NO. 12-11735

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRUCE RICH,

PLAINTIFF-APPELLANT,

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *ET AL.*,

DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA, GAINESVILLE DIVISION
NO. 1:10-CV-00157-MP-GRJ – HON. MAURICE M. PAUL

BRIEF OF PRISON FELLOWSHIP MINISTRIES, THE CHRISTIAN LEGAL SOCIETY, AND THE NATIONAL ASSOCIATION OF EVANGELICALS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

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

1. Andrews, Jeffrey: Defendant-Appellee, Food Service Director;
2. Belitzky, Joe: Office of the Attorney General, counsel for Defendants-Appellees;
3. Bierman, Carrie R.: Cravath, Swaine & Moore LLP, counsel for *Amici Curiae* Prison Fellowship Ministries, the Christian Legal Society, and the National Association of Evangelicals;
4. Bondi, Pam: Office of the Attorney General, counsel for Defendants-Appellees;
5. Brooks, Roger G.: Cravath, Swaine & Moore LLP, counsel for *Amici Curiae* Prison Fellowship Ministries, the Christian Legal Society, and the National Association of Evangelicals;
6. Buss, Edwin G.: Defendant-Appellee, Secretary of Florida Department of Corrections;

7. Christian Legal Society: *Amicus Curiae*;

8. Colby, Kimberlee Wood: Christian Legal Society, *Amicus Curiae*;

9. Deno, Julie: Defendant-Appellee, Food Service;

10. Fuhrman, Kathleen: Defendant-Appellee, Registered Dietician;

11. Goodrich, Luke W.: The Becket Fund for Religious Liberty, counsel for Plaintiff-Appellant;

12. Hicks, Milton: Defendant-Appellee, former retired warden;

13. Jones, Gary R.: Magistrate Judge;

14. Maher, Susan Adams: Office of the Attorney General, counsel for Defendants-Appellees;

15. McNeil, Walter: Defendant-Appellee, former Secretary of Florida Department of Corrections;

16. National Association of Evangelicals: *Amicus Curiae*;

17. Paul, Maurice M.: Senior District Judge;

18. Prison Fellowship Ministries: *Amicus Curiae*;

19. Rassbach, Eric C.: The Becket Fund for Religious Liberty, counsel for Plaintiff-Appellant;

20. Rich, Bruce: Plaintiff-Appellant;

21. Robinson, S.T.: Defendant-Appellee, former Assistant Warden of Programs

22. Stubbs, Joy A.: Office of the Attorney General, counsel for Defendants-Appellees;

23. Taylor, Alex: Defendant-Appellee, Chaplaincy Services Administrator; and

24. Thigpen, Albert: Defendant-Appellee, Food Service Administrator.

August 8, 2012

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"Upchurch Aff. ¶ __"	Affidavit of James Upchurch, Exhibit B to Defendants' Motion for Summary Judgment, in *Rich v. Buss, et al.*, 1:10-cv-00157-MP-GRJ, filed August 1, 2011.
"Op. at __"	Report and Recommendation of the United States District Court for the Northern District of Florida in *Rich v. Buss, et al.,* 1:10-cv-00157-MP-GRJ, dated January 12, 2012, also available at 2012 WL 694839 (N.D. Fla. Jan. 12, 2012).

The undersigned respectfully submit this brief *amicus curiae* in support of Plaintiff-Appellant and reversal of the District Court's decision, dated March 4, 2012, in *Rich v. Buss*, No. 1:10-cv-00157-MP-GRJ, 2012 WL 695023 (N.D. Fla. Mar. 5, 2012).

STATEMENT OF INTEREST

This brief is submitted on behalf of *amici curiae* Prison Fellowship Ministries, the Christian Legal Society, and the National Association of Evangelicals.

Prison Fellowship Ministries is the largest prison ministry in the world, and partners with thousands of churches and tens of thousands of volunteers to care for prisoners, former prisoners and their families. With one-on-one mentoring, in-prison seminars and various post-release initiatives, Prison Fellowship Ministries uses religious-based teachings to help guide prisoners when they return to their families and society, and thereby contributes to restoring peace in those communities most endangered by crime. Prison Fellowship Ministries has also vigorously defended the right of inmates of all faiths to practice their faith in prison. Prison Fellowship Ministries was active in the defeat of efforts in Congress to exclude prisoners from the protections of the Religious Freedom and Restoration Act of 1990 ("RFRA"), was an active leader in the broad coalition that drafted and

secured passage of the Religious Land Use and Incarcerated Persons Act of 2000 ("RLUIPA"), and has defended RLUIPA in courts through amicus briefs.

The Christian Legal Society is an association of Christian attorneys, law professors, and law students dedicated to the defense of religious freedoms. From its inception, members of the Christian Legal Society have fought to preserve religious organizations' autonomy from the government, and to protect the free exercise rights of persons of all faiths.

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It believes that religious freedom is God-given, and that the government does not create such freedom, but is charged to protect it. It is grateful for the American legal tradition of safeguarding religious freedom, and believes that this jurisprudential heritage should be carefully maintained.

In addition to a long tradition of litigation representations, each of the *amici* played an active role in the drafting and advocacy of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, *et seq.*, the law at issue in this litigation. After conducting extensive hearings and finding that various state prison systems were imposing "frivolous or arbitrary" restrictions on prisoners' practice of their religions, 146 Cong. Rec. 16,699 (2000) (joint statement of Sens. Orrin Hatch and Edward Kennedy), a unanimous Congress

enacted RLUIPA to protect the free exercise rights of prisoners against unnecessary governmental restriction. Now, the statute is under attack by various state agencies which, under the banner of conclusory security concerns, seek to narrow (or dispense with altogether) RLUIPA's free exercise safeguards. Respect for the language of the statute, respect for the legislative intent, and an appropriate concern for religious rights—even those of prisoners—all require that this Court reject that invitation and apply the statute with the full force intended by Congress.

Furthermore—and this is of grave concern to *amici*—this Court's treatment of RLUIPA will have implications far beyond prison walls. Because RLUIPA incorporates the traditional constitutional strict scrutiny analysis, any effort to "tone down" strict scrutiny in this context threatens to weaken strict scrutiny across the board. As the Supreme Court has warned, the "watering down" of strict scrutiny in one context will inevitably "subvert its rigor in other fields where it is applied". *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 888, 110 S. Ct. 1595, 1605 (1990).

STATEMENT OF ISSUES

As stated in Appellant's opening brief, the relevant issues are as follows:

1. Whether the Florida Department of Corrections has established as a matter of law that the denial of a kosher diet is the least restrictive means of furthering a compelling governmental interest.

2. Whether the District Court erred by denying plaintiff's request for additional discovery under Federal Rule of Civil Procedure 56(d). (Appellant Br. at 1.)

This brief will address the first of these issues.

SUMMARY OF THE ARGUMENT

This is a case about the scope of a State's obligation, under RLUIPA, to accommodate inmates' religious observations, once the State has made the decision to accept federal funds subject to RLUIPA's statutory requirements.

It is undisputed that the State of Florida has accepted funds tied to RLUIPA's requirements, and so must comply with those requirements. It is undisputed that the Florida Department of Corrections ("FDOC") has refused to and does not wish to provide kosher meals to Bruce Rich, an orthodox Jew who keeps strictly to the dietary mandates of his faith. It is undisputed that Mr. Rich's orthodox Jewish faith is sincere, and that "keeping kosher" is and has been a vital tenet of that faith for thousands of years.

Nevertheless, mistakenly relying on two conclusory affidavits from FDOC employees, and mistakenly guided by two erroneous lower court decisions, the District Court granted pre-discovery summary judgment for the prison on Mr. Rich's claim under RLUIPA, denying him even the opportunity to take discovery. The Court should correct the legal error below, and give full effect to RLUIPA's

express and unambiguous mandate that the State shall not place any "substantial burden" on prisoners' free exercise rights unless the State can satisfy the rigorous and well-established "strict scrutiny" standard.

RLUIPA is structured as a package deal between state prison systems and the federal government. Under the deal, states that acquiesce to RLUIPA's terms are awarded additional federal funds. In exchange, those states must not restrict an inmates' religious exercise absent a showing that: 1) the challenged government policy furthers a compelling governmental interest; and 2) the challenged policy is the least restrictive means to further that interest. *See* 42 U.S.C. § 2000cc-1(a). Perhaps even more importantly—because it gives teeth to these requirements—the government must "*demonstrate*" with specific facts that each element is met. *Id.* (emphasis added). Mere conclusions or speculation will not do.

In this case, the trial court accepted just that. Departing from well-established authority, the District Court accepted speculative and cursory declarations—void of any specific facts or empirical data—as sufficient to justify the State's forcing Mr. Rich to violate core requirements of his faith. Indeed, the court relied on such conclusory statements to grant summary judgment so as to deny Mr. Rich even an opportunity to make his case. Further, the court below did not even consider the requirement that the State demonstrate that refusal to provide

kosher meals was the "least restrictive means" by which it could achieve its compelling interest of prison security. Given that a large majority of states do provide kosher meals to observant Jewish prisoners, it is almost impossible that FDOC could make such a showing. In short, the court allowed the State to keep RLUIPA-conditioned federal funds while running roughshod over RLUIPA's requirements.

Ample and authoritative precedent from the Supreme Court and lower courts says that this ruling cannot stand. However, while the court below was wrong, it was not uniquely wrong. Two courts addressing factually analogous situations have wrongly allowed prisons to limit religious exercise based on mere hypotheses and generalized assertions from prison officials, without requiring the statutorily required factual *showing*. These two cases, like the decision below, threaten to erode the meaning of "strict scrutiny", both in the context of RLUIPA, and more widely. *Amici curiae* submit this brief to urge this Court to affirm the correct application of strict scrutiny, and to make clear that in this Circuit, a state that chooses to accept federal funds subject to RLUIPA but nevertheless wishes to impose "substantial burdens" on inmates' free exercise is required to clear the high bar of strict scrutiny, not some lesser and newly invented standard.

ARGUMENT

II. RLUIPA REQUIRES THE APPLICATION OF THE TRADITIONAL "STRICT SCRUTINY" TEST.

The judicially created standard of "strict scrutiny" was adopted to protect this country's most important civil rights from government intrusion. Courts have applied strict scrutiny to government actions that discriminate based on race, *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227, 115 S. Ct. 2097, 2113 (1995), regulate content of free speech, *United States v. Playboy Entertainment Group*, 529 U.S. 803, 813-14, 120 S. Ct. 1878, 1886-87 (2000), or impinge on "fundamental rights", *Washington v. Glucksberg*, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 2268 (1997).

Thus, the test is undeniably and intentionally exacting: *First*, the government must demonstrate that its action furthers a "compelling governmental interest". *Second*, the government must demonstrate that denial of free exercise is the "least restrictive means" available to achieve that interest. *Playboy Entm't Grp.*, 529 U.S. at 813-14, 120 S. Ct. at 1886-87. And integral to both these prongs is a requirement that should be emphasized in its own right: the burden of proof facing the government. "To survive strict scrutiny . . . a State must do more than *assert* a compelling state interest—it must *demonstrate* that its law is necessary to serve the asserted interest." *Burson v. Freeman*, 504 U.S. 191, 199, 112 S. Ct. 1846, 1852 (1992). Not surprisingly, strict scrutiny is considered the "most

rigorous and exacting standard of constitutional review". *Miller v. Johnson*, 515 U.S. 900, 920, 115 S. Ct. 2475, 2490 (1995).

There should be no dispute that the test required by RLUIPA is exactly this "strict scrutiny" test developed by the Supreme Court in the context of protecting other constitutional rights. That Congress imported the Supreme Court's articulation of the strict scrutiny test verbatim into the text of the statute is a matter of fact.[1] It is equally indisputable that importation of this preexisting "strict scrutiny" test into the context of prisoners' free exercise rights was exactly what Congress intended. 146 Cong. Rec. 19,123 (2000) (statement of Rep. Charles T. Canady) (explaining that RLUIPA was "intended to codify the traditional compelling interest test").[2] There is no invitation in either the statutory text or the

[1] *Compare* 42 U.S.C. § 2000cc-1(a) (stating that "[n]o government shall impose a substantial burden on the religious exercise" of a prisoner unless the imposition of the burden "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest") *with Playboy*, 529 U.S. at 813-14, 120 S. Ct. at 1886-87 (holding that in order to satisfy strict scrutiny, a statute that regulates speech based on its content "must be narrowly tailored to promote a compelling Government interest" and be the "least restrictive means" to further that interest).

[2] The Congressional Record is replete with references to this objective. *See, e.g.*, 146 Cong. Rec. 16,702 (2000) (statement of Sen. Reid) (describing the strict scrutiny test to be applied under RLUIPA, which is "the highest standard the courts apply to actions on the part of government"); *id.* at 16,996 (2000) (statement of Sen. Strom Thurmond) (same).

legislative history for courts to "dumb down" strict scrutiny in this one particular context by crafting some new "strict scrutiny lite" for RLUIPA alone.

Faithful to this statutory background, courts—including this one—have repeatedly recognized that RLUIPA applies the pre-existing strict scrutiny test to the context of free exercise within prisons. For example, in *Benning v. Georgia*, 391 F.3d 1299, 1304 (11th Cir. 2004), the Eleventh Circuit held that "RLUIPA applies strict scrutiny to government actions that substantially burden the religious exercise of institutionalized persons", while the Fifth Circuit reached the same conclusion in *A.A. ex rel. Betenbaugh v. Needville Independent School District*, 611 F.3d 248, 270 (5th Cir. 2010) (noting that RLUIPA "gives courts the power to mete out religious exemptions to federal prisoners under strict scrutiny").[3] And, while *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430, 126 S. Ct. 1211, 1220 (2006) concerned the Religious Freedom Restoration Act ("RFRA") rather than RLUIPA, the relevant RFRA statutory language is identical to that of RLUIPA, and there the Supreme Court held that "Congress's express decision to legislate the compelling interest test indicates that RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test".

[3] *See also* cases cited *infra* at Section II.A.

III. THE STATE HAS NOT SHOWN THAT FORCING OBSERVANT JEWISH PRISONERS TO EAT NON-KOSHER MEALS "FURTHERS" COMPELLING SECURITY GOALS.

A. Generalities and Mere Apprehensions Are Insufficient To Show That the Denial of Kosher Meals "Furthers" the State Interest in Prison Security, and Florida Offers Nothing More.

The District Court granted Defendants' motion for summary judgment based solely on the affidavits of two prison officials. On inspection, these two affidavits provide no justification for the denial of kosher meals other than cost (the sole topic of the Fuhrman Affidavit), and mere speculation as to possible security issues that providing kosher meals might implicate (the topic of the Upchurch Affidavit).

As to cost, Appellant has cited conclusive authority holding that, while cost may be relevant to achieving a compelling government interest, saving money is not, in and of itself, a "compelling government interest" (Appellant Br. at 32-34), and *amici* will not address that point.

As to security, the Court will search the Upchurch Affidavit in vain for identification of a *single* specific instance of a security problem—within an FDOC prison or anywhere in America—precipitated by providing kosher meals to Jewish prisoners. The Court will search in vain for reference to a single study supporting the various hypothesized scenarios of "discord", "unrest", and "retaliation" that Mr. Upchurch spins. (Upchurch Aff. ¶¶ 8, 11.) In paragraph 5 of

his affidavit, Mr. Upchurch asserts that "some" of the security issues that he discusses "manifested themselves while the Jewish Dietary Accommodation Program (JDAP) was in operation during 2007, as discussed further herein", but in fact he scarcely discusses the experience of the JDAP "further herein" at all, and does not identify a single security problem experienced in connection with that program. Instead, all the Court will find are hypotheses and speculations. Mr. Upchurch speculates that providing Appellant with a kosher meal "would *likely* result in other inmates attempting to obtain a similar special religious diet especially *if* the kosher diet is believed to provide better quality and/or more food." (Upchurch Aff. ¶ 7 (emphasis added).) Upchurch does not even opine that kosher meals *would* be perceived as better or larger. He argues that "the worst case scenario would be *if* inmates believed that the higher cost to provide the kosher diet was *somehow* impacting in a negative way the quality and quantity of the food being served to them in the general population". (Upchurch Aff. ¶ 11 (emphasis added).) Upchurch does not actually opine that inmates *would* believe any such thing, but he nevertheless goes on to hypothesize that this contingency "would *likely* lead to retaliation against the kosher inmates and/or disruption of the institution in general by the non-diet inmates to express their displeasure". (Upchurch Aff. ¶ 11 (emphasis added).)

None of this is remotely adequate, as a matter of law, to *demonstrate* that denial of kosher meals actually "furthers" prison security. Certainly, both Congress[4] and the Supreme Court have cautioned that RLUIPA did not "elevate accommodation of religious observances over an institution's need to maintain order and safety", *Cutter v. Wilkinson*, 544 U.S. 709, 722, 125 S. Ct. 2113, 2122 (2005), and that the strict scrutiny analysis must be applied recognizing the security needs of the prison setting, and with "due deference to the experience and expertise of prison and jail administrators", *Cutter*, 544 U.S. at 723, 125 S. Ct. at 2123. But this "deference" does not excuse the State from the requirement to *demonstrate*—rather than speculate—that its denial of free exercise actually furthers prison security. As the sponsors of RLUIPA stated, "The compelling interest test is a standard that responds to facts and context", 146 Cong. Rec. 16,699 (joint statement) and "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements", *id.* (quoting

[4] The Congressional sponsors of RLUIPA encouraged courts to apply the Act's standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources". 146 Cong. Rec. 16,699 (joint statement) (quoting S. Rep. No. 103-111, at 10 (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News 1892, 1899, 1900).

S. Rep. No 103-111, at 10 (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News 1892).

This was indeed a common theme of two Supreme Court decisions that Congress specifically referenced as guiding precedent when it passed RLUIPA, *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205, 92 S. Ct. 1526 (1972).[5] In *Sherbert,* the Court rejected as inadequate the State's argument that accommodating Saturday sabbatarians (which could include both Jews and Seventh Day Adventists) "might" lead to "the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work", noting that the State had put forth "no *proof* whatsoever to warrant such fears of malingering or deceit as those which the respondents now advance". 374 U.S. at 407, 83 S. Ct. at 1795 (emphasis added).[6] Similarly, in the landmark *Yoder* case, the Supreme Court granted that the State had an interest in

[5] RFRA, the statutory predecessor to RLUIPA, expressly adopted "the compelling interest test as set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972)". 42 U.S.C. § 2000bb(b)(1). In passing RLUIPA, Congress noted that it meant RLUIPA to apply the same standard as RFRA. *See* 146 Cong. Rec. 16,699.

[6] Although this statement was dicta, as the State had not raised the argument below, the Court's reasoning was later cited with approval in *O Centro*, 546 U.S. at 436, 126 S. Ct. at 1223, and dicta from the Supreme Court is especially persuasive. *See Peterson v. BMI Refractories*, 124 F.3d 1386, 1392 n. 4 (11th Cir. 1997) ("[D]icta from the Supreme Court is not something to be lightly cast aside.").

"compulsory education", but held that the State must make an exception to accommodate the contrary religious tenets of the Amish because "it was incumbent on the *State show with more particularity* how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish." *Yoder*, 406 U.S. at 221, 92 S. Ct. at 1543 (emphasis added).[7]

More recently, in *O Centro*, a case applying RFRA, the Supreme Court continued the same theme. While acknowledging a compelling interest in controlling the use of the "exceptionally dangerous" substance "hoasca", which contained a hallucinogen, the Court held that the Federal Government was nevertheless required by RFRA to grant an exception to a religious sect that used hoasca in its sacramental ceremonies, because the government had failed to "offer[] *evidence* that granting the requested religious accommodations would seriously compromise its ability to administer the program." *O Centro*, 546 U.S. at 435, 126 S. Ct. at 1223 (emphasis added). In fact, the Court noted that the *Cutter* decision of the prior year had reaffirmed "the feasibility of case-by-case

[7] On similar grounds, the Court rejected the State's argument that Amish children should be subject to compulsory education because of the "possibility" that some may choose to leave the Amish community and will then be ill-equipped for life. *Yoder*, 406 U.S. at 224, 92 S. Ct. at 1537. The Court dismissed this argument as "highly speculative" because there was "no specific evidence" that Amish regularly leave the community or that if they leave, they are not equipped to contribute to society. *Id.*

consideration of religious exemptions to generally applicable rules", a consideration only possible based on *evidence* rather than mere assertion. *O Centro*, 546 U.S. at 436, 126 S. Ct. at 1223.

The requirement that the government provide *evidence* of how the burdening of plaintiff's rights actually furthers the asserted compelling interest serves to keep the government's burden steep. Permitting governments to satisfy strict scrutiny through unsupported assertions of the general benefits of a policy would eliminate the entire purpose of strict scrutiny—which is to allow for religious *exemptions* from laws of general applicability. As the Supreme Court warned, if strict scrutiny is to retain any meaning—and the rights it protects retain any vitality—state actors must offer more than "slippery slope concerns that could be invoked in response to any . . . claim". *O Centro*, 546 U.S. at 436-37, 126 S. Ct. at 1223.[8]

[8] Notably, even when courts have applied the less stringent "legitimate penological interests" test to determine whether certain prison regulations improperly infringe on a prisoner's constitutional rights, *Turner v. Safley*, 482 U.S. 78, 89, 107 S. Ct. 2254, 2261 (1987), they have required the government to do more than merely assert safety concerns. *See, e.g., Walker v. Sumner*, 917 F.2d 382, 386-87 (9th Cir. 1990) (reversing summary judgment where prison failed to offer sufficient evidence that mandatory AIDS tests for prisoners was based on legitimate penological objectives, but merely offered "conclusory assertions" that the tests were meant to protect the health, welfare, and safety of the prison population); *Caldwell v. Miller*, 790 F.2d 589, 598-99 (7th Cir. 1986) ("The interest in preserving order and authority in a prison is self-evident, and internal security is central to all other correctional goals. Nonetheless, in the absence of

Following this strong line of teaching from the Supreme Court, circuit courts have repeatedly held that conclusory statements in affidavits from prison officials, or other mere assertions, are insufficient to satisfy the showing required under RLUIPA. For example, in *Spratt v. Rhode Island Department of Corrections,* 482 F.3d 33 (1st Cir. 2007), the First Circuit refused to credit an affidavit from a prison official that cited neither studies nor any supporting research, and failed to offer any factual explanation as to why the prison's ban on inmate preaching furthered the interests of security. *Id.* at 39. The court found that "Self-serving affidavits [about the need to promote prison safety] that do not contain adequate specific factual information based on personal knowledge are insufficient to defeat a motion for summary judgment, let alone sustain one." *Id*. In *Washington v. Klem*, 497 F.3d 272 (3d Cir. 2007), the Third Circuit held that "Even in light of the substantial deference given to prison authorities, the mere assertion of security . . . reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement. Rather, the particular policy must further this interest." *Id.* Thus, "A conclusory statement is not enough." *Id*. Similarly, in *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir.

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evidentiary support, Miller's assertion that a total ban on all group religious services is and was reasonably necessitated by security considerations is conclusory, and hence, an insufficient basis for summary judgment.").

2010), the Tenth Circuit remanded an RLUIPA claim because "there simply is no record evidence regarding [the state's] contentions" that refusal to provide a halal diet furthered security interests. *Id.* at 1318-19.[9]

The District Court relied heavily on two different cases: *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007), and *Linehan v. Crosby*, No. 06-CV-00225, 2008 WL 3889604 (N.D. Fla. Aug. 20, 2008), *aff'd* 346 F. App'x 471 (11th Cir. 2009). (*See* Op. at 9-11.) However, to the extent these cases diverge from the long line of authority cited above, they were wrongly decided by courts that—unlike the Supreme Court—did not take RLUIPA seriously, and failed to actually apply the "strict scrutiny" standard.

The *Baranowski* court upheld a refusal to provide kosher meals based on an affidavit from the director of the prison's Chaplaincy Department, which asserted that providing kosher food would be too costly and "would raise resentment among other inmates because payments for kosher meals would of necessity come out of the general food budget for all inmates". 486 F.3d at 118.

[9] *See also Jova v. Smith*, 582 F.3d 410, 415 (2d Cir. 2009) ("[T]he state may not merely reference an interest in security or institutional order in order to justify its actions."); *Lovelace v. Lee*, 472 F.3d 174, 190-92 (4th Cir. 2006) (refusing to hold that asserted interests were compelling given government's failure to present evidence); *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988-89 (8th Cir. 2004) ("[Officials] must do more than offer conclusory statements and offer post hoc rationalizations for their conduct.").

The court found that this adequately established that the prison's policy of not providing a kosher meal "is related to maintaining good order and controlling costs and, as such, involves compelling governmental interests". *Id.* at 125. This reasoning is wide of the mark in several respects. *First*, as noted above, "controlling costs" has definitively been held not to be a compelling state interest in and of itself. (Appellant Br. at 32-34.) *Second*, it is by no means sufficient under strict scrutiny that a challenged policy "is related to" or "involves" a compelling interest: the State has a burden to show that the policy *furthers* that interest, and is the *least restrictive means* available of doing so. (*See infra* Section I.) *Third*, the affidavit did *not* (so far as the opinion reveals) provide any factual basis for the assertion that money spent on kosher meals would necessarily degrade meal service for other inmates (it is difficult to imagine that the head chaplain could have a basis for such knowledge), nor for the assertion that serving kosher meals would "raise resentment", nor for the conclusion that such resentment, if it occurred, would have any significant impact on security in the prison setting, in which "resentment" among inmates is notoriously rife for far more serious reasons including gang affiliation.

The decision of the Northern District of Florida in the *Linehan* case relied almost entirely on *Baranowski* rather than the many precedents discussed above, and was wrongly decided for essentially the same reasons that infect the

decision below in this case. Like the present case, *Linehan* concerned denial of kosher meals and, as in the present case, the State relied entirely on conclusory affidavits from Mr. Upchurch and Ms. Fuhrman—only the former addressing security concerns. As in this case, Upchurch testified that providing plaintiff with a kosher meal "would be seen by the rest of the inmates as preferential treatment resulting in a negative impact on morale and subsequently the institutional environment and orderly operation", gang members would attempt to manipulate the system by opportunistically claiming to be a certain faith in order to be transferred together to institutions providing kosher meals, and there would be a risk of retaliation from prisoners receiving non-kosher meals. *Linehan*, 2008 WL 3889604, at *6. Like the court below here, the *Linehan* court failed to insist that defendants offer any specific evidence—or anything at all other than bare assertion—that providing kosher meals actually threatens prison security. As in his affidavit in this case, Upchurch spoke of "risks" of perceptions of preferential treatment, negative impact on morale, and retaliation, but identified no historical instances or other factual basis for such fears. *Compare id. with* Upchurch Aff. ¶¶ 6, 9, 11. Both affidavits also assert as a matter of historical fact that gang members "attempted" to manipulate the system in order to get assigned to the same facility, but neither describes a single incident in which these "attempts" succeeded or were not adequately handled by the prison officials. *Linehan*, 2008 WL 3889604, at *6;

Upchurch Aff. ¶ 10. Similarly, in both affidavits Upchurch warned in general terms that some prisoners had claimed to be Jewish to receive the special diet—without explaining how that threatened security. *Linehan*, 2008 WL 3889604, at *6; Upchurch Aff. ¶ 7. Given this complete dearth of factual showing of any negative impact on security, Upchurch's *Linehan* affidavit was utterly inadequate to meet the State's strict scrutiny burden under RLUIPA for all the reasons we have discussed in connection with his affidavit in the present case, and we will not repeat the discussion. *Linehan* is misleading, and simply highlights the urgency that this Court make a clear statement of the requirements of RLUIPA and how they must be met.[10]

[10] This analysis need not disturb the result of the Eleventh Circuit's non-precedential affirmance of *Linehan*, *see* 11th Cir. R. 36-2, because there the Court was considering an appeal from a denial of a motion to alter or amend the judgment, which is decided under the abuse of discretion standard. *Linehan*, 346 F. App'x at 472. Furthermore, in *Linehan*, the defendants offered uncontroverted evidence that the vegan diet provided to the prisoner satisfied the tenets of his faith, and the prisoner, unlike Appellant, did not dispute the security concerns expressed in Upchurch's affidavit. *Linehan*, 2008 WL 3889604, at *6-8; *see also Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) (noting that the district court did not abuse its discretion in denying a motion to alter or amend a judgment, where that motion did "nothing but ask the district court to reexamine an unfavorable ruling").

B. Mere Recitations That Denying Kosher Meals Will Save Money Cannot Constitute a Showing That Denial Will Further the State Interest in Prison Security.

While we have said that saving money is not itself a compelling government interest (*see supra* Section I.A), cost may in some cases be relevant to *achieving* a compelling interest such as prison security. Florida has not, however, made a showing that could establish (much less establish so indisputably as to justify summary judgment) that the cost of providing kosher meals will reduce prison security.

First, as to the foundational facts, it is difficult to credit Ms. Fuhrman's stark estimates of the minimum cost required to supply kosher meals, given that the majority of state prison systems, and the federal prison system all find a way to provide kosher meals within their own chronically tight budget constraints. (*See infra* Section III.A.) Certainly, a jury would be entitled not to credit her estimates, and should have been given the chance to doubt them.

Second, Florida has provided no evidence that savings on kosher meals would improve, or that spending on kosher meals would degrade, prison security. While Mr. Upchurch "testifies" to the truism that resources required to provide kosher meals "can only be obtained by redeployment from other areas" (Upchurch Aff. ¶ 10), states constantly balance a vast array of priorities, both within the overall prison system budget, and between "corrections" and other state

goals. No affiant says, and no reason is given to believe, that the incremental money spent on kosher meals would result in reduced expenditures on prison security.

Third, given that the free exercise accommodation requirements of RLUIPA are not absolute mandates, but rather come only as conditions on certain federal grants to state prison systems, it is difficult to see how Florida could possibly show that the RLUIPA funding-with-obligations package *detracts* from Florida's legitimate goal of prison security. Essentially, Congress decided that it wanted to encourage accommodation of prisoners' free exercise of religion, and was prepared to pay for that.[11] This type of federal "package deal" is permissible. *See South Dakota v. Dole*, 483 U.S. 203, 206, 107 S. Ct. 2793, 2795-96 (1987) ("Congress may attach conditions to the receipt of federal funds".). If Florida believes that the funding offered exceeds the cost of accommodating free exercise by prisoners, then it will accept the funding and the obligations, and will have more, not less, money for other prison priorities—even after paying for kosher

[11] Religious dietary observance was explicitly one of the types of free exercise that Congress, through RLUIPA, intended to motivate states to accommodate. *See Cutter*, 544 U.S. at 716 n.5, 125 S. Ct. at 2119 (citing "typical examples" of barriers impeding religious exercise, including refusal to provide halal food to Muslim inmates while offering kosher food to Jewish prisoners, and unwillingness to provide Jewish inmates with sack lunches to facilitate breaking fasts after nightfall).

meals. By contrast, if Florida believes that the funding offered will not cover the cost of complying with the conditions, it can decline the funding, and make its own budget choices unconstrained by RLUIPA. *See, e.g.*, *Van Wyhe v. Reisch*, 581 F.3d 639, 652 (8th Cir. 2009) ("If a State's citizens view federal policy as sufficiently contrary to local interests, they may elect to decline a federal grant."); *Madison v. Virginia*, 474 F.3d 118, 128 (4th Cir. 2006) ("[T]he choice to accept or reject federal funds remains the prerogative of the States.").[12] Indeed, since the state is completely free to evaluate that financial balance and decide whether to "comply[] with the conditions set forth in the [relevant legislation] or forgo[] the benefits of federal funding", *Pennhurst State School & Hospital v. Halderman*, 451

[12] The Supreme Court has recognized that "in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which 'pressure turns into compulsion'." *Dole*, 483 U.S. at 211, 107 S. Ct. at 2798 (quoting *Steward Mach. Co. v. Davis*, 301 U.S. 548, 590, 57 S. Ct. 883, 892 (1937)). However, no court has found that the amount of federal funding provided to state prisons renders the statutory conditions imposed by RLUIPA unconstitutionally coercive. *See Van Wyhe*, 581 F.3d at 652 (holding that federal contributions to a prison that ranged between 9.5% and 17.35% of the state's annual corrections budget "do[] not render the statute unconstitutionally coercive"); *Madison v. Virginia*, 474 F.3d 118, 128 (4th Cir. 2006) (finding that the "tiny fraction" of federal funding provided to the Virginia Department of Corrections did not "leave the State without a real choice regarding the funds and their conditions"). In fact, the standard created by *Dole* is so high that it is not generally considered coercive to force states to choose whether to forfeit as much as 60% of an agency's operating budget. *See, e.g., Van Wyhe*, 581 F.3d at 652.

U.S. 1, 11, 101 S. Ct. 1531, 1537 (1981), there is no need for the Court to second-guess that balance and that decision.

What cannot be proper is for courts to analyze allegations of *costs* associated with complying with RLUIPA's free exercise obligation in a vacuum, without reference to the *funding* provided by Congress. This would effectively break the balanced package offered by Congress, unravel Congress's clear policy goal of promoting accommodation of free exercise, and permit states to take the money while "declining" the conditions joined by statute to those grants. *See Charles v. Verhagen*, 348 F.3d 601, 609 (7th Cir. 2003) (noting that if the state prison system "wishes to receive any federal funding, it must accept the related, unambiguous conditions [in RLUIPA] in their entirety").

In short, because the requirements of RLUIPA are voluntary, conditional, and accompanied with money, evidence that "kosher meals cost money" is *not* evidence that paying for those meals will leave the State out of pocket—much less that the cost will negatively impact prison security.

IV. THE STATE CANNOT SHOW THAT FORCING OBSERVANT JEWISH PRISONERS TO EAT NON-KOSHER MEALS IS THE "LEAST RESTRICTIVE MEANS" OF ACHIEVING ADEQUATE PRISON SECURITY.

Even if there had been any showing (rather than mere hypotheses) that refusal of kosher meals "furthered" the interest of prison security, the State failed altogether to submit evidence that total denial of kosher meals was the "least

restrictive means" by which it could accomplish its security objectives, and the court below failed altogether to conduct the required "least restrictive means" analysis. Given that at least 35 state prison systems[13] and the Federal Bureau of Prisons[14] provide prisoners with kosher meals, it is logically almost impossible to conceive how that requirement could have been met, and *amici* believe that it is literally impossible that a finding of "least restrictive means" could have been proper at summary judgment. If the ruling below is permitted to stand, then the "least restrictive means" requirement has been simply erased from RLUIPA.

Fortunately, strong authority emphasizes the vitality of the "least restrictive means" prong as a separate requirement and separate analysis. The Supreme Court defined the "least restrictive means" element in the strongest possible terms in *Cutter*, citing with approval the district court's requirement of "[a] finding that it is *factually impossible* to provide the kind of accommodations that RLUIPA will require without significantly compromising prison security or the levels of service provided to other inmates". 544 U.S. at 725, 125 S. Ct. at 2124. While strict scrutiny does not "require prison administrators to refute

[13] Appellant Br. at 9 & n.1.

[14] S*ee* 28 C.F.R. § 548.20; U.S. Dep't of Justice, Fed. Bureau of Prisons, Program Statement No. 4700.06, *Food Service Manual* 22-26 (2011), *available at* http://www.bop.gov/policy/progstat4700_006.pdf.

every conceivable option in order to satisfy the least restrictive means prong", *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996), "prison administrators generally ought to explore at least some alternatives, and their rejection should generally be accompanied by some measure of explanation." *Spratt*, 482 F.3d at 41, n.11. In *Spratt*, the First Circuit held that the government must at least offer some explanation as to why less restrictive policies "would be unfeasible, or why they would be less effective at maintaining institutional security", 482 F.3d at 41, while in *Washington*, the Third Circuit held that a least restrictive means analysis "necessarily implies a comparison with other means", 497 F.3d at 284.[15] As the Fourth Circuit explained, this requirement is not inconsistent with the obligation to defer to the judgment of prison officials, but emphasizes that the State must provide *some* explanation to which a court can defer. *See Couch v. Jabe*, 679 F.3d 197, 203-04 (4th Cir. 2012) (vacating grant of summary judgment where affidavits offered by prison officials failed to show grooming policy was least restrictive means to further health and security concerns).

[15] *See also Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005) ("CDC cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice."); *Murphy*, 372 F.3d at 989 ("It is not clear that [the prison] seriously considered any other alternatives, nor were any explored before the district court.").

How do all those other state and federal prison systems—which necessarily have the similar security interests as Florida—provide kosher meals without triggering the security horrors that the FDOC's affiants predict? *See Warsoldier*, 418 F.3d at 999-1000 ("[F]ailure 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."). *Why* is the state of Florida able to accommodate a bevy of other dietary needs or preferences consistent with security concerns (always providing "meal options for the religious requirements of inmates whose religions require a pork-free, lacto-ovo, or lacto-vegetarian diet", Fla. Admin. Code R. 33-204.003(6)), yet can think of no way to provide kosher meals? *How* is it that the FDOC is able always to provide, upon request, a non-meat "alternate entrée" (Fla. Admin Code R. 33-204.002(3)) without inviting resentment and "retaliation" (*see* Upchurch Aff. ¶ 11)? *What* is the evidence that kosher meals are so notoriously delicious, nutritious (*see* Upchurch Aff. ¶ 7) and envied that they alone cannot be provided without a breakdown of prison order? These are the type of questions that a "least restrictive alternative" analysis would necessarily ask. And even to ask these questions—which the District Court did not do—is to realize that there can be no good answer. A jury would very likely find that the FDOC's purported security concerns are mere pretext for a system that

wishes to avoid the expenditure, can't be bothered, or has simply failed to understand the historic centrality of kosher observance to the orthodox Jewish faith.[16]

Be that as it may, here there was no evidence at all in the record that either the State or the court below even considered and compared any "means" of ensuring adequate security other than outright denial of kosher meals to all prisoners. As detailed in Section II.B *supra*, mere speculation that providing kosher meals might lead to jealousy, conversions of convenience, and "disruption of the institution" is not even a legally adequate showing that denial of kosher meals will actually "further" prison security. Even less does it meet the requirement of demonstrating that it is the "least restrictive means" of doing so.

It is critical not to conflate the "least restrictive means" requirement of the second clause of 42 U.S.C. § 2000cc-1(a) with the "furthers" requirement of the first clause of that provision. The former requirement is additional to, and will often be more difficult to satisfy than, the latter. Nor is it consistent with either the

[16] The problem of accommodating kosher dietary rules within a non-kosher majority culture is not a new one. The Book of Daniel recounts the moral dilemma faced by four young Jews who were being trained for service in the court of Babylon in the sixth century B.C. (Daniel, Shadrach, Meshach, and Abednig), when they were ordered to eat nutritious but non-kosher meals. *See Daniel* 1:3-15. Ultimately, even the not notably liberal-minded Babylonian empire found a way to accommodate their "free exercise" of kosher observance. *See id.* at 1:16.

statutory language or the precedent cited above to accept (as the *Baranowski* court and the court below apparently did) a mere showing that a policy was "related to" maintaining good order and "involve[d]" a compelling governmental interest, as sufficient to satisfy the requirements of 42 U.S.C. § 2000cc-1(a). Such findings simply do not address the "least restrictive means" requirement. Accordingly, the decision below must be reversed for this independent reason.

CONCLUSION

For the foregoing reasons, *amici curiae* Prison Fellowship Ministries, the Christian Legal Society, and the National Association of Evangelicals respectfully request that this Court maintain the high burden of proof required by RLUIPA and reverse the District Court's grant of summary judgment.

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COMBINED CERTIFICATIONS

ROGER G. BROOKS hereby certifies as follows:

1. Independent Authorship—This brief complies with Fed. R. App. P. 29(c)(5) because no counsel for any party authored the brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and no person, other than the *amici curiae*, their members or their counsel, contributed money that was intended to fund preparing or submitting the brief.

2. Type-Volume Limitations—This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 11th Cir. R. 32-4.

3. Type-Face and Type-Style Limitations—This brief complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

4. Filing—Pursuant to Fed. R. App. P. 25(a)(2)(B)(ii), and 11th Cir. R. 31-3, on August 8, 2012, the original plus six copies of this brief were sent to

the Clerk of the Court. Pursuant to 11th Cir. R. 31-5, a PDF file of this brief will be electronically transmitted to the Court.

5. Service—Pursuant to Fed. R. App. P. 25(c)(1)(C) and 11th Cir. R. 31-3, on August 8, 2012, one copy of this brief was dispatched to each of the following counsel via third-party commercial carrier for delivery within three days:

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