No. 15-15543-GG

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JOHN WATKINS,

Plaintiff-Appellee

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Defendant-Appellant

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

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE

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No. 15-15543-GG
John Watkins v. *Secretary, Fla. Dep't of Corr.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, 26.1-2, and 28-1 counsel for *amicus curiae* United States of America certifies that in addition to the persons and entities identified in the defendant-appellant's and plaintiff-appellee's briefs, the following persons may have an interest in the outcome of this case:

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Date: April 22, 2016

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INTEREST OF THE UNITED STATES

The United States Department of Justice is charged with enforcing the Religious Land Use and Institutionalized Persons Act (RLUIPA), see 42 U.S.C. 2000cc-2(f), and therefore has an interest in the statute's implementation. Most importantly, the Department is currently litigating, on a system-wide basis, the very issue presented here—whether RLUIPA obligates Florida state prisons to provide kosher meals. *United States* v. *Secretary, Fla. Dep't of Corr.*, No. 1:12-

cv-22958 (S.D. Fla.) (complaint filed Aug. 14, 2012). In that case, the district court granted a permanent injunction in August 2015, ordering the State to provide a certified kosher diet to all prisoners with a sincere religious belief in keeping kosher. The State's appeal from that ruling is currently pending before this Court as case No. 15-14117 (docketed Sept. 14, 2015).

The United States submits this brief pursuant to Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES

1. Did the district court correctly conclude that denying plaintiff kosher meals does not serve a compelling governmental interest under RLUIPA, 42 U.S.C. 2000cc-1(a), given the meals' minimal impact on the prison system's budget?

2. Did the district court properly conclude that denying plaintiff kosher meals is not the least restrictive means of furthering the government's interest in controlling costs, given that many other prison systems provide kosher meals and that the Florida prison system already provides individualized diets, at similar cost, to inmates with medical needs?

STATEMENT OF THE CASE

Plaintiff, a Sunni Muslim, is a prisoner in the Florida state system. Doc. 88 at 2. He filed this pro se suit under RLUIPA in April 2012, challenging various

restrictions on the practice of his faith. Doc. 88 at 20.[1] Specifically, plaintiff challenged a prohibition on his growing a quarter-inch beard, the lack of religiously compliant foods during Eid festivals, the provision of a single Muslim worship service for both Sunni Muslims and adherents of the Nation of Islam, and the unavailability of halal or kosher foods.[2] Doc. 88 at 2, 32.

The district court (largely adopting a magistrate's findings and recommendations) granted summary judgment for the plaintiff on the last of these claims. Doc. 91 at 2, 7.[3] The district court rejected the State's argument that the claim was mooted by the prison system's decision, during the course of the litigation, to make kosher meals available system-wide. Doc. 91 at 4. In light of Florida's longstanding "give and take history" of implementing and then

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[1] "Doc. _" refers to documents filed in the district court by docket number. "Br. _" refers to pages in the State's opening brief.

[2] Halal foods are those that meet Muslim dietary obligations, including a requirement for ritual slaughter of meat and avoidance of pork and alcohol. Watkins has stated that a kosher diet comports with these requirements and would thus meet his religious needs. Doc. 88 at 9-10, 20; Doc. 77-3 at 1; Doc. 77-12 at 28-32. The district court consequently treated the plaintiff's request for a halal diet as a request for kosher food. Doc. 91 at 4.

[3] The magistrate judge also recommended that judgment be granted for plaintiff on his request to grow a quarter-inch beard. Doc. 88 at 32. The district court found that claim moot, however, because the prison had changed its grooming rules in response to *Holt* v. *Hobbs*, 135 S. Ct. 853 (2015), and "[t]here [wa]s no reason to believe the Department will take any other course in the future." Doc. 91 at 4.

discontinuing kosher-meal programs (Doc. 88 at 24-25), as well as the Department's continued insistence "that it can discontinue the program and go back to its old policy whenever it wishes—including when it decides its budget will no longer support the new program" (Doc. 91 at 4; see also Doc. 88 at 22), the court concluded that there was no guarantee that the prison system would not once again revert to its old ways. Doc. 91 at 4.

In applying RLUIPA, the district court acknowledged that "due regard [must be] afforded the Department's considerable discretion in operating its facilities" and that "the Department can legitimately consider cost in deciding how to accommodate the free exercise of religion." Doc. 91 at 5. But the court concluded that the State had failed to demonstrate that the denial of kosher meals was justified by an interest in avoiding costly expenditures, or that the prison system had pursued the least restrictive means of achieving that interest. Doc. 88 at 26-27.

First, the court reasoned that providing kosher meals would only marginally increase the prison system's expenditures. While standard meals cost $1.80, kosher meals cost $3.53 per inmate per day, an amount comparable to the daily cost of therapeutic diets—$2.00 to $3.00—that the prison system already provides on an individualized basis to inmates with various medical conditions. Doc. 88 at 13, 27. Bearing the additional cost of kosher diets would have only a "minimal

impact on [the system's overall] budget appropriation of $2,299,631,064.00." Doc. 88 at 27.

Second, the court heeded the Supreme Court's direction in *Holt* v. *Hobbs*, 135 S. Ct. 853, 866 (2015), that "when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course." Doc. 88 at 19 n.13 (quoting *Holt*, 135 S. Ct. at 866). Here, the State produced no evidence to show "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." Doc. 88 at 26-27 (quoting *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525, 534 (11th Cir. 2013)).

Accordingly, the court entered an injunction requiring the State to serve Watkins kosher meals. Doc. 91 at 6-7. Citing the Prison Litigation Reform Act (PLRA), 18 U.S.C. 3626(a)(1)(A), the court found that the injunction was narrowly drawn, extending no further than necessary to correct the violation of federal rights, and was the least intrusive means necessary to correct the violation.[4]

[4] The PLRA requires that "[p]rospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs" and shall not be granted "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least

(continued…)

Doc. 91 at 5 (citing *United States* v. *Secretary, Fla. Dep't of Corr.*, 778 F.3d 1223, 1227 (11th Cir. 2015)).

The State appealed. Plaintiff moved to stay the appeal until resolution of the United States' case. This Court denied the stay.

SUMMARY OF ARGUMENT

RLUIPA prohibits a state from imposing a substantial burden on a prisoner's religious exercise except when it does so to further a compelling governmental interest and it employs the least restrictive means of accomplishing that interest. 42 U.S.C. 2000cc-1(a). The State bears the burden of persuasion on both the compelling-interest and least-restrictive-means elements of a RLUIPA claim. 42 U.S.C. 2000cc-2(b).

The district court properly concluded that the State had failed to meet its burden of demonstrating that it had a compelling interest in denying Watkins' request for kosher meals. In reaching that conclusion, the district court properly considered the marginal cost of providing Watkins with kosher meals, rather than the speculative, aggregate cost of accommodating all prisoners who might request a religious diet. And the district court rightfully did not impose a *de minimis* cap on the costs that RLUIPA requires a prison system to assume and, instead,

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(…continued)
intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. 3626(a)(1)(A).

evaluated the cost of the requested accommodation in the context of the prison system's overall budget.

The district court was likewise correct in concluding that the prison system failed to demonstrate that denying Watkins' request was the least restrictive means of meeting the prison system's interest in conserving its resources. The State's ability to administer a therapeutic diet to inmates with medical needs undercuts its claim that inmate-morale and administrative-cost problems would plague a kosher-meal program. And the court was on solid ground in concluding that countless other prison systems' abilities to provide kosher meals, and Florida's having itself provided such meals in the past, indicate that denying Watkins' request is not a necessary measure.

The district court's conclusions find substantial support in *Rich* v. *Secretary, Florida Department of Corrections*, 716 F.3d 525 (11th Cir. 2013), in which this Court held that the State had failed to meet its burden in another case much like this one. There, the Court eschewed reliance on speculation and exaggerated fears in undertaking the compelling-interest analysis, and it drew on evidence from other prisons' practices, Florida's history of providing kosher meals, and the State's medical-meal program to conclude that the State had not shown that denying kosher meals was the least restrictive means of controlling Florida's prison costs. *Id.* at 533-534. This Court should do the same.

ARGUMENT

RLUIPA prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," even through a neutral policy, unless the imposition furthers "a compelling governmental interest" by "the least restrictive means." 42 U.S.C. 2000cc-1(a). Once the plaintiff demonstrates a substantial burden on religious practice, the State bears the burden of persuasion to show that the imposition of the burden advances a compelling interest and that the State employed the least restrictive means of accomplishing that interest. 42 U.S.C. 2000cc-2(b). Here, the State has not met its burden under either element.

I

THE STATE FAILED TO DEMONSTRATE THAT DENYING PLAINTIFF KOSHER MEALS FURTHERS A COMPELLING GOVERNMENTAL INTEREST

In its compelling-interest analysis, the district court properly considered the cost of providing Watkins with kosher meals, rather than the speculative aggregate cost of accommodating all prisoners who might request a religious diet. Nor was the district court required to impose a *de minimis* cap on the costs that RLUIPA requires prison systems to assume. Finally, the district court was faithful to RLUIPA when it evaluated the cost of the accommodation in the context of the prison system's overall budget.

A. The District Court Properly Undertook An Individualized Analysis Of The Cost Of Providing Plaintiff Kosher Meals

RLUIPA is premised on "granting specific exemptions to particular religious claimants." *Holt* v. *Hobbs*, 135 S. Ct. 853, 863 (2015) (citation omitted). And that individualized analysis must be based on facts rather than on "speculation" or "assumptions." *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013) (internal quotation marks omitted). Thus, the district court properly considered the cost of accommodating the *plaintiff*, rather than the speculative aggregate cost of accommodating all prisoners who might request a religious diet.

As the Supreme Court observed in applying the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb, the government may not take a "categorical approach." *Gonzales* v. *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430, 126 S. Ct. 1211, 1220 (2006). Rather, it must "demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person'—the particular claimant whose sincere exercise of religion is being substantially burdened." *Id.* at 430-431, 126 S. Ct. at 1220 (quoting 42 U.S.C. 2000bb-1(b)); see also *Koger* v. *Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) ("[T]he governmental interest should be considered in light of the prisoner's request and circumstances at the detention facility.").

Thus, the Court should not credit the State's conjecture that accommodating plaintiff's request would "open[] the door for others to request their own

individualized religious diets" (Br. 27), require accommodations for all "other inmates with other specific dietary requirements" (Br. 24), or pave the way for plaintiff to change his mind about his religious needs and request more elaborate meals (Br. 23). If other prisoners—or Watkins—were to request more costly or cumbersome dietary accommodations, those requests would have to be considered on their own terms. The state cannot refuse to accommodate individual requests, like Watkins' current one, simply because prison officials see "no way to cabin religious exceptions once recognized." *O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. at 430, 126 S. Ct. at 1220.

Accordingly, the Seventh Circuit held that a prison could not reject a plaintiff's request for kosher meals based on fear that "every prisoner would demand a religious diet that requires daily, person-specific preparation so expensive that in the aggregate the costs of compliance would be crippling." *Schlemm* v. *Wall*, 784 F.3d 362, 365 (2015). The court said that this argument rested on mere speculation, and explained that the proper question was "what it would cost to honor [plaintiff's] request." *Ibid.* As the *Schlemm* court put it, accommodation of a sincere need for a religious meal does not mean a prison must honor other, future requests for "sacraments" of "chateaubriand and sherry." *Ibid.* There, as here, "the costs of accommodating other inmates' requests (should any be made) can be left to future litigation." *Id.* at 366.

Nor is the State entitled to a reversal of the district court's decision because it has identified cases in which other prisoners did not prevail in obtaining kosher meals. Br. 33-34. The record in *Linehan* v. *Crosby*, 346 F. App'x 471 (11th Cir. 2009), was markedly different from the one here because the meals requested by the plaintiff there cost upwards of $15.00 per day. See *Linehan* v. *Crosby*, No. 4:06-CV-00225-MP-WCS, 2008 WL 3889604, at *5 (N.D. Fla. Aug. 20, 2008). The State cites another unpublished case in which a prisoner requested "an alcohol-free lacto-vegetarian diet" and disposable utensils, *Muhammad* v. *Sapp*, 388 F. App'x 892, 897 (11th Cir. 2010), and a published case, *Martinelli* v. *Dugger*, 817 F.2d 1499 (11th Cir. 1987), cert. denied 484 U.S. 1012, 108 S. Ct. 714, abrogated by *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349, 107 S. Ct. 2400, 2404 (1987), predating RLUIPA. Those cases are simply irrelevant to whether the facts of *this* case demonstrate that Florida can provide Watkins with a kosher diet. The feasibility of providing kosher meals is "a subject that demands a fact-intensive inquiry" unique to each case, *Moussazadeh* v. *Texas Dep't of Criminal Justice*, 703 F.3d 781, 795 (5th Cir. 2012), as corrected (Feb. 20, 2013), and the State has failed to demonstrate that the district court erred in undertaking that individualized analysis.

B. The State Is Wrong To Claim That RLUIPA Obligates It To Assume Nothing More Than De Minimis *Costs*

The State likewise errs in claiming that it has a compelling interest in avoiding anything "more than *de minim*[*i*]*s* costs." Br. 43. RLUIPA itself specifies that the obligations that it imposes "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. 2000cc-3(c). Because of this explicit mandate, the fact that a religious accommodation would increase a prison system's outlays is not determinative. "Saving a few dollars is not a compelling interest." *Schlemm*, 784 F.3d at 365. Even under RFRA, which applies a similar least-restrictive-means test but without any explicit instruction as to costs, this Court has explained that "prison officials cannot simply utter the magic words 'security and costs' and as a result receive unlimited deference from [courts] charged with resolving these disputes." *Davila* v. *Gladden*, 777 F.3d 1198, 1206 (11th Cir.), cert. denied, 136 S. Ct. 78 (2015) (citation omitted).

The cases the State cites are not to the contrary. In *Garner* v. *Kennedy*, 713 F.3d 237, 245-246 (5th Cir. 2013), cited by the State (Br. 44), the prison claimed that allowing a prisoner to grow a quarter-inch beard would entail administrative costs, including a strain on the chaplaincy, barbering expenses, and reissuance of identification cards for the plaintiff and any other prisoners who sought a similar accommodation. *Garner*, 713 F.3d at 241, 245. And, like the State here, the

defendant in *Garner* said its budget was "going to be 'extremely tight' in the near future." *Id*. at 245. The Fifth Circuit concluded that the increase in costs did not justify denying the accommodation because the prison had not shown "how other operations of the prison system would be affected by these increased costs." *Ibid*.

In *Fowler* v. *Crawford*, 534 F.3d 931, 943 (8th Cir. 2008), cert. denied, 556 U.S. 1105, 129 S. Ct. 1585 (2009), the prison prevailed against a request that it set up a sweat lodge with an open fire at plaintiff's maximum security prison after the district court found that the accommodation would jeopardize security. Br. 44. The court went on to say, after recounting "obvious * * * security concerns," that building the lodge would also require "significant prison resources" to be diverted from other areas of the prison. *Id*. at 942-943. [5]

Far from establishing that RLUIPA requires only *de minimis* expenditures, these cases demonstrate that cost considerations are not compelling absent a showing that the increase in outlays would come at the expense of the prison system's operations or security considerations. That conclusion is consistent with

[5] The prison also cites (Br. 44) *Hathcock* v. *Cohen*, 287 F. App'x 793 (11th Cir. 2008). But the passage the brief cites involved the First Amendment, which "does not impose a least-restrictive-alternative test, but asks instead whether the prisoner has pointed to some obvious regulatory alternative * * * not imposing more than a *de minimis* cost to the valid penological goal." *Id.* at 800 (quoting *Overton* v. *Bazzetta*, 539 U.S. 126, 136, 123 S. Ct. 2162, 2169 (2003)). Indeed, the prison in *Hathcock* provided kosher meals, and its obligation to do so was not at issue in that case. *Id.* at 798.

the Supreme Court's recognition in *Cutter* v. *Wilkinson*, 544 U.S. 709, 125 S. Ct. 2113 (2005), that RLUIPA should be applied to preserve "good order, security and discipline, consistent with consideration of costs and limited resources." *Id.* at 723, 125 S. Ct. at 2123 (citing 146 Cong. Rec. 16,699 (2000) (joint statement) (quoting S. Rep. No. 111, 103d Cong., 1st Sess. 10 (1993))).

The State made no showing here that the increased costs entailed in providing Watkins with kosher meals, or in providing the kosher-meal program as a whole, would be so substantial as to compromise prison security or other prison operations.[6] And the State has likewise been unable to make any such showing in the United States' system-wide challenge to the denial of kosher meals. See *United States* v. *Secretary, Fla. Dep't of Corr*., No. 12-22958-CIV, 2015 WL 1977795, at *5 (S.D. Fla. Apr. 30, 2015) (finding that "[d]uring the time that the [kosher-meal plan] has been offered, [Florida prisons have] not had to discontinue any programs because of * * * costs"). That said, the impact of the state-wide kosher-meal program on Florida's prison operations is pending in an appeal from that decision, *United States* v. *Secretary, Fla. Dep't of Corr*., No. 15-14117, (docketed Sept. 14, 2015), and need not be decided here.

[6] The prison cites (Br. 36) speculative evidence about additional security staff and equipment a kosher diet may require. But the district court properly concluded that these concerns were unsubstantiated and "exaggerated," noting, for example, that the State pointed to the cost of microwaves and heated cabinets, even though it has switched to a cold kosher diet. Doc. 88 at 26; Doc. 76 at 14 n.3.

C. The District Court Properly Evaluated The Plaintiff's Request In The Context Of The Prison System's Larger Budget

In applying RLUIPA's compelling-interest standard, "[c]ontext matters." *Cutter*, 544 U.S. at 723, 125 S. Ct. at 2123 (alteration in original; citation omitted). A court cannot effectively undertake "consideration of costs and limited resources" without evaluating them in the context of an entity's other financial outlays. *Ibid.* (citation and internal quotation marks omitted). Accordingly, the district court rightfully considered the fact that the cost of accommodating plaintiff's dietary needs—$3.53 per day, which represents $1.73 above the usual meal cost of $1.80—represents a small fraction of the prison system's overall budget of $2,299,631,064.00. Doc. 88 at 13, 27. The cost of providing Watkins with kosher meals remains marginal if one limits the comparison to the prison system's smaller food budget of $54,065,698. Doc. 77-10 at 2. Indeed, even if one were to consider the aggregate cost of *all* kosher diets, the expenditure represents a tiny fraction of the prison system's financial outlays. See *United States* v. *Secretary, Fla. Dep't of Corr.*, 2015 WL 1977795, at *1, *3-5, *8 (finding even with "[d]efendants' worst case scenario," cost would be "five one thousandths (0.005) of Defendants' total budget").[7]

[7] The prison claims (Br. 19-22) that the court should not consider the whole budget because it is administratively difficult to transfer funds between budget categories, but the evidence showed that such transfers are indeed possible.

(continued…)

Evaluating the cost of providing Watkins with kosher meals in the context of the prison system's overall financial outlays hardly "distort[s] the facts." Br. 37. It is hard to see how the analysis the State would prefer—an abstract consideration of "costs * * * examined in terms of *gross dollar amount* of the anticipated cost, rather than as a ratio of the anticipated cost vs. the Department's overall budget" (Br. 36)—would have been at all meaningful. Not only does that proposal disregard the contextual analysis mandated by *Cutter*, but it would leave the court with no logical means of deciding whether a projected "gross dollar amount" threatens a compelling government interest. Without knowing how much money one has to spend, it is impossible to ascertain what one can afford. For this reason, other courts have similarly compared the cost of providing kosher meals with a prison system's larger budgetary allocations. See, *e.g.*, *Moussazadeh*, 703 F.3d at 795 (comparing cost of kosher meals to overall food budget); *Beerheide* v. *Suthers*, 286 F.3d 1179, 1191 (10th Cir. 2002) (comparing cost of kosher meals with overall food budget, in context of free-exercise claim).[8]

(…continued)
Doc. 77-10. And it hardly seems likely that any drastic measures would be required to subsidize the kosher meals of a single prisoner.

[8] To be sure, a cost-to-budget ratio is not all that matters. The result in these cases might have been different if the prisons had shown that the costs entailed could not be assumed without compromising prison security or operations. See pp. 11-13, *supra*.

If, in the future, the prison system's financial circumstances were to change for the worse, or the costs of kosher meals were to rise dramatically, nothing would prevent the State from seeking relief from the district court's judgment. *Rufo* v. *Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 381, 112 S. Ct. 748, 758 (1992). Federal Rule of Civil Procedure 60(b) allows a court to deal with unforeseen situations if they arise, including any circumstances that render the injunction "no longer equitable." Fed. R. Civ. P. 60(b)(5); see also *Secretary, Fla. Dep't of Corr.*, 2015 WL 1977795, at *9 (stating that "if a fiscal crisis, or anything else implicating a compelling state interest, were to occur nothing would prevent Defendants from seeking to modify any permanent injunction entered"). But a court is not required to accommodate "mere speculation" or "exaggerated fears" well before they materialize. *Rich*, 716 F.3d at 533 (citation omitted).

II

THE STATE DID NOT SHOW THAT DENYING PLAINTIFF KOSHER MEALS WAS THE LEAST RESTRICTIVE MEANS OF CONSERVING ITS RESOURCES

Where "a less restrictive means is available for the Government to achieve its goals, the Government must use it." *Holt* v. *Hobbs*, 135 S. Ct. 853, 864 (2015) (citation and internal quotation marks omitted). The fact that a prison system manages to offer medical exemptions, and that other prison systems are able to provide a requested accommodation, provides strong evidence that the denial of an

accommodation is not the least restrictive means of achieving the government's aims. Both of these considerations indicate that Florida can accommodate Watkins' request.

A. The District Court Properly Considered The Prison System's Provision Of Medical Or Therapeutic Diets

In *Holt*, the Court recognized that if the "proffered [compelling] objectives are not pursued" in analogous circumstances, this "suggests that 'those interests could be achieved by narrower ordinances that burdened religion to a far lesser degree.'" *Holt*, 135 S. Ct. at 865-866 (quoting *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520, 546, 113 S. Ct. 2217, 2234 (1993)). Thus, the Court in *Holt* concluded that the prison's *medical* exemption to its no-beard rule undermined its claim that it could not administer a *religious* exemption to that rule. *Id*. at 866.

In light of *Holt*, the district court properly considered the Florida prison system's provision of individualized diets to prisoners with medical needs. Doc. 77-11 at 1; Doc. 1 at 49. Therapeutic diets impose an expense on the prison system that is virtually identical to the burden imposed by providing kosher meals. Doc. 77-11 at 1. As mentioned above, kosher meals cost $3.53 per inmate per day (Doc. 88 at 13), and in February 2015, there were 1031 prisoners in the kosher-meal program. See *United States* v. *Secretary, Fla. Dep't of Corr.*, No. 12-22958-CIV, 2015 WL 1977795, at *3 (S.D. Fla. Apr. 30, 2015). The prison system

provides therapeutic diets, which range in cost from $2.00 to $3.00 per inmate per day (Doc. 88 at 13, 27) to more than 3000 inmates system-wide (Doc. 77-11 at 1), *Secretary, Fla. Dep't of Corr.*, 2015 WL 1977795, at *5. And both regimes require advance application and approval. Indeed, therapeutic diets presumably impose greater logistical difficulties than kosher meals because they must be personalized to a specific inmate's medical condition, while kosher meals are one-size-fits-all. The State's ability to provide such therapeutic meals undercuts its claim that providing a "special[]" diet would cause unmanageable administrative difficulties, problems with bartering, and fights over food. Br. 29; Doc. 77-9 at 3-4.[9]

The State argues that medical diets are "not comparable" to religious ones because they are "medically necessary" and constitutionally required. Br. 39-40 (citing *Martinelli* v. *Dugger*, 817 F.2d 1499, 1507 (11th Cir. 1987), cert. denied 484 U.S. 1012, 108 S. Ct. 714, abrogated by *O'Lone* v. *Estate of Shabazz*, 482 U.S. 342, 349, 107 S. Ct. 2400, 2404 (1987)). But both types of diets are required by federal law. Indeed, RLUIPA "'affords confined persons greater protection of religious exercise than what the Constitution itself affords.'" *Smith* v. *Allen*, 502

[9] The prison also provides, apparently without significant difficulty, an administrative process to approve certain inmates for special vegan meals. Doc. 77-9 at 1; Doc. 42 at 1, 5-6; see also *Secretary, Fla. Dep't of Corr*., 2015 WL 1977795, at *3.

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).

Indeed, this Court already recognized, in a kosher-meal case predating *Holt*, that Florida's ability to "administer a therapeutic diet program without * * * inmate morale and administrative cost problems" undermines the State's claim that such problems "would plague a kosher meal program." *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013). There, as here, the prison system's ability to offer a "therapeutic meal program * * * suggests that there are less restrictive means" of controlling costs and administrative problems than disallowing kosher meals altogether. *Id*. at 534. That conclusion has only been strengthened by the Supreme Court's ruling in *Holt*.

B. The District Court Properly Considered Other Prisons' Practices

The *Holt* Court recognized that other prisons' ability to accommodate a plaintiff's request can strongly indicate that an outright prohibition is not the least restrictive means to achieve a compelling interest. *Holt*, 135 S. Ct. at 861. Not only did the *Holt* Court conclude that other prison systems' provision of an accommodation is relevant to the RLUIPA analysis, but it required prison officials "to show, in the face of [such] evidence, why the vast majority of States and the Federal Government permit [the accommodation], but it cannot." *Id.* at 866.

Similarly, in *Cutter* v. *Wilkinson*, the Supreme Court found it relevant in evaluating RLUIPA's constitutionality that the Federal Bureau of Prisons (BOP) "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." 544 U.S. 709, 725, 125 S. Ct. 2124 (2005) (citation omitted).

Against this backdrop, it is hardly surprising that this Court held in *Rich* that "[w]hile 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." 716 F.3d at 534. The *Rich* Court noted that the BOP and a plurality of state prison systems had been able to offer religious dietary accommodations and rejected "[d]efendants' 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." *Ibid.* In this case, as the court concluded, Florida prison officials have *still* "not explained '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.'" Doc. 88 at 26-27 (quoting *Rich*, 716 F.3d at 534).

The prison system is wrong that this Court's decision in *Knight* v. *Thompson*, 723 F.3d 1275 (11th Cir. 2013), reinstated in part, superseded in part by 797 F.3d 934 (2015), prohibits consideration of other systems' practices. Cf. Br. 41-43. Indeed, in language omitted from the prison system's brief (Br. 42), *Knight* held that other prisons' practices are indeed "relevant to the RLUIPA analysis." *Knight*, 797 F.3d at 947 (citing *Rich*, 716 F.3d at 534). *Knight* affirmed a district court's decision to uphold a hair-length restriction, despite evidence that the BOP and most state prison systems allow prisoners to have long hair, because the court concluded that other evidence—including security considerations specific to the defendant—pointed the other way. *Id*. at 945. Given this countervailing evidence and "the district court's factual findings," the Court was reluctant to reverse the lower court's decision. *Id*. at 945.

Here, however, the district court rightfully ruled in the plaintiff's favor. Not only do *most* prison systems in the country provide kosher food, but Florida has itself successfully done so in the past, and the State provided no reasons why it could not do so again. The BOP began offering kosher meals in 1979, offered them nationwide in 1995, and now serves them in all its facilities, including its Florida facilities and its maximum-security facilities. Furthermore, at least 35 state prison systems, including those in New York, California, and Texas, provide kosher meals. *Lawson* v. *Department of Corr*., No. 4:04-CV-00105-MP-GRJ,

2015 WL 9906259, at *10 & n.4 (N.D. Fla. Sept. 30, 2015), report and recommendation adopted, No. 4:04-CV-00105-MP-GRJ, 2016 WL 297710 (N.D. Fla. Jan. 22, 2016); see also *United States* v. *Secretary, Fla. Dep't of Corr.*, No. 12-22958-CIV, 2013 WL 6697786, at *6 (S.D. Fla. Dec. 6, 2013), judgment vacated, and appeal dismissed, 778 F. 3d 1223 (11th Cir. 2015); *Rich*, 716 F.3d. at 534. Because the State has not identified any unique characteristics of the Florida prison system that render it distinct from the BOP or the systems of these other states, it falls short on *Holt*'s directive to "offer persuasive reasons why it believes that it must take a different course." *Holt*, 135 S. Ct. at 866.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify, pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), that the BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE:

(1) complies with Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it contains less than 7,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2007, in 14-point Times New Roman font.

Dated: April 22, 2016

s/April J. Anderson
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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2016, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* SUPPORTING PLAINTIFF-APPELLEE AND URGING AFFIRMANCE with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

I further certify that seven copies of the same brief were mailed to the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by certified U.S. mail, postage prepaid.

I further certify that on April 22, 2016, the foregoing brief was mailed to the following by certified U.S. mail, postage prepaid:

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