the minimal imposition to accomplish the government's compelling ends." *United States* v. *Hardman*, 297 F.3d 1116, 1145 (10th Cir. 2002) (Hartz, J., concurring).

It is well-established that "the policies followed at other well-run [correctional] institutions [are] relevant to a determination of the need for a particular type of restriction." *Procunier* v. *Martinez*, 416 U.S. 396, 414 n.14, 94 S. Ct. 1800, 1812 n.14 (1974), overruled on other grounds by *Thornburgh* v. *Abbott*, 490 U.S. 401, 109 S. Ct. 1874 (1989). It follows that a prison's claim that

a specific restriction on religious exercise is the least restrictive means of advancing compelling governmental interests is significantly undermined by evidence that many other prisons, with the same compelling interests, allow the practice at issue. See, *e.g.*, *Rich*, 716 F.3d at 534 ("While the practices at other institutions are not controlling, they are relevant to an inquiry about whether a particular restriction is the least restrictive means by which to further a shared interest."); *Warsoldier* v. *Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005) ("[T]he failure of a defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means.").

The BOP's treatment of a specific prison practice is particularly relevant in this analysis, as the BOP for many years "has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners." *Cutter* v. *Wilkinson*, 544 U.S. 709, 725, 125 S. Ct. 2113, 2124 (2005) (quoting U.S. Br. at 24 (No. 03-9877)). Where the BOP accommodates a particular religious exercise, a state prison defendant that substantially burdens that same exercise is unlikely to satisfy RLUIPA's strict-scrutiny inquiry "in the absence of any explanation by [the defendant] of significant differences between the [state prison] and a federal prison that would render the federal policy

unworkable." *Spratt* v. *Rhode Island Dep't Of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007); see also *Warsoldier*, 418 F.3d at 999 (enjoining prison's hair-length policy where "[p]risons run by the federal government, Oregon, Colorado, and Nevada all meet the same penological goals without such a policy").

2. The FDOC's Blanket Ban On Kosher Meals Does Not Advance A Compelling Governmental Interest

An overarching theme of the appellants' opening brief is that RLUIPA does not compel a state prison to provide kosher meals to religiously sincere inmates, but merely gives the prison the choice to adopt a religious diet program that the prison is free to disregard if and when competing fiscal priorities arise. See Br. 19-20, 24, 28-29. In fact, RLUIPA's text expressly requires all States that receive federal prison funds, including Florida, to comply with Section 3. See 42 U.S.C. 2000cc-1(b)(1). The district court correctly concluded that the appellants failed to carry their burden under this statutory provision of showing that the FDOC's blanket ban on kosher meals is the least restrictive means of advancing a compelling governmental interest.

First, the district court correctly concluded that the appellants' decision to offer a kosher diet statewide, and their admission that the FDOC can do so consistent with its interests, demonstrates that the FDOC has no compelling government interest in denying such a diet. See, *e.g.*, Doc. 106 at 19 n.6 (quoting

James Upchurch's testimony that "it's fair to say that the Department of Corrections has now determined that it can provide a statewide kosher diet plan *consistent with its interests*") (emphasis added). Since their adoption of the RDP, the appellants have consistently maintained that they are committed to providing a kosher diet statewide. The RDP itself states that it will be implemented statewide. Doc. 29, Ex. F at 2. At the preliminary-injunction hearing and in subsequent status reports, the FDOC reiterated that it would implement the CFO statewide after implementing the CFO at UCI. Doc. 67 at 47-48, 116, 120-121; Doc. 99 at 6. The FDOC cannot state that it is committed to, and capable of, providing kosher meals statewide, consistent with its interests, and simultaneously argue that it has a compelling interest in not providing such meals.

As the district court noted, numerous courts have upheld the unexceptional proposition that a government cannot argue that it has a compelling interest in prohibiting something it already permits. See, *e.g.*, *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 546-547, 113 S. Ct. 2217, 2233-2234 (1993) (city failed to establish compelling interest in preventing the slaughter of animals in one context while allowing it in another). In the RLUIPA context, several federal courts of appeals have similarly recognized that a prison lacks a compelling interest in banning an activity that it expressly allows. In *Moussazadeh* v. *Texas Department of Criminal Justice*, 703 F.3d 781 (5th Cir. 2012), for

example, the Fifth Circuit held that a prison's argument that it had a compelling governmental interest in minimizing costs by denying a kosher meal to an inmate "is dampened by the fact that it has been offering kosher meals to prisoners for more than two years." *Id.* at 794. In *Koger* v. *Bryan*, 523 F.3d 789 (7th Cir. 2008), the Seventh Circuit similarly held that a prison lacked a compelling governmental interest in denying a non-meat diet to an inmate where "the prison already served two diets that would have satisfied his request." *Id.* at 800; see also *Spratt*, 482 F.3d at 40 (prison lacked compelling governmental interest in banning inmate preaching where the prison previously allowed such preaching); cf. *Washington* v. *Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (restriction on the number of religious books a prisoner could possess failed strict scrutiny where other facilities in state prison system did not impose same restriction); *Warsoldier*, 418 F.3d at 1001 (hair-length restriction applied only to male inmates failed strict scrutiny). Similarly, the appellants' voluntary decision to provide a kosher diet, along with their concession that they are capable of doing so statewide consistent with their interests, vitiates any argument that they have a compelling interest in not providing a kosher diet.

Second, the district court correctly concluded that the United States is likely to succeed on the merits of its RLUIPA claim because the appellants failed to show a compelling interest that is furthered by a blanket denial of kosher meals.

RLUIPA provides that a government may need "to incur expenses in its own operations to avoid imposing a substantial burden." 42 U.S.C. 2000cc-3(c); cf. *Cutter*, 544 U.S. at 726, 125 S. Ct. at 2125 ("Should inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition."). Based on the evidence presented, the district court correctly found that the projected costs of providing kosher meals statewide "are not of a compelling magnitude" under RLUIPA. Doc. 106 at 20. The district court accepted the appellants' own estimate that long term participation in the kosher diet program would average around 500 prisoners per day, requiring a marginal expenditure of only $1.06 million, or .0005 of the FDOC's annual budget.[7] Doc. 106 at 20. The court further reasoned that even assuming that 1000 FDOC inmates – *four times* the number of inmates that participated in the JDAP – requested and were qualified to consume kosher meals, the additional cost of providing kosher meals would amount to $2.12 million per year, or .001 of the FDOC's annual budget. Doc. 106 at 20. Other federal courts

[7] The district court noted that the FDOC had experienced an initial surge in applications while implementing the kosher diet program at one facility, but correctly concluded that "the high participation rate will not be maintained" because the FDOC "admit[ted] that the high participation rate is not based on religious reasons." Doc. 106 at 21.

of appeals have suggested that avoiding expenses for kosher meals that constitute a small percentage of a prison's costs is not a compelling governmental interest.[8] Cf. *Moussazadeh*, 703 F.3d at 795 (expressing skepticism that "saving less than .05% of the food budget constitutes a compelling interest"); *Beerheide* v. *Suthers*, 286 F.3d 1179, 1191 (10th Cir. 2002) (avoiding expense of free kosher meals that amount to .158% of the food budget was not rationally related to penological goal of controlling costs and prisoner abuse of program).

The appellants' arguments on appeal do not undermine the district court's determination. First, they contend (Br. 31-32) that the district court failed to reconcile an asserted "tension" between RLUIPA's statement that the government may need to incur expenses to avoid imposing a substantial burden and RLUIPA's legislative history, which requires courts to apply the Section 3 standard consistent with consideration of costs and limited resources. In support of this assertion, the appellants contend (Br. 25-27) that this Court has "repeatedly concluded," in light

[8] The appellants argue that, because some unforeseen future fiscal crisis may arise, Congress could not have intended to require States to accommodate religious exercise if accommodation would impose any cost on the State. See Br. 28-29. Congress was surely aware, however, that if changed circumstances occur, a court may modify its injunction. See Fed. R. Civ. P. 60(b). If such a fiscal crisis occurs that somehow differentiates the appellants from the BOP and the many States that have successfully implemented a kosher diet for years, the appellants are free to return to the district court and request that the court modify its December 6 Order accordingly.

of RLUIPA's legislative history, that controlling costs is a compelling governmental interest that justifies a refusal to provide a religious diet.

This argument fails for several reasons. Because RLUIPA's provision stating that the government may need to incur expenses to avoid imposing a substantial burden on religious exercise is clear, there is no need for this Court to resolve any "tension" with RLUIPA's legislative history. See, *e.g.*, *Harris* v. *Garner*, 216 F.3d 970, 976 (11th Cir. 2000) ("When the import of the words Congress has used is clear, as it is here, we need not resort to legislative history, and we certainly should not do so to undermine the plain meaning of the statutory language."), cert. denied, 532 U.S. 1065, 121 S. Ct. 2214 (2001); *Allapattah Servs., Inc.* v. *Exxon Corp.*, 362 F.3d 739, 750 (11th Cir. 2004) (Tjoflat, J., dissenting from denial of rehearing en banc) ("When the plain language and the legislative history of a statute conflict, the plain language should control unless its application would lead to absurd results.") (citations and internal quotation marks omitted). In any event, controlling costs cannot be a compelling governmental interest where, as here, the State has voluntarily committed to spend the funds and asserts it can do so without jeopardizing its penological interests. See pp. 31-33, *supra*.

Appellants are incorrect (Br. 32-35) that the district court erred in concluding that the projected costs of the kosher diet were not of a compelling magnitude because they constituted a small percentage of the FDOC's total annual

budget. The appellants contend that the circuit court cases the district court cited are inapplicable because they compared the costs of the diet to the agency's food budget rather than total budget. But these cases in fact support the district court's decision, because they stand for the proposition that avoiding costs for kosher meals that constitute only a miniscule percentage of a prison system's expenses do not constitute a compelling governmental interest for purposes of RLUIPA.

The appellants also err in contending that Congress intended for the courts to examine the gross number of dollars to be expended to determine whether costs are sufficiently high to consider avoiding them a compelling governmental interest. The appellants, however, provide no legal support for their view on congressional intent. Indeed, using a gross dollar amount instead of a percentage of the total agency budget ignores the reality that some state correctional institutions are more capable of absorbing costs than others due to the size of their budget, and thus what may constitute a significant figure for one institution will be a minor figure for another. The district court therefore correctly held that the projected costs of providing a kosher diet statewide, when viewed in light of the FDOC's annual budget, were insufficient to make avoiding such costs a compelling governmental interest.

3. The FDOC's Blanket Ban On Kosher Meals Is Not The Least Restrictive Means Of Advancing A Compelling Governmental Interest

The appellants also failed to carry their burden of proof on the least restrictive means factor. As the district court recognized, the BOP, state prisons in California, New York, Texas, and Illinois, and state prisons in at least 31 other states offer a kosher meal option to prisoners with a sincere religious basis for requesting one. Doc. 56 at 9; Doc. 106 at 22. The appellants do not even attempt in their opening brief to identify any meaningful distinction between the FDOC's operation and the operation of these institutions that justifies the FDOC's denial of a kosher diet. This omission strongly suggests that the FDOC's blanket denial of a kosher diet is not the least restrictive means to further the cost interest it asserts. See, *e.g.*, *Rich*, 716 F.3d at 534; *Spratt*, 482 F.3d at 42; *Warsoldier*, 418 F.3d at 999-1000. Indeed, in *Rich*, this Court reversed a grant of summary judgment to the Secretary and other FDOC officials in another Section 3 case brought by a prisoner seeking a kosher diet, "in light of the Defendants' meager efforts to explain why Florida's prisons are so different from the penal institutions that now provide kosher meals such that the plans adopted by those other institutions would not work in Florida." *Rich*, 716 F.3d at 534.

Florida's own history of providing special diets to its inmates buttresses this conclusion. The FDOC has long offered vegan, therapeutic, and medical meal

plans, which cost more than the mainline meal plan, despite budget shortfalls. Upchurch admitted that the FDOC "has been able to successfully manage any issues relat[ing] to providing these special diets to certain prisoners for at least a number of years." Doc. 67 at 60. This ability to offer alternative meals further suggests that there are less restrictive alternatives to further the FDOC's interest in cost savings than a blanket denial of kosher meals. See *Rich*, 716 F.3d at 534.

The appellants' lone challenge (Br. 27-28) to the district court's finding on this issue is their assertion that "this court has rejected reliance on what other institutions choose to do," accompanied by a citation to this Court's decision in *Knight* v. *Thompson*, 723 F.3d 1275, 1286-1287 (11th Cir. 2013), petition for cert. pending, No. 13-955 (filed Feb. 6, 2014). *Knight* is readily distinguishable from this case. *Knight* held that "[w]hile the practices of other institutions are relevant to the RLUIPA analysis, they are not controlling," and concluded that the defendant state prison justified its ban on long hair for male inmates by "show[ing] that no efficacious less restrictive measures exist," based in large measure on a "detailed" record of actual security incidents caused by male prisoners wearing long hair. 723 F.3d at 1284, 1286. In this case, by contrast, there is no evidence of security concerns related to providing kosher meals, and Upchurch conceded that the new process of providing kosher meals would avoid the security issues that had purportedly plagued the JDAP. Doc. 67 at 48-49, 53-54. To the extent that *Knight*

has any relevance to this case, it is to underscore that the appellants failed to demonstrate that its blanket denial of kosher meals is the least restrictive means of advancing a compelling government interest.

4. The Disputed Provisions Of The Religious Diet Program Are Not The Least Restrictive Means Of Advancing A Compelling Governmental Interest

The district court also correctly concluded that the appellants failed to carry their burden under RLUIPA of showing that the disputed provisions of the RDP are the least restrictive means of advancing a compelling governmental interest. To implement its findings, the court issued a narrow preliminary injunction that enjoined provisions of the RDP only to the extent that those provisions violated RLUIPA. The appellants' challenges to the district court's rulings on these matters are without merit.

First, the district court correctly determined that the appellants failed to show that the aspects of the RDP's sincerity test that test a prisoner's knowledge of religious dogma are the least restrictive means of advancing a compelling governmental interest. To implement this determination, the court barred a detailed investigation into the inmate's fidelity to his claimed faith and ability to specify the religious laws that formed the basis of his diet needs, but allowed a chaplain to conduct an in-person assessment of an inmate's sincerity. Doc. 99-8 at 4-5; Doc. 106 at 32. The appellants failed to offer any evidence that the aspects of

the FDOC's sincerity assessment that focus on knowledge and dogma further a compelling interest in controlling costs; indeed, FDOC operations manager Shane Phillips admitted that he is not aware of any savings the RDP's current sincerity testing provision would generate. Doc. 67 at 148. Because the claim of cost savings is speculative, the appellants failed to carry their burden on the compelling governmental interest factor. See *Rich*, 716 F.3d at 533.

The appellants also failed to satisfy their burden of showing that the religious dogma testing is the least restrictive means of furthering their alleged interest in containing costs. The evidence adduced at the hearing indicated that many correctional institutions, including the BOP and the New York Department of Correctional Services, provide kosher meals without engaging in a detailed inquiry into an inmate's fidelity to religious orthodoxy. Doc. 56 at 9; Doc. 67 at 90, 101-104; Doc. 106 at 26. The appellants failed to distinguish the FDOC's operation from the operations of these institutions, and thus failed to carry their burden on the least restrictive means factor. See, *e.g.*, *Rich*, 716 F.3d at 534; *Spratt*, 482 F.3d at 42; *Warsoldier*, 418 F.3d at 999-1000.

Next, the district court correctly determined that the appellants failed to show that the RDP's zero-tolerance rule is the least restrictive means of advancing a compelling governmental interest. To implement this determination, the court forbade the automatic and mandatory suspension of a prisoner for a single act of

bartering CFO food items or consuming non-kosher food without giving him the opportunity to explain the circumstances prior to removal and without any discretion for chaplains or prison officials. Doc. 99-8 at 6-7; Doc. 106 at 32. As with the religious dogma testing, the appellants failed to offer any evidence that the zero-tolerance rule furthered their claimed interest in costs. Again, Phillips acknowledged that the FDOC had not conducted any analysis as to whether a rule requiring that prison officials remove a prisoner from the CFO for 30 days for a single act of consuming a non-kosher item without an opportunity to meet with a chaplain first would save the FDOC money, and that he did not know how much money the zero-tolerance rule would save the FDOC. Doc. 67 at 144. This omission renders the appellants' claim of a compelling governmental interest in controlling costs speculative. See *Rich*, 716 F.3d at 533.

The appellants also failed to satisfy their burden of showing that the zero-tolerance rule is the least restrictive means of furthering their alleged interest in containing costs. The appellants allude (Br. 44-45) to the BOP's allegedly similar zero-tolerance policy, but the BOP's policy is different in critical respects: it makes the removal of inmates from the kosher meal program discretionary and removal only occurs after the prisoner has an opportunity to explain the circumstances. See pp. 55-56, *infra*. The opportunity for consultation prior to removal is paramount, because under RLUIPA "few lapses in perfect adherence do

not negate [a prisoner's] overarching display of sincerity." *Moussazadeh*, 703 F.3d at 792. The appellants produced no evidence before the district court that a policy similar to the BOP's would not work for the FDOC. Without producing any evidence to support their zero-tolerance rule, the appellants cannot demonstrate that it is the least restrictive means of advancing their claimed interest in controlling costs. See *Rich*, 716 F.3d at 534; see also *Warsoldier*, 418 F.3d at 999; *Washington*, 497 F.3d at 284; *Murphy* v. *Missouri Dep't of Corr*., 372 F.3d 979, 988 (8th Cir.), cert. denied, 543 U.S. 991, 125 S. Ct. 501 (2004).

Finally, the district court correctly determined that the appellants failed to show that the RDP's ten-percent rule advances a compelling governmental interest. To implement this determination, the court prohibited the automatic and mandatory removal of a CFO participant who missed ten percent of his CFO meals in one month. Doc. 99-8 at 6; Doc. 106 at 32. To support their argument that the ten-percent rule furthers their compelling interest in containing costs, the appellants offered the testimony of Phillips and FDOC assistant secretary for institutions James Upchurch that the ten-percent rule saves costs on meals that are prepared and discarded if not eaten. Doc. 67 at 49-50, 157. Because neither Phillips nor Upchurch attempted to quantify the magnitude of this waste or the amount of money the ten-percent rule would save the FDOC, this testimony is speculative and

does not satisfy the appellants' burden on the compelling governmental interest factor. See *Rich*, 716 F.3d at 533.

The appellants also failed to satisfy their burden of showing that the ten-percent rule is the least restrictive means of furthering their ostensible interest in avoiding costs. Former BOP regional food director Dennis Watkins testified that the officials who operated BOP's prison kitchens knew from past service roughly how many inmates would show up for each meal, and in the event the kitchens did not prepare enough meals, it "wasn't a major issue" to pull an additional kosher meal from the freezer and reheat it in the microwave. Doc. 68 at 127. Phillips, FDOC's operations manager, testified that it would be difficult to project the number of inmates who would consume kosher meals, but conceded that the FDOC has successfully tracked inmate participation in the FDOC's medical and therapeutic diets. Doc. 67 at 124, 146-147, 158. In light of the existence of the BOP's less restrictive alternative, and the appellants' concession that they have used this alternative in the past for other dietary options, the appellants failed to demonstrate that the ten-percent rule is the least restrictive alternative for their claimed interest in controlling costs. See *Rich*, 716 F.3d at 534; see also *Warsoldier*, 418 F.3d at 999; *Washington*, 497 F.3d at 284; *Murphy*, 372 F.3d at 988.

B. The United States Satisfied The Remaining Factors For Preliminary Injunctive Relief In This Case

The remaining factors a court must consider in deciding whether to grant preliminary injunctive relief essentially involve a balancing of the relevant benefits and harms of a preliminary injunction to the affected parties and to the public: whether irreparable injury will be suffered unless the injunction is issued; whether the threatened injury to the moving party outweighs whatever damage the proposed injunction might cause the non-moving party; and whether the injunction would serve the public interest. The United States easily satisfied the factors, and indeed, the appellants do not challenge in their opening brief the district court's legal analysis or factual determinations on these factors.

It is clear that FDOC inmates who have a sincere belief that their faith requires them to keep kosher will sustain irreparable injury if an injunction does not issue. "RLUIPA enforces First Amendment freedoms," and the FDOC's blanket ban on kosher meals and its implementation of the RDP provisions that violate RLUIPA will inflict irreparable harm on many FDOC inmates who wish to exercise their faith freely by keeping kosher. *Opulent Life Church* v. *City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (finding irreparable harm when RLUIPA is violated); see also *Warsoldier*, 418 F.3d at 1001-1002 (observing that a prisoner's "colorable" RLUIPA claim "sufficiently established that he will suffer

an irreparable injury absent an injunction"). Moreover, because irreparable injury occurs where First Amendment freedoms are deprived "for even minimal periods of time," *Elrod* v. *Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976), the availability of a post-suspension grievance procedure in the RDP (see Br. 50; Doc. 67 at 155-156) does not mitigate the harm imposed by the zero-tolerance rule's removal of inmates for a single violation.

Balanced against the substantial threatened harm to religiously sincere FDOC inmates if a preliminary injunction is denied is the minimal harm to the appellants that will result if the injunction is granted pending the end of this litigation. The December 6 Order merely enjoined the FDOC from implementing provisions of the RDP that the court determined violated RLUIPA, leaving the FDOC with significant discretion to manage the RDP to ensure the religious sincerity of those prisoners asking for kosher meals. See Doc. 106 at 32; Doc. 162; cf. *Freedom Holdings, Inc.* v. *Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("[O]rdinary compliance costs [with a statute] are typically insufficient to constitute irreparable harm."); *American Hosp. Ass'n* v. *Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm."); *A.O. Smith Corp.* v. *FTC*, 530 F.2d 515, 527-528 (3d Cir. 1976) ("Any time a corporation complies with a government regulation that requires corporation action, it spends money and

loses profits; yet it could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction.").

Finally, the public interest weighs heavily in favor of a preliminary injunction. Enforcement of federal statutes is in the public interest. See *United States* v. *Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("Frustration of federal statutes and prerogatives are not in the public interest."), cert. denied, 133 S. Ct. 2022 (2013). This principle is particularly applicable in the case of RLUIPA, which passed both houses of Congress unanimously as "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter*, 544 U.S. at 714, 125 S. Ct. at 2117. To that end, RLUIPA provides that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [the statute] and the Constitution." 42 U.S.C. 2000cc-3(g). Because the December 6 Order interprets RLUIPA to protect broadly the religious exercise of FDOC inmates with a sincere religious belief in keeping kosher, preliminary injunctive relief prohibiting implementation of the blanket ban on kosher meals and the RDP's religious dogma testing, ten-percent rule, and zero-tolerance rule best serves the public interest.

C. The District Court Acted Within Its Discretion In Preliminarily Enjoining Provisions Of The Religious Diet Program That It Determined Violated RLUIPA

This Court should also reject the appellants' challenges to the terms of the preliminary injunction (Br. 39-54). A district court possesses wide discretion to craft injunctive relief to address ongoing or potential harm. See, *e.g.*, *Thomas* v. *Bryant*, 614 F.3d 1288, 1317-1318 (11th Cir. 2010); *LaMarca* v. *Turner*, 995 F.2d 1526, 1543 (11th Cir. 1993), cert. denied, 510 U.S. 1164, 114 S. Ct. 1189 (1994). This authority is not without limits, however. The Prison Litigation Reform Act of 1995 (PLRA) provides that "[i]n any civil action with respect to prison conditions, * * * [p]reliminary injunctive relief must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct that harm."[9] 18 U.S.C. 3626(a)(2); see also *Cumulus Media, Inc.* v. *Clear Channel Comm'n, Inc.*, 304 F.3d 1167, 1178 (11th Cir. 2002) ("[A] preliminary injunction must be 'narrowly tailored to fit specific legal violations, because the district court should not impose unnecessary burdens on lawful activity.'") (quoting *Starter Corp.* v. *Converse, Inc.*, 170 F.3d 286, 299 (2d Cir. 1999)).

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[9] RLUIPA itself anticipates that the PLRA applies to RLUIPA claims. See 42 U.S.C. 2000cc-2(e) ("Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).").

Applying this standard makes clear that the district court acted well within its wide discretion in preliminarily enjoining the provisions of the RDP that it determined violated RLUIPA. The district court considered extensive evidence on each of the provisions of the RDP that it enjoined and made express findings supporting its injunction. The relief it granted in the December 6 Order was narrowly drawn, extended no further than necessary to correct the harm, and was the least intrusive means of doing so. Indeed, the court's April 3 Order clarifying its preliminary injunction makes clear that the relief the court granted was narrowly drawn.

1. The District Court Properly Enjoined The FDOC's Implementation Of The Religious Diet Program's Religious Dogma Testing

The district court properly enjoined the FDOC's implementation of the aspects of the RDP's sincerity test that examined a prisoner's knowledge of religious dogma, which is a threshold barrier an inmate must pass before being admitted to the RDP. The court correctly found that this test violates RLUIPA by conditioning enrollment in the RDP on a potential participant's knowledge of religious orthodoxy. See Doc. 106 at 24-26. Based on this finding, the district court preliminarily enjoined subsections (b) through (e) of the RDP's section of its Specific Procedures titled Sincerity Assessment Process for the Certified Food Option. See Doc. 99-8 at 4-5; Doc. 106 at 32. This relief was "narrowly drawn"

and "extend[ed] no further than necessary to correct" the violation, 18 U.S.C. 3626(a)(2), as it barred a detailed investigation into the inmate's fidelity to his claimed faith and ability to specify the religious laws that formed the basis of his diet needs, but allowed a chaplain to conduct an in-person assessment of an inmate's sincerity. See, *e.g.*, *Moussazadeh*, 703 F.3d at 792 (observing that the sincerity test is limited to a credibility determination because "[t]o examine religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread"); *Koger*, 523 F.3d at 799 ("[C]lergy opinion has generally been deemed insufficient to override a prisoner's sincerely held religious belief.").

The appellants challenge (Br. 50-54) the district court's preliminary enjoining of the religious dogma testing on the ground that this Court's decision in *Martinelli* v. *Dugger*, 817 F.2d 1499 (11th Cir. 1987), cert. denied, 484 U.S. 1012, 108 S. Ct. 714 (1988), requires an inmate who challenges a prison policy as burdening his religious exercise to show a sincere belief that is rooted in religion, not just a sincere belief. This point is correct, but hardly persuasive. RLUIPA allows prison officials to "question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic." *Cutter*, 544 U.S. at 725 n.13, 125 S. Ct. at 2124 n.13. Nowhere in RLUIPA or in *Martinelli*, however, is there any indication that prison officials may go beyond this inquiry to test an inmate's

religious orthodoxy and exclude inmates who do not know religious laws or are unable to cite a specific law to support their request for a kosher diet.

2. The District Court Properly Enjoined The FDOC's Implementation Of The Religious Diet Program's Ten-Percent Rule And Zero-Tolerance Rule

The district court also properly enjoined the FDOC's implementation of the RDP's ten-percent rule and zero-tolerance rule. The court correctly determined that ten-percent rule violates RLUIPA by removing a prisoner from the CFO for consuming less than 90 percent of available meals even if every meal he consumes is kosher. See Doc. 106 at 27-28. Based on this determination, the district court preliminary enjoined subsection (c) of the RDP's section of its Special Procedures titled Compliance and Termination. See Doc. 99-8 at 6; Doc. 106 at 32. This relief was "narrowly drawn" and "extend[ed] no further than necessary to correct" the violation, 18 U.S.C. 3626(a)(2), because it prohibited the automatic and mandatory removal of a CFO participant who missed ten percent of his CFO meals in one month.

The court also correctly determined that the zero-tolerance rule violates RLUIPA by removing a prisoner from the CFO for a single act of consuming a non-kosher item without giving the prisoner the opportunity to explain how this item fits within his religious beliefs prior to removal from the program. See Doc. 106 at 26-27. Based on this determination, which applies to both compliance with

the RDP and bartering, the district court preliminarily enjoined subsections (e)(2) through (3) of the RDP's Compliance and Termination section. See Doc. 99-8 at 6-7; Doc. 106 at 32. This relief was "narrowly drawn" and "extend[ed] no further than necessary to correct" the violation, 18 U.S.C. 3626(a)(2), because it forbade the automatic and mandatory suspension of a prisoner for a single act of bartering CFO food items or consuming non-kosher food without giving him the opportunity to explain the circumstances prior to removal, but permitted the FDOC to monitor participants, to suspend them for violating terms of the CFO, and to discipline them for bartering CFO food items. See, *e.g.*, *Moussazadeh*, 703 F.3d at 791-792 (observing that purchase of non-kosher foods alone does not establish insincerity because "sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time"); *Grayson* v. *Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) ("[A] sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?").

The appellants pose several challenges to the district court's grant of injunctive relief on the zero-tolerance rule, none of which is persuasive.[10] The appellants argue (Br. 41-42) that the district court's preliminary injunction of subsection (e)(2), which authorized the automatic and mandatory removal from the CFO of prisoners who barter CFO food items, is defective because the court failed to make the findings concerning bartering required by Federal Rule of Civil Procedure 65(d)(1) and the PLRA. Rule 65(d)(1) requires that a district court order granting an injunction "state the reasons why it issued; state its terms specifically; and describe in reasonable detail -- and not by referring to the complaint or other document -- the act or acts restrained or required." Fed R. Civ. P. 65(d). The purpose of this specificity requirement is "to protect those who are enjoined 'by informing them of what they are called upon to do or to refrain from doing in order to comply with the injunction or restraining order.'" *Hughey* v. *JMS Dev. Corp.*, 78 F.3d 1523, 1531 (11th Cir.) (quoting 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2955 (2d ed. 1995)), cert. denied, 519 U.S. 993, 117 S. Ct. 482 (1996). The district court's findings as to zero tolerance apply to both the monitoring and bartering subsections of the RDP, because the problem the court was trying to address is the same for

[10] The appellants do not challenge in their opening brief the district court's grant of preliminary injunctive relief on the ten-percent rule.

both. The district court's December 6 Order, along with the April 3 Order, made clear to the appellants that the FDOC could not mandate removal of an inmate from the CFO for any bartering with no opportunity for the inmate to discuss the violation with a chaplain before suspension. See *Garrido* v. *Dudek*, 731 F.3d 1152, 1159 (11th Cir. 2013); *Combs* v. *Ryan's Coal Co.*, 785 F.2d 970, 978 (11th Cir.), cert. denied, 479 U.S. 853, 107 S. Ct. 187 (1986).

The appellants also contend (Br. 41-42) that the district court's preliminary injunction of subsection (e)(2) is overbroad because it exempts kosher food from the FDOC's general disciplinary measures that punish inmate bartering.[11] This argument is based on a misunderstanding of the injunction. Although the language on the final page of the December 6 Order is general, when read in the context of the complete decision, the most logical interpretation of the injunction is that it enjoins only the automatic and mandatory removal of a prisoner from the CFO for bartering. Indeed, in its motion to clarify, the United States asserted that it "does not read the Injunction to prohibit all discipline for bartering of RDP food," but rather "understands the Injunction to prohibit a 'zero tolerance' standard that

[11] The appellants also argue (Br. 40-41) that there is no case or controversy as to subsection (e)(2) because the United States did not attack this provision in the district court. This argument is without merit, because it is based on a false premise. In two separate Proposed Findings of Facts and Conclusions of Law, filed with the district court on May 24, 2013, and July 5, 2013, the United States requested that the court enjoin subsection (e)(2). Doc. 56 at 27; Doc. 71 at 30.

results in automatic removal of the prisoner from the RDP program for bartering, because bartering is not per se evidence of insincerity." Doc. 148 at 2. The April 3 Order granted the United States' motion to clarify (Doc. 162), indicating that the district court agreed that its injunction did not prohibit the FDOC from enforcing its general disciplinary measures that punish inmate bartering against CFO participants who barter kosher food.

The appellants also dispute (Br. 42-50) the district court's preliminary enjoining of subsection (e)(3), which authorized the automatic and mandatory suspension from the RDP of inmates who consume non-kosher food items. This argument also is based on a misreading of the district court's grant of relief and a misunderstanding of the court's use of the term "zero tolerance." Far from preventing the FDOC from weeding out insincere inmates from the RDP or "from imposing any remedial action for inmates' disobedience of the diet policy" (Br. 47-50), the December 6 Order, as clarified by the April 3 Order, plainly allows the FDOC to monitor participants and suspend them for violating the terms of the CFO. As noted above, the district court merely enjoined the RDP's automatic, mandatory suspension of an inmate found to violate the CFO without giving him the opportunity to explain the circumstances prior to removal.

The sources of law the appellants cite (Br. 44-46) in support of their argument make clear their confusion on this issue. First, a BOP regulation and

internal policy that the appellants describe (Br. 44) as "'zero tolerance' policies" expressly make discretionary, through their use of the term "may," the removal of inmates who violate the terms of their religious diet. See 28 C.F.R. 548.20(b); BOP Program Statement 19, http://www.bop.gov/policy/progstat/5360_009.pdf. Importantly, the BOP's policy is to provide prisoners with the opportunity to speak with the chaplain about alleged violations before they are removed or suspended from the kosher meal program. See *ibid.* Second, the appellants fail to show that the decisions they cite (Br. 44-46) as upholding a state prison's removal of an inmate from a religious diet program for non-compliance condone an automatic and mandatory suspension without the prior opportunity to explain the circumstances. Indeed, none of these cases address whether a prisoner should be afforded an opportunity to explain before being suspended from a diet program. These cases thus do not undermine the district court's exercise of discretion on this issue.

CONCLUSION

This Court should affirm the district court's order granting the United States' motion for a preliminary injunction.

Respectfully submitted,

JOCELYN SAMUELS
Acting Assistant Attorney General

s/ Christopher C. Wang
DENNIS J. DIMSEY
MARK L. GROSS
CHRISTOPHER C. WANG
Attorneys
Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, DC 20044-4403
(202) 514-9115
Chris.Wang@usdoj.gov

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s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

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I hereby certify that on May 21, 2014, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE with the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system, and that seven paper copies identical to the electronically filed brief were sent to the Clerk of the Court by certified First Class mail, postage prepaid. I further certify that all counsel of record are CM/ECF registered and will be served by the appellate CM/ECF system.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney