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October 1, 2014

VIA ELECTRONIC FILING

John Ley, Clerk of Court
United States Court of Appeals
for the Eleventh Circuit
Elbert Parr Tuttle Court of Appeals Building
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *United States* v. *Secretary, Florida Dep't of Corr.*, No. 14-10086-X

Dear Mr. Ley:

The United States submits this supplemental letter brief in response to this Court's letter of September 25, 2014. The Court believes that the preliminary injunction the district court issued in its order of December 6, 2013 (Doc. 106) (the December 6 Order) may have expired under the automatic 90-day provision of 18 U.S.C. 3626(a)(2). Accordingly, this Court has requested that the parties brief the following questions: (1) Whether the district court made sufficient findings in the record that its preliminary injunction "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right," as required by 18 U.S.C. 3626(a)(1) and (2); (2) whether the district court made the December 6 Order "final before the expiration of the 90-day period," as required by 18 U.S.C.

3626(a)(2); and (3) if the preliminary injunction has expired under the 90-day expiration period of 18 U.S.C. 3626(a)(2), whether this appeal is moot. The United States addresses these issues seriatim.

The Prison Litigation Reform Act of 1995 (PLRA) establishes standards for the entry and termination of all prospective relief – defined as "all relief other than compensatory monetary damages," 18 U.S.C. 3626(g)(7) – in civil actions challenging prison conditions. See *Miller* v. *French*, 530 U.S. 327, 333, 120 S. Ct. 2246, 2251 (2000). The PLRA requires that preliminary injunctive relief "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." 18 U.S.C. 3626(a)(2). The statute further provides that "[p]reliminary injunctive relief shall automatically expire on the date that is 90 days after its entry, unless the court makes the findings required under subsection (a)(1) for the entry of prospective relief and makes the order final before the expiration of the 90-day period." *Ibid.*

1. This Court has interpreted the PLRA's findings requirement of Section 3626(a)(1)(A) to require particularized findings on the need for, narrowness of, and intrusiveness of, the relief granted. In *Johnson* v. *Breeden*, 280 F.3d 1308 (11th Cir. 2002), this Court rejected as insufficient to satisfy Section 3626(a)(1)(A) the district court's summary conclusion that the jury's award of punitive damages,

which it assumed was prospective relief, was "narrowly drawn, extend[ed] no further than necessary to correct the violation of the Federal right, and [wa]s the least intrusive means necessary to correct the violation of the Federal right." *Id.* at 1325-1326. This Court instructed that "[w]hile there may not be much to say about the [need-narrowness-intrusiveness] factors that a district court is required to consider, the court should discuss those factors and enter findings that are as specific to the case as the circumstances permit." *Id.* at 1326; cf. *Cason* v. *Seckinger*, 231 F.3d 777, 784-785 (11th Cir. 2000) (interpreting the similarly worded Section 3626(b)(3) to require "[p]articularized findings, analysis, and explanations" rather than conclusory findings couched in the statutory language).

In its December 6 Order in this case, the district court clearly explained the factual circumstances underlying its order, including the substantial burden imposed by the appellants' failure to offer a kosher diet to prisoners and the lack of compelling justification for that burden; discussed the well-settled factors for evaluating motions for preliminary injunctions; and made specific findings explaining why injunctive relief was necessary to prevent continuing violations of federal law. Doc. 106. The United States believes that the December 6 Order satisfied in substance Section 3626(a)(1)(A)'s requirement that a district court make findings on the need-narrowness-intrusiveness factors. Nevertheless, the Court need not resolve whether these findings meet Section 3626(a)(1)(A)'s

requirements because, as explained below, the injunction expired under Section 3626(a)(2), rendering this appeal moot.

2. Under Section 3626(a)(2), for preliminary injunctive relief to extend beyond 90 days from its issuance, the district court must make the order final before the expiration of the 90-day period by issuing a second set of findings on need, narrowness, and intrusiveness. Here, the district court made no additional findings since issuing the preliminary injunction on December 6, 2013. Accordingly, the preliminary injunction at issue in this appeal automatically expired under 18 U.S.C. 3626(a)(2). See *Mayweathers* v. *Newland*, 258 F.3d 930, 936 (9th Cir. 2001).

3. Article III of the United States Constitution limits federal-court jurisdiction to "actual, ongoing cases or controversies." *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477, 110 S. Ct. 1249, 1253 (1990). "[A] justiciable controversy 'must be definite and concrete, touching the legal relations of parties having adverse legal interests'" – *i.e.*, "a real and substantial controversy admitting of specific relief through a decree of a conclusive character." *Dow Jones & Co.* v. *Kaye*, 256 F.3d 1251, 1254 (11th Cir. 2001) (quoting *Aetna Life Ins. Co.* v. *Haworth*, 300 U.S. 227, 240-241, 57 S. Ct. 461, 464 (1937)). This limitation precludes a federal court from giving "opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter

in issue in the case before it." *Church of Scientology* v. *United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 449 (1992) (quoting *Mills* v. *Green*, 159 U.S. 651, 653, 16 S. Ct. 132, 133 (1895)). "For that reason, if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed." *Ibid.* (quoting *Mills*, 159 U.S. at 653, 16 S. Ct. at 133).

It is well-settled that this Court cannot grant effective relief on interlocutory appeal where the preliminary injunction whose grant or denial vested jurisdiction in this Court under 28 U.S.C. 1292(a)(1) has expired. In *Leedom Management Group, Inc.* v. *Perlmutter*, 532 F. App'x 893 (11th Cir. 2013), this Court considered an interlocutory appeal from a district court's grant of a preliminary injunction that had already expired by its own terms. This Court concluded that the injunction's expiration meant that "the controversy over its geographic scope [wa]s no longer 'definite' or 'concrete,'" and therefore the Court could not "grant 'specific relief through a decree of a conclusive character.'" *Id.* at 895 (quoting *Aetna Life Ins. Co.*, 300 U.S. at 240-241, 57 S. Ct. at 464). This Court dismissed the appeal as moot. *Id.* at 896; see also *Brooks* v. *Georgia State Bd. of Elections*, 59 F.3d 1114, 1119 (11th Cir. 1995) ("[T]his court has consistently held that the appeal of a preliminary injunction is moot where the effective time period of the injunction has passed."); *Tropicana Prods. Sales, Inc.* v. *Phillips Brokerage Co.*,

874 F.2d 1581, 1582-1583 (11th Cir. 1989) (dismissing an appeal from a denial of a preliminary injunction as moot where the appeal was argued after expiration of the injunction at issue). The expiration by statute of the preliminary injunction at issue in this appeal similarly prevents this Court from granting "specific relief through a decree of a conclusive character," *Aetna Life Ins. Co.*, 300 U.S. at 240-241, 57 S. Ct. at 464, and so this Court should dismiss this appeal as moot unless an exception to the mootness doctrine applies.

The only exception to the mootness doctrine that could possibly apply is that the preliminary injunction at issue in this appeal represents a continuing controversy capable of repetition, yet evading review.[1] The "capable of repetition, yet evading review" exception to mootness requires a showing that there is "a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party, and * * * the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration."

[1] Two other general exceptions to the mootness doctrine are (1) where "an appellant has taken all steps necessary to perfect the appeal and to preserve the status quo before the dispute becomes moot"; and (2) "where the trial court's order will have possible collateral legal consequences." *B & B Chem. Co.* v. *United States Envtl. Prot. Agency*, 806 F.2d 987, 990 (11th Cir. 1986). The first exception does not apply, as it "is an extremely narrow one that has been limited primarily to criminal defendants who seek to challenge their convictions notwithstanding that they have been released from custody." *Brooks*, 59 F.3d at 1121 (quoting *Ethredge* v. *Hail*, 996 F.2d 1173, 1176-1177 (11th Cir. 1993)). The second exception does not apply because there is no evidence here that the preliminary injunction has had any collateral legal consequences.

Sierra Club v. *Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997) (citing *Murphy* v. *Hunt*, 455 U.S. 478, 482-483, 102 S. Ct. 1181, 1183-1184 (1982)). This exception is "narrow" and "only applies in 'exceptional situations.'" *Dow Jones & Co.*, 256 F.3d at 1256 (quoting *City of L.A.* v. *Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 1669 (1983)).

This exception does not apply in this case because the issues this appeal presents will not evade review. While this interlocutory appeal was pending in this Court, the case has proceeded on schedule in the district court. The parties have filed motions for summary judgment, and responses and replies in support thereof with the district court. The motions are awaiting the court's decision. See Doc. 268, 293, 299, 306, 312, 314. The issues of whether the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) requires the appellants to provide kosher meals statewide to inmates with a sincere religious belief in keeping kosher, and whether particular provisions of the appellants' Religious Diet Program violate RLUIPA, can be brought to this Court's review on appeal from the district court's final judgment, whether that comes on summary judgment or after trial. This conclusion follows from *Perlmutter*, where this Court rejected applying the "capable of repetition, yet evading review" exception to review a preliminary injunction that had expired. In that case, this Court held that "[w]hen this appeal is dismissed, after all, the case will return to the district court, go to trial, and any

disputes regarding the proper interpretation of the restrictive covenants [that gave rise to the preliminary injunction] will be hashed out in the district court and then be subject to this Court's review on appeal from the final judgment." 532 F. App'x at 896.

4. In sum, the district court did not satisfy Section 3626(a)(2)'s requirement to make its order final within 90 days of the order's issuance. Accordingly, the preliminary injunction the district court issued in its December 6 Order automatically expired by statute 90 days thereafter, or on March 6, 2014. The injunction's expiration precludes this Court from granting "specific relief through a decree of a conclusive character." This Court therefore should dismiss the appeal as moot.

Sincerely,

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Deputy Chief

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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 the United States certifies that the following persons may have an interest in the outcome of this case:

Andreoli, Ryan J., Attorney, Cadwalader, Wickersham, and Taft LLP, counsel for amicus American Jewish Committee

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Crews, Michael D., Secretary, Florida Department of Corrections

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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

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Wang, Christopher C., Attorney, United States Department of Justice, Civil Rights Division, Appellate Section, counsel for the United States

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney

Date: October 1, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on October 1, 2014, I electronically filed the foregoing THE UNITED STATES' SUPPLEMENTAL LETTER BRIEF with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system, and that seven paper copies of the electronically-filed letter brief were sent to the Clerk of the Court by First Class mail. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

s/ Christopher C. Wang
CHRISTOPHER C. WANG
Attorney