KOSHER FOOD – ELEVENTH CIRCUIT BRIEF

INTEREST OF THE AMICI[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Florida is now denying kosher food to ***all*** its prison inmates because of a "participation explosion" that followed initiation of a statewide kosher diet program available "to any inmate declaring a religious need for a kosher diet, not just Jews." Appellants' Amended Initial Brief, pp. 8-9. Because we speak for America's Orthodox Jewish community, our principal concern is the Jewish population of Florida's prisons and the current suppression in Florida's prisons of a fundamental observance of the Jewish faith. Although we are sensitive to the conscientious demands of prison inmates who adhere to other faiths (or to no faith whatever), this Brief addresses the issues in this appeal from the perspective of Jews in Florida's prisons who are determined to observe the dietary restrictions of the Jewish faith. Depriving them of a kosher diet is callous contempt for their beliefs. It compels them to violate every day a cardinal principle of Jewish religious observance that has been identified with Judaism for 3000 years. Denial of kosher food in prison is probably the most severe infringement of religious observance that prison authorities could possibly administer to Jewish prison inmates.

[1] All parties have consented to the filing of this amicus brief.

This Brief describes the centrality of *kashrut* in Jewish religious practice. It also refutes the startling assertion that cost is a permissible legal justification for denying kosher food to religiously observant prison inmates.

There is, in addition, an unusual and strikingly unjust aspect to Florida's justification for refusing to provide kosher food in its prisons. The State of Florida's contention that it is too expensive to provide a kosher diet in its prisons does not rest on a calculation of the cost of feeding kosher meals to the relatively small number of sincere religious observers in Florida's prisons. It is based, rather, on the fact that many inmates who, in the State's opinion, do not sincerely adhere to a kosher diet have requested kosher meals. Florida claims, in essence, that the religious observance of sincere conscientious observers may be suppressed because the State's accommodation of a large number of insincere claimants greatly increases the cost of complying with the needs of those who are sincere.

This is a peculiar and patently unacceptable rationale for denying constitutional rights. The cost of implementing a legitimate constitutional liberty invoked by authentic claimants cannot be multiplied by adding the cost of also complying with demands of others who make bogus claims to the same right. Religiously observant prison inmates are not responsible for the State's failure or inability to distinguish in a constitutionally acceptable manner between the sincere and the insincere. The honest claim should not be denied because it is too hard, too

expensive, or too difficult for government to distinguish it constitutionally from the dishonest claim.

ARGUMENT

I.

COMPLIANCE WITH JEWISH DIETARY LAWS (*KASHRUT*) IS MANDATED BY THE JEWISH FAITH AND IS A CENTRAL AND FUNDAMENTAL TENET OF JUDAISM

We recognize that the Courts of Appeals have articulated varying standards for defining the burden on religious exercise that is governed by the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the Religious Freedom Restoration Act ("RFRA"). Compare, *e.g.*, *Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996) ("forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs"), with *Abdur-Rahman v. Michigan Dep't of Corrections*, 65 F.3d 489, 491 (6th Cir. 1995) ("the prison's policy did not affect an essential tenet of Rahman's religious beliefs").

The burden on religious exercise imposed on a prisoner whose religious belief requires him or her to eat only kosher food and who is denied kosher meals is an impermissible burden on religious exercise under every articulated test. Prison inmates obviously must rely on their jailers for sustenance. If the prison

administration provides only non-kosher meals, it compels observant Jewish prisoners to violate their faith's dietary rules several times each day or go hungry and suffer serious malnourishment.

The Jewish dietary laws – known as *kashrut* in Hebrew (occasionally transliterated as "*kashruth*") – have occupied a prominent place in the history of the Jewish people. Their observance is indisputably a "central tenet" of Judaism and is a "fundamental" principle of Jewish religious law. The *Encyclopedia Judaica* reports that in Second Temple times (516 B.C.E. to 70 C.E.) "Jews endangered their lives by their faithful adherence to the dietary laws" and that "[d]espite the difficulties, and even dangers, inherent in the observance of the dietary laws during subsequent periods of severe persecution, the Jews steadfastly remained faithful to *kashrut*." 5 *Encyclopedia Judaica* 656 (2d ed. 2007) (Addendum A to this Brief).

Jewish history is replete with accounts of tribulations suffered by devout Jews who refused to eat non-kosher food, even at great personal peril and risk to their health. Illustrative is (a) the experience of Ethiopian Jews described in Gadi Ben Ezer, *The Migration Journey* (Transaction Publishers 2005), pp. 76, 83, 94; (b) the very limited diets of many Jewish soldiers in the Austrian army during World War I recounted in Marsha L. Rozenblit, *Reconstructing a National Identity* (Oxford University Press 2001), p. 97 ("subsisted on bread, marmalade, coffee,

and perhaps some cheese during their years in the service"); (c) the experiences of Jews in Moscow under the Soviet Union told in Sascha L. Goluboff, *Jewish Russians: Upheavals in a Moscow Synagogue* (Univ. of Pennsylvania Press 2011), pp. 70-71; and (d) the hardships endured by Jewish immigrants during their voyages to America in the early Twentieth Century reported in Lawrence J. Epstein, *At the Edge of a Dream* (Jossey-Bass, Wiley 2007), p. 42 ("many of the new arrivals had chosen not to eat the non-kosher foods on the ships crossing the Atlantic"). [2]

During the Holocaust kosher food was deliberately withheld by Nazi rulers in order to starve the observant Jewish population. "Devout Jews preferred to starve rather than eat the unkosher meals served in public kitchens." Trunk, Jewish Responses to Nazi Persecution (Stein and Day 1979), p. 22; "While some Jews managed all during the Holocaust period to survive by eating only bread and potatoes, obtaining extra rations of these by bartering their portions of *terefah* [unkosher] food with others, most were unable to do so." Irving J. Rosenbaum, *The Holocaust and Halakhah* (Ktav 1976), p. 136.

A contemporary authority has said in an oft-cited work: "The deeply rooted observance of *kashruth* has, among other factors, prevented the Jews from being

[2] The author of this Brief acknowledges the assistance of Ms. Leah Azhdam in researching this subject.

absorbed by the numerous nations in whose midst they have lived more than two thousand years. Hallowed since the days of Sinai, the dietary laws have been tenaciously kept by the Jewish people in all the lands of the Diaspora. . . . The dietary laws have been described as one of the vital resources by means of which Jewish tradition helps to identify the individual Jew with his people." Philip Birnbaum, *A Book of Jewish Concepts* (Hebrew Publishing Co. 1964), p. 297 (Exhibit B to this Brief).

II.

"COST CONTAINMENT" IS NOT A PERMISSIBLE GROUND FOR DENYING RELIGIOUS LIBERTY

In *Rich v. Secretary, Florida Department of Corrections*, 716 F.3d 525, 532-533 (11th Cir. 2013), this Court said that "safety and cost can be compelling governmental interests," but concluded that Florida had failed to carry its burden to show that either of these two interests are furthered by the policy of denying kosher meals to prison inmates. Florida has similarly failed in this case to meet its burden in opposing the United States' prayer for a preliminary injunction.

We submit that this Court should reconsider its *dictum* that consideration of cost could be a compelling governmental interest under federal statutes that secure religious observance such as RLUIPA and RFRA. Florida asserts that it may deny sincerely held religious practices if required to do so because of "limited resources

and the need to control its costs." Appellants' Amended Initial Brief 25. That contention conflicts, however, with the explicit language of RLUIPA and runs counter to the best traditions of America. Ever since the founding of the Republic, government has incurred enormous cost to secure religious observance by all inhabitants of the United States. Recently enacted federal laws should not be interpreted to narrow the respect that American values have always accorded to religion and permit bureaucrats to stifle religious observance because accommodation is "too expensive."

A. RLUIPA Explicitly Bars Consideration of Cost.

Unlike other federal laws that are silent with regard to cost, RLUIPA explicitly removes cost to government agencies as a permissible consideration. Section 5(c) of RLUIPA, 42 U.S.C. § 2000cc-3(c), provides that the law "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."

RLUIPA is ***not*** a law in which the permissibility of considering cost is a "gap left open by Congress." *E.P.A. v. EME Homer City Generation, L.P.*, 134 S. Ct. 1584, 1607 (2014). The Supreme Court has held that when Congress is silent on the question whether cost is a permissible factor for an administrative agency, it may be invoked only if there is "a textual commitment of authority" to consider cost. *Whitman v. American Trucking Associations, Inc.*, 531 U.S. 457, 468 (2001).

In the *Whitman* case the Supreme Court held that Congress' silence "unambiguously bars cost considerations" by the responsible agency. 531 U.S. at 471.

In RLUIPA Congress "unambiguously" instructed each government agency to "incur expenses in its own operations" in accommodating the religious observances of prisoners. If, as in *Whitman*, Congressional silence was deemed "unambiguous" proof that cost is an impermissible consideration, it follows, *a fortiori*, that when Congress explicitly declares that government should "incur expenses in its own operations" to implement the directive of the law, government may not take allegedly excessive cost into account.

B. Federal and State Tax Exemptions and Tax Credits for Churches and Religious Education Demonstrate That Thrift Is Not a "Compelling Interest" Justifying Denial of Religious Rights.

The concern of Florida's prison officials that satisfying the *bona fide* religious observance of inmates in Florida's penal institutions is too expensive conflicts with the fiscal generosity that has always marked this Nation's policy towards religious observance. The First Amendment's Establishment Clause has been held to prohibit direct monetary aid to religious institutions, but America's respect for religion and government's willingness to expend public funds to protect private religious observance cannot be denied. In *Walz v. Tax Commission*, 397

U.S. 664 (1970), Chief Justice Burger reviewed the history of property-tax exemptions for religious institutions and recognized that "[g]ranting tax exemptions to churches necessarily operates to afford an indirect economic benefit" and that "[a]ll of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees." 397 U.S. at 674, 676.The total national cost of these tax exemptions is obviously immense, but Congress and all the States have borne this cost as part of the "national attitude toward religious tolerance." 397 U.S. at 678.

The Supreme Court has re-affirmed the generous financial "national attitude" of government towards an individual's observance of religion in cases such as *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002). The majority opinion in *Zelman* noted that it "was not relevant to the constitutional inquiry" to calculate "the amount of government aid channeled to religious institutions by individual aid recipients." 536 U.S. at 651. Justice O'Connor's concurring opinion in *Zelman* particularized the substantial cost to Colorado (more than $40 million annually), Maryland (more than $60 million annually), Wisconsin (approximately $122 million annually), and New Orleans, Louisiana (over $36 million annually) resulting from state property tax exemptions for religious institutions. 536 U.S. at 665-666.

As for the federal government, Justice O'Connor observed that "it is reported that over 60 percent of household charitable contributions go to religious charities." 536 U.S. at 666. The Congressional Joint Committee on Taxation estimated in a February 2013 Report that the total charitable-contribution deductions in the United States over the five years between 2012 and 2017 will be $37.5 billion. *Estimates of Federal Tax Expenditures for Fiscal Years 2012-2017,* Table 3, Prepared for the House Committee on Ways and Means and the Senate Committee on Finance (https://www.jct.gov/publications.html?func=startdown&id=4503). On this basis, the federal government is effectively spending $7.5 billion per year in supporting the maintenance of churches and other religious institutions.

When contrasted with these figures, the additional costs of providing kosher meals to Florida's prison inmates is the proverbial drop in the bucket. It is both unseemly and unlawful, in light of the American tradition of encouraging religious observance at substantial cost to the public treasury, for Florida's prison authorities to attempt to save relatively minute amounts at the expense of prisoners' religious observance. In any event, it is plain from the massive cost to the federal and state governments of encouraging and promoting religious worship and education that cost may not be deemed a "compelling interest" under federal laws securing religious observance.

III.

GOVERNMENT HAS A HEIGHTENED CONSTITUTIONAL BURDEN TO MEET RELIGIOUS NEEDS OF PRISON INMATES

In *Katcoff v. Marsh*, 755 F.2d 223 (2d Cir. 1985), the Court of Appeals for the Second Circuit upheld the federal government's constitutional authority to provide and pay for chaplains in the military services. The Court noted that it was obligatory "to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them." 755 F.2d at 234. The Supreme Court's opinion in *Abington School Dist. v. Schempp*, 374 U.S. 203, 226 n.10, 83 S. Ct. 1560, 1573 n.10 (1963), referred to a "situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths." In his concurring opinion Justice Brennan compared military chaplains with chaplains in penal institutions: "Since government has deprived such persons of the opportunity to practice their faith at places of their choice . . . government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be." 374 U.S. at 297-298, 83 S. Ct. at 1611.

On this account, the Supreme Court held in *Turner v. Safley*, 482 U.S. 78 (1987), and in *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), that unless their restrictions are related to compelling penological objectives, prison authorities are constitutionally obliged to afford prisoners an opportunity to engage in religious observance. The Florida prison officials' denial of kosher food to prisoners violates the constitutional duty owed to the prisoners by government officials.

Various Courts of Appeals have confirmed this constitutional duty. The Second Circuit said in *McEachin v. McGuinnis*, 357 F.3d 197, 203 (2d Cir. 2004), "courts have generally found that to deny prison inmates the provision of food that satisfies the dictates of their faith does unconstitutionally burden their free exercise rights." And in *Moorish Science Temple of America v. Smith*, 693 F.2d 987, 990 (2d Cir. 1982), the Court said "the denial of kosher food to a Jewish inmate is not justified by an important or substantial government objective." See also *Makin v. Colorado Dep't of Correction*, 183 F.3d 1205 (10th Cir. 1999); *Ashelman v. Wawrzaszek*, 111 F.3d 674, 677 (9th Cir. 1997); *LeFevers v. Saffle*, 936 F.2d 1117 (10th Cir. 1991); *McElyea v. Babbitt*, 833 F.2d 196, 198 (9th Cir. 1987); *Kahane v. Carlson*, 527 F.2d 492, 495 (2d Cir. 1975).

The Indiana Department of Correction took a position similar to Florida's in the District Court in *Willis v. Commissioner, Indiana Department of Correction*, 753 F. Supp.2d 768 (S.D. Ind. 2010). The Indiana officials appealed to the Seventh

Circuit from the District Court's ruling rejecting their contention that the additional cost of kosher meals was a "compelling governmental interest" that justified denying kosher meals to Indiana's prison inmates (although the inmates' religious convictions were assertedly respected by providing them vegan meals prepared in non-kosher utensils).

After briefs were filed (including an *amicus curiae* brief from many of the same *amici* who have joined in this brief), the Indiana Department of Correction dismissed its appeal. *Willis v. Buss, et al.,* Seventh Circuit Court of Appeals No. 11-1071 [Dkt. No. 25].

The Fifth Circuit's contrary decision in *Baranowski v. Hart*, 486 F.3d 112, 122 (5th Cir. 2007), was based on rulings that Court made before the enactment of RLUIPA – *i.e.*, the Fifth Circuit rulings in *Kahey v. Jones*, 836 F.2d 948 (5th Cir. 1988); and *Udey v. Kastner*, 805 F.2d 1218 (5th Cir. 1986). In light of the language of RLUIPA, the earlier Fifth Circuit rulings should not have been followed in *Baranowski*.

This Court's summary affirmance in 346 Fed. Appx. 471 (11th Cir. 2009), of *Linehan v. Crosby*, 2008 WL 3889604 (N.D. Fla. 2008), does not govern this case. The District Court's findings in *Linehan* paralleled the inadequate justifications for refusing to provide kosher food in this case – "[t]he cost would be far too great, special treatment for Plaintiff would generate unrest among other

prisoners, and would create a significant security risk." *Linehan* at 9. Those reasons do not withstand scrutiny.

Millions of dollars are spent annually by the federal and state governments for the salaries of military and prison chaplains. They provide religious services to military personnel and to prisoners because neither group has free access to churches, synagogues, mosques, and other places of worship. Published reports show that there are currently 2,900 chaplains in the U.S. Army, 850 Navy, Marine, and Coast Guard chaplains, and 500 Air Force chaplains (Scott Fontaine, http://www.airforcetimes.com/article/20101127/NEWS/11270304/Air-Force-looks-to-make-cuts-in-chaplain-force (last visited May 23, 2014)). The average annual salary for civilian officers in the U.S. military is $67,000 (http://www.goarmy.com/benefits/total-compensation.html). Consequently, it is fair to approximate the total annual salaries of military chaplains as almost $285 million.

There are approximately 1,724 chaplains in the federal prison system. Pew Research, *Religion and in Prisons – A 50 State Survey,* March 22, 2012 (http://www.pewforum.org/Social-Welfare/prison-chaplains-appendix-c.aspx). If they are paid at the GS-12 level, their annual salary is approximately $70,000. Hence the United States expends annually over $120 million for the salaries of chaplains in federal prisons. The relative additional cost of providing meals to

military personnel and prisoners who do not violate their religious convictions is minor.

In a 2007 survey, 26 out of 34 States responded that they provided kosher food to prisoners in their institutions (http://www.foxnews.com/story/0,2933,294349,00.html). The United States represents that today's total is 35. Brief for the United States 12. Among these States are Arizona, California, Colorado, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Nevada, New York, Ohio, Oregon, Pennsylvania, Rhode Island, South Dakota, Texas, Washington, and Wisconsin. If the additional expense is not "compelling" enough to prevent the federal government and at least 35 States from making this accommodation to the religious needs of kosher-observing prisoners, it surely cannot qualify as "compelling" in Florida.

IV.

SINCERE OBSERVERS OF RELIGIOUS DIETARY LAWS SHOULD NOT BE PREJUDICED BECAUSE THERE ARE MANY INSINCERE CLAIMANTS

The record in this case establishes that Florida instituted a program of providing kosher meals to individuals in its prison population who claimed that they observed Jewish dietary laws. The budget for that program was apparently acceptable. Appellants' Amended Initial Brief 8-10. "[N]o one was prepared for the explosion of interest that actually occurred." *Id.* at 10. Once the program was

initiated, the number of applicants grew until it reached 43.3% of the population at one prison. *Id.* at 11. This excessive enrollment resulted in postponement of the plan to start serving a kosher diet statewide.

Florida's contention that implementation of the statewide plan would be too expensive assumes that everyone who requests kosher meals will be entitled to receive them, regardless of the sincerity or insincerity of the religiously-based request. If this argument is accepted, sincere observance is suppressed because it is too difficult, constitutionally or practically, to determine whose religious belief is sincere and whose is not. Because the total cost of providing for the honest claimant together with the charlatan is too high, neither may be accommodated. The conscientious religious observer is turned away and his religious observance is burdened because government agents find it too difficult to distinguish between him and the insincere claimant.

This is an unacceptable result. A government program that benefits individuals who are entitled to relief should not be terminated because undeserving imposters multiply the total cost of the program. Although there is much fraud in the operation of the food-stamp program that provides assistance to the needy **[LYNDA:CITE]**, no responsible public opinion advocates terminating the program altogether because the cost of fighting fraud significantly increases the program's total expense. When the right at stake is constitutionally protected – as

is religious exercise – it is plainly impermissible to deny that right by adding to the cost of protecting the right the additional expense of distinguishing between individuals who are entitled and those who are not.

To be sure, Florida's announced policy of providing kosher food to any prisoner who requests it regardless of the inmate's religious belief may be attributable to constitutional and legal prohibitions that limit a court's authority to distinguish between faiths and to probe an individual's religious convictions. See, *e.g.*, *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013); *Love v. Reed*, 216 F.3d 682, 688-689 (8th Cir. 2000); *Patrick v. LeFevre*, 745 F.2d 153 (2d Cir. 1984); *Kaplan v. Hess*, 694 F.2d 847 (D.C. Cir. 1982). If so, the additional cost beyond the bare expense of providing meals to Jewish inmates who observe Jewish dietary laws is not truly a "cost of providing a kosher diet." It is, rather, a "cost of maintaining the wall of separation between church and state" under the First Amendment.

The constitutional right to have assistance of counsel in any felony prosecution (*Gideon v. Wainwright*, 372 U.S. 335 (1963)) has resulted in costly public-defender programs in many jurisdictions. Many accused are assigned counsel even though they are not so poor that they could not afford to retain a lawyer, and many exploit the public-defender system to raise frivolous defenses to criminal charges. No one has suggested that this "participation explosion" justifies

closing the public-defender program and thereby denying counsel to accused who truly need a lawyer to present a valid defense and who invoke the constitutional right recognized by the Supreme Court in its *Gideon* opinion. The cost of providing counsel to the undeserving is viewed as a cost of our Nation's willingness to resolve all doubts in favor of the preservation and protection of constitutional rights. By the same token, the added expense of providing kosher meals in Florida's prisons to inmates who have no sincere religious need for such meals is a cost of the Constitution's limitation on the jurisdiction of secular authorities and secular courts to interfere in ecclesiastical matters. It is not a true cost of providing kosher food to prison inmates whose religious convictions mandate that they eat only kosher food.

CONCLUSION

The order of the District Court should be affirmed.

May 28, 2014 Respectfully submitted,

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