IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA, Plaintiff; v. SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, *et al.*, Defendants.	No. 1:12-cv-22958-SEITZ/SIMONTON

[PROPOSED] FINDGS OF FACT AND CONCLUSION OF LAW

The United States respectfully submits the following findings of fact and conclusions of law pursuant to this Court's May 22, 2013, Order, Dkt. No. 44.

* * *

The United States seeks a preliminary injunction ordering Defendants to provide a kosher diet to prisoners with a sincere religious basis for keeping kosher and enjoining four discreet provisions of Defendants' recently-enacted Religious Diet Program. The Motion is GRANTED for the reasons set forth below.

Defendants history of evading their obligations under the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc ("RLUIPA") demonstrates that injunctive relief is necessary to protect the religious exercise of Florida prisoners. Defendants terminated their prior kosher diet program in 2007 against the advice of their own study group and then denied virtually all sincere requests for a kosher diet over the next six years. Defendants did not shift gears and pledge to provide a kosher diet to certain prisoners until eight

months into litigation filed by the United States. A policy change so "late in the game" does not moot this case, particularly where Defendants continues to argue that they may lawfully deny a kosher diet to all Florida prisoners at any time. Further, the United States is likely to prevail on the merits of its RLUIPA claim because Defendants cannot justify their refusal to provide a kosher diet under RLUIPA's strict scrutiny requirement while simultaneously pledging to offer a kosher diet voluntarily. Defendants have likewise failed to demonstrate that any of the four challenged restrictions in their new Religious Diet Program are the least restrictive means of furthering a compelling government interest. Moreover, an injunction is appropriate because the protection of religious freedom and enforcement of federal law advance the public interest, and an injunction protecting these interests is not likely to harm Defendants.

FINDINGS OF FACT

Florida Department of Corrections

The Florida Department of Corrections ("FDOC" or "Defendants") incarcerates approximately 102,000 prisoners in 60 major facilities, Undisputed Facts at ¶ 1, with an operating budget of $1.94 billion for the 2012-2013 fiscal year. Undisputed Facts at ¶ 3. FDOC receives federal funds, Undisputed Facts at ¶ 3, and is subject to RLUIPA. 42 U.S.C. § 2000cc-1(b). FDOC incarcerates prisoners who have a sincere religious basis for keeping kosher. Undisputed Facts at ¶ 4.

Defendants' History of Providing a Kosher Diet

Prior to 2004, Defendants did not offer a kosher diet to any prisoners. Undisputed Facts at ¶ 5. In September 2002, a FDOC prisoner named Alan Cotton filed suit in the U.S. District Court for the Southern District of Florida seeking a kosher diet. *Cotton v. Dep't of Corr.*, No. 1:02-cv-22760 (S.D. Fla. 2002). In April 2004, shortly after the *Cotton* case settled, Defendants

instituted a kosher diet program known as the Jewish Diet Accommodation Program ("JDAP"). U.S. Ex. 2. JDAP offered kosher meals in 13 FDOC facilities. Prisoners eligible to participate in JDAP were transferred to one of these 13 facilities. *Id*. Initially, only Jewish prisoners were eligible to participate in JDAP, but Defendants opened the program to prisoners of all faiths in 2006. *Id*.

In early 2007, FDOC Secretary Jim McDonough commissioned a Religious Diet Study Group to evaluate JDAP. *Id*. On July 26, 2007, the Study Group issued its report on Defendant's kosher diet program (the "Report"). The Report recommended that Defendants "retain a kosher dietary program," and that failure to do so would likely violate RLUIPA. *Id.* at 27. The Study Group stated that a prisoner desiring to keep kosher "is substantially burdened" by the denial of kosher food "because the regulations [denying a kosher diet] leave him with no meaningful choice. He may either eat the non-kosher food and fail to obey his religious laws or not eat the non-kosher food and starve." *Id*. Despite the Report's recommendation, Defendants terminated JDAP in August 2007. Undisputed Facts at ¶ 11.

During the three and a half years of JDAP's operation, a total of 784 prisoners enrolled in the Program, with an average enrollment of 250 prisoners per day. U.S. Ex. 2. At the time Defendants terminated JDAP, enrollment was 272 prisoners, including 248 Jewish prisoners, 11 Messianic Jews, and 13 prisoners of other faiths. U.S. Ex. 8 at 2.

After terminating JDAP, Defendants did not offer a kosher diet to any prisoners from August 2007 – August 2010. In August 2010, Defendants instituted a "pilot" kosher diet program (the "Pilot Program") in the South Unit of the South Florida Reception Center ("SFRC"). Undisputed Facts at ¶ 18. From 2007-2013, FDOC did not offer a kosher diet to any prisoners except for the small number of prisoners in the Pilot Program.

To be eligible for the Pilot Program, a prisoner must be either 59 years old or in a minimum security classification. Enrollment is officially capped at 15 prisoners, and has ranged from 8 to 18 prisoners during the Program's existence. Undisputed Facts at ¶ 19. The pilot program has operated continuously since August 2010, but has never been expanded to any facility besides SFRC. Defendants' September 2010 review of the pilot program found that the total cost of providing a 2,750 calorie kosher diet to prisoners in the program was $4.71 per day. U.S. Ex. 7.

Since August 2007, Defendants have offered three primary diet options in their 60 major facilities: (1) a main line; (2) a vegan option; and (3) a no-meat option. U.S. Ex. 1. None of these diet options is kosher. *See Rich v. Secretary*, No. 12-11735, ___ F.3d ___ , Slip Op. at 3 (11th Cir. May 14, 2013). All FDOC prisoners may select either the main line or no-meat diet option, but must submit a formal request to consume the vegan diet option. U.S. Ex. 1. In 2007, Defendants removed all pork products from their food service offerings. U.S. Ex. 2.

In addition to the main line, no-meat, and vegan diet options, Defendants offer at least 15 medical and therapeutic diets at each facility. U.S. Ex. 4. The medical and therapeutic diet options available at FDOC include: clear liquid diet; cold liquid diet; full liquid diet; puree diet; mechanical dental diet; 1600 calorie diet; 2200 calorie diet; 2800 calorie diet; 4000 calorie regulated diet; prenatal diet; pre-dialysis diet; and a dialysis diet. *Id.*

Defendant's Litigation Posture In Kosher Diet Cases

Since discontinuing JDAP in 2007, Defendants have defended their refusal to offer a kosher diet in at least three lawsuits filed by *pro se* prisoners: *Linehan v. Crosby*, 2008 WL 3889604 (N.D. Fla. 2008); *Muhammad v. Crosby*, 2009 WL 2913412 (N.D. Fla. 2009); and *Rich v. Buss*, No. 1:10-cv-157 (N.D. Fla. 2010). In litigation with the United States, however,

Defendants have changed their policies regarding a kosher diet on the eve of court proceedings in an apparent attempt to avoid liability, but not meaningfully addressing their violations of RLUIPA.

In May 2011, the United States opened a formal investigation of FDOC's dietary policies. U.S. Ex. 18. The United States' 15-month investigation included the review of thousands of pages of documents, retaining expert consultants in prison administration, and inspecting four FDOC facilities: the South Florida Reception Center, Dade C.I., Everglades C.I., and South Bay, C.I. In August 2012, the United States' investigation concluded that Defendants' failure to offer a kosher diet violated RLUIPA. The United States advised Defendants of this conclusion on Aug. 1, 2012. U.S. Ex. 19.

The United States offered to work with FDOC to negotiate a resolution of the investigation that made a kosher diet available to all FDOC prisoners who have sincere religious grounds for keeping kosher. *Id*. Defendants refused to consider any change to their policies in response to the findings of the United States' investigation, and on August 14, 2012, the United States filed the instant suit alleging that Defendants violated RLUIPA by failing to offer a kosher diet to prisoners with a sincere religious basis for keeping kosher. Complaint, Dkt. No. 1.

On January 17, 2013, the parties met with mediator Thomas H. Bateman III for court-ordered mediation of this case. At this mediation session, Defendants agreed to submit a kosher diet proposal to the United States by March 4, 2013. Joint Mot. to Stay, Dkt. No. 24. The Court stayed this litigation until April 19, 2013, to facilitate settlement discussions. Order, Dkt. No. 27. On March 22, 2013, while the case was stayed for settlement discussions, Defendants issued a new policy - Procedure 503.006 - called the Religious Diet Program. U.S. Ex. 3. Defendants did not notify the United States of this new policy. Instead, the United States first learned of the

policy on April 2, 2013 from counsel in separate litigation against Defendants' dietary policies. Status Rpt., Dkt. No. 28. One week after learning of the new policy, the United States filed a Motion for a Preliminary Injunction, Dkt. No. 29, and the Court lifted the stay on April 15, 2013. Order Lifting Stay, Dkt. No. 30.

In this litigation against the United States, Defendants continue to assert that prisoners do not have a right to a kosher diet under RLUIPA, and that Defendants may lawfully deny a kosher diet at any time. See Defs' Opp. to U.S. Mot. for Prelim. Inj. ("Opp.") at 2.

Defendants' New Religious Diet Program

Defendants implemented the new Religious Diet Program in a single facility - the Union Correctional Institution – on April 5, 2013. U.S. Ex. 3. The Union Correctional Institution houses Bruce Rich, the plaintiff in an ongoing lawsuit against FDOC seeking a kosher diet whose appeal was argued before the Eleventh Circuit on April 18, 2013. U.S. Ex. 11. By its terms the Religious Diet Program is not effective in any other institution until September 2013. U.S. Ex. 3. To date, no prisoner has received a kosher diet under the Religious Diet Program. U.S. Ex. 33.

Once implemented, the Religious Diet Program will offer a certified kosher diet at all FDOC facilities to prisoners who FDOC determines to be eligible to participate in the Program. U.S. Ex. 3. These kosher meals will consist of prepackaged, certified kosher entrees in addition to items from FDOC's normal food service operations. *Id*.

Defendants estimate that the marginal cost of providing a kosher diet under the Religious Diet Program is $5.81 per prisoner, per day. U.S. Ex. 30. The total cost of the Program depends in part on the number of participants. While Defendants assert that more than 8,600 prisoners are eligible to participate in the Religious Diet Program, enrollment in Defendants' prior kosher

diet program averaged only 250 prisoners per day. U.S. Ex. 2. Accordingly, if participation in the Religious Diet Program is the same as participation in JDAP (averaging 250 prisoners per day), its total cost will be $530,162 per year. This expense represents .00027 of FDOC's operating budget ($530,000 / $1.94 billion = .00027). If participation in the Religious Diet Program is twice as high as participation in JDAP (averaging 500 prisoners per day), the total cost of the Religious Diet Program will be $1,060,324 per year. This expense represents .00054 of FDOC's operating budget.

Prisoners are eligible to participate in the Religious Diet Program's kosher diet only if they pass the "sincerity test" prescribed by FDOC Procedure 503.006(4)-(5). The Religious Diet Program's "sincerity test" requires that prisoners seeking to participate in the Program file a formal request for a kosher diet and interview with a FDOC chaplain who tests the prisoner's "knowledge of the religious and the requirements of keeping a religious diet." U.S. Ex. 3. The chaplain may then "confirm" a prisoner's stated beliefs though "internet searches to research diet requirements for specific religions," staff interviews, inspection of records of the prisoner's attendance at religious ceremonies; and conversations with religious figures. *Id.* If the prisoner's knowledge of religious orthodoxy is sufficient, the prisoner advances to the next step of the process, during which he or she must eat exclusively non-kosher meals for 90 days. *Id.* This period drops to 30 days after December 2013. *Id.* After the 90-day period of eating non-kosher food, the prisoner is re-interviewed by a FDOC chaplain, who again evaluates the prisoner's answers based on "internet searches," interviews with staff and clergy, and inspection of FDOC records. *Id.*

Upon completion of this process the chaplain either approves or denies the prisoner's application to the Religious Diet Program based on the prisoner's demonstrated "knowledge of the religious and the requirements of keeping a religious diet." *Id*.

On May 22, 2013, after briefing on the United States' Preliminary Injunction Motion was complete and less than two weeks before the hearing set by this Court, Defendants shifted gears again and issued another revised kosher diet policy. U.S. Ex. 32. The new policy employs the same rigorous sincerity testing regime with one exception: it does not include the 30-to-90 day period of eating non-kosher food that the United States challenged in its Preliminary Injunction Motion. *Id*. Defendants' counsel confirmed that Defendants did not issue this revised policy until May 22, 2013. U.S. Ex. 33.

The new Religious Diet Program – both the March 2013 version and May 2013 version – contains a provision that removes any prisoner who misses 10 percent of available meals. U.S. Ex. 3, 32. A removed prisoner may not reapply for six months. *Id*. The 10 percent rule applies even if the prisoner who misses 10 percent of meals consumes exclusively kosher food when the prisoner elects to eat. *Id*. A prisoner who fasts for religious reasons and misses 10 percent of meals will be removed from the Religious Diet Program unless the prisoner submits a request for a religious fast 15 days in advance. *Id*.

The Religious Diet Program also contains a "zero tolerance removal provision," under which a prisoner is removed from the Program if he or she consumes any item that Defendants have not listed as "kosher." *Id*. Removal lasts for 30 days for a first offense, 120 days for a second offense, and one year for all subsequent offenses. *Id*. Prisoners subject to this provision do not have an opportunity to explain their reasons for consuming a "non-kosher" item before removal from the Religious Diet Program. *Id*.

Dietary Policies at Other Correctional Institutions

At least 35 state departments of correction offer a kosher diet to their prisoners. U.S. Ex. 16. In 2007, the FDOC study group's survey of state correctional facilities found that 26 of 34 responding facilities offered a kosher diet. U.S. Ex. 2. Institutions that currently provide a kosher diet to prisoners include the Federal Bureau of Prisons ("BOP"), the New York Department of Correctional Services, California Department of Corrections and Rehabilitation, Texas Department of Criminal Justice, and the Illinois Department of Corrections. U.S. Ex. 2, 16, 23. The New York state correctional system does not require any sincerity test before admitting prisoners to its kosher diet program. U.S. Ex. 23. Rather, a prisoner need only register his or her religious preference to obtain a religious diet. *Id*.

The Federal Bureau of Prisons offers a "Certified Religious Menu" to prisoners in each of its 115 facilities, including its maximum security facility in Florence, Colorado, and several facilities in the state of Florida. U.S. Ex. 14. In each of its facilities, BOP's food service consists of a main line, a vegetarian option, and a Certified Religious Menu option. *Id*. Like FDOC, BOP does not use pork products in any of its food service. *Id*. BOP's Certified Religious Menu serves prepackaged, certified kosher entrees supplemented with certain items from BOP's other food service operations. *Id*.

BOP's Certified Religious Menu is open to prisoners of all religious faiths. A federal prisoner who desires a kosher diet must submit a request and meet with a chaplain at the prisoner's facility. Once a BOP chaplain determines that a prisoner's request for the Certified Religious Menu is sincere, the chaplain notifies the facility's food service director and the prisoner is immediately eligible to participate in the Certified Religious Menu. *Id*. There is no waiting period before a federal prisoner may begin consuming a certified kosher diet. *Id*. BOP

does not remove prisoners from the Certified Religious Diet who elect not to eat a certain percentage of meals. *Id.*

Approximately 1.3 percent of BOP prisoners are currently enrolled in the Certified Religious Menu program. The marginal cost of BOP's Certified Religious Menu ranges from $3.60 to $4.15 per prisoner, per day. BOP has provided a kosher diet option for more than 30 years.

CONCLUSIONS OF LAW

The United States seeks a preliminary injunction ordering Defendants to provide a kosher diet to prisoners with a sincere religious basis for keeping kosher and enjoining four discreet provisions of Defendants' recently-enacted Religious Diet Program. For the reasons set forth below, such an injunction is warranted.

The United States is likely to prevail on the merits of its RLUIPA claim, and an injunction is necessary to prevent Defendants from continuing to irreparably harm Florida prisoners by unlawfully restricting their access to a kosher diet. Indeed, Defendants' most recent kosher diet program violates RLUIPA in several important ways, and Defendants' insistence that they may deny a kosher diet at any time demonstrates that injunctive relief is needed to ensure that Defendants do not again eliminate their kosher diet program entirely – particularly because Defendants did exactly that, against the advice of their own study group, in 2007. Moreover, an injunctive relief is appropriate because an injunction will not harm Defendants and the protection of religious freedom and enforcement of federal law advance the public interest.

The Defendants' last minute changes to its kosher diet program do not impact the propriety of relief. The United States' RLUIPA claim is not moot and this Court has jurisdiction to issue a preliminary injunction because voluntary cessation of unlawful conduct does not moot

a case unless a defendant has "completely and irrevocably eradicated the effects of the alleged violation" and "there is no reasonable expectation that the alleged violation will recur." *Harrell v. Florida Bar*, 608 F.3d 1241, 1265-66 (11th Cir. 2010). Defendants cannot meet this standard here because they altered their challenged dietary policies only in response to this litigation and continue to assert that they may lawfully deny a kosher diet at any time. *See Rich v. Secretary*, No. 12-11735, ___ F.3d ___ (11th Cir. May 14, 2013). Further, this Court has jurisdiction to decide the United States' challenge to four provisions of the Religious Diet Program. The application of these provisions falls squarely within the scope of the United States' claim that Defendants' dietary policies violate RLUIPA. Indeed, Defendants rely on the new Program to argue that this case is moot.

Accordingly, the United States' Motion for a Preliminary Injunction is granted.

I. MOOTNESS

Defendants denied a kosher diet to virtually all of its prisoners until modifying their dietary policies eight months into this litigation. Such a "late in the game" policy change does not moot the case. *Harrell*, 608 F.3d 1266. Rather, mootness occurs only where a defendant "unambiguously" changes course in a way that "completely and irrevocably eradicate[s] the effects of the alleged violation," and "there is no reasonable expectation that the alleged violation will recur." *Harrell,* 608 F.3d at 1265-66. Government defendants who "unambiguously" terminate unlawful conduct are entitled to a rebuttal presumption that their conduct will not recur. *Harrell*, 608 F.3d at 1268. This presumption is inapplicable here because Defendants defend the legality of their old policies and their new policies continue to violate RLUIPA. *Id*.

Even if the presumption applies, however, it is rebutted here for several reasons: (1) Defendants continue to defend the legality of the dietary policies that prompted litigation, *see*

Nat'l Assoc. of Bds. of Pharmacy v. Bd. of Regents, 633 F.3d 1297, 1312 (11th Cir. 2011); *Jager v. Douglas Co. School Dist.*, 862 F.2d 824, 834 (11th Cir. 1989); (2) Defendants changed their policy in response to litigation, *see Sheely*, 505 F.3d at 1186 (11th Cir. 2007) (no mootness where change in policy "came almost nine months into this lawsuit"); *Nat'l Advertising Co. v. City of Ft. Lauderdale,* 934 F.2d 283, 284 (11th Cir. 1991) (no mootness where city amended code six weeks after suit); and (3) Defendants previously rescinded a kosher diet program, *see Nat'l Assoc. of Bds. Of Pharmacy*, 633 F.3d at 1311 ("the Board of Regents made similar promises before [] and failed to keep them, prompting the current law suit.").

For precisely these reasons, the Eleventh Circuit recently held that "there is nothing to suggest that Florida will not simply end the new kosher meal program at some point in the future, just as it did in 2007." *Rich*, Slip Op. at 10. The Court of Appeals found that a challenge to Defendants' kosher diet policies was not moot because Defendants argued that their prior policy of denying a kosher diet "should be declared constitutional," Defendants "never promised not to resume the prior practice," and the "[t]he policy change was not made before litigation was threatened, but was instead late in the game." *Id*. The *Rich* decision noted that "Florida announced that it was going to change its policy only after . . . the U.S. Department of Justice filed suit against it in the Southern District of Florida," and thus it "appear[s] that the change in policy is an attempt to manipulate jurisdiction." *Id*. The same analysis demonstrates that this case is not moot.

Indeed, FDOC continues to make changes to its new Religious Diet Program, further demonstrating that this case is not moot. On May 22, 2013, after briefing on this Preliminary Injunction Motion was complete, Defendants revised their Religious Diet Program and eliminated one of the restrictions on providing a kosher diet that, for the reasons described

below, violates RLUIPA. U.S. Ex. 33. Florida's pattern of last-minute policy changes continues, even after the Eleventh Circuit's specific condemnation of this behavior. *Rich*, Slip Op. at 10. Under these circumstances, Defendants' argument that this case is moot must fail.

RLUIPA's "safe harbor" provision compels the same result. As the Eleventh Circuit explained, "[w]e have seen nothing that suggests this provision preempts the principle that 'voluntary cessation of challenged conduct moots a case . . . only if it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur'" *Rich*, Slip Op. at 6 (citing *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 222 (2000)).

II. JURISDICTION

Defendants claim that this Court lacks jurisdiction to adjudicate deficiencies with the new Religious Diet Program because the United States does not address the Program in its Complaint. Opp. at 11-12. This argument is unavailing, as Federal Rule of Civil Procedure 8 does not require a plaintiff to allege every fact that supports its claim. Fed. R. Civ. P. 8. In its Complaint, the United States alleges that Defendants' diet policies violate RLUIPA by burdening the religious exercise of prisoners seeking a kosher diet. Defendants' various modifications to their dietary policies in response to this litigation are factual issues that clearly fit within the scope of the United States' RLUIPA claim. Any other result would allow a defendant to avoid liability for perpetuity by continually modifying a policy challenged in litigation. In any event, Defendants themselves place the new Religious Diet Program at issue by arguing that it moots the United States' case.

III. MERITS OF A PRELIMINARY INJUNCTION

A preliminary injunction is appropriate where the moving party shows: (1) a substantial likelihood of success on the merits; (2) that an injunction is necessary to prevent irreparable

injury; (3) that the injury to the moving party outweighs whatever damage the proposed injunction might cause the non-moving party; and (4) that an injunction is in the public interest. *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 968 (11th Cir. 2005). Each of these factors weighs in favor of a preliminary injunction here.

A. The United States is Likely To Succeed on the Merits of its RLUIPA Claim

After hearings spanning three years, Congress found that prisoners are sometimes subject to "frivolous or arbitrary" barriers to religious exercise and, accordingly, passed RLUIPA unanimously in 2000. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005) (citing 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen Hatch and Sen. Kennedy on RLUIPA) ("Whether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways."). In doing so, Congress recognized the crucial role that religious belief plays in the orderly operations of institutions and the rehabilitation of prisoners. *See* 146 Cong. Rec. S6678-02, at S6688-89 (daily ed. July 13, 2000) ("[s]incere faith and worship can be an indispensible part of rehabilitation.").

RLUIPA prohibits policies that substantially burden religious exercise except where a policy "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling government interest." 42 U.S.C. § 2000cc-1(a). Under this scheme, once a plaintiff proves that a challenged practice substantially burdens religious exercise, the burden shifts to the defendant to satisfy RLUIPA's strict scrutiny inquiry. 42 U.S.C. § 2000cc-2(b).

1. Defendants' challenged dietary policies substantially burden the religious exercise of Florida prisoners

Each of Defendants' challenged dietary policies substantially burdens the religious exercise of Florida prisoners. A "policy of not providing kosher food may be deemed to work a

substantial burden upon [an inmate's] practice of his faith." *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007); *see also Beerheide v. Suthers*, 286 F.3d 1179, 1192 (10th Cir. 2002) (failure to provide kosher diet burdens free exercise of religion in violation of the First Amendment). Defendants do not contest that four of the five policies challenged here impose a substantial burden: (1) the blanket denial of kosher food; (2) the Religious Diet Program's requirement that applicants to the Program consume non-kosher food for 30-to-90 days before accessing a kosher diet; (3) the Religious Diet Program's "zero tolerance" removal of prisoners from the Program who consume a single item Defendants deem non-kosher; and (4) the Religious Diet Program's "sincerity test" that probes prisoners' knowledge of religious doctrine. *See* Defs' Opp. to Mot. for Prelim. Inj., Dkt. No. 34, at .21-24; U.S. Reply, Dkt. No. 40, at 9-10.

The fifth challenged provision – which removes prisoners from the Religious Diet Program if they miss ten percent of meals – likewise imposes a substantial burden. The "10 percent rule" removes prisoners from their desired religious diet for a minimum of six months if they do not eat at least 90 percent of the available meals, even if every meal the prisoners eat is kosher. A policy that denies a religious diet to a prisoner, even where there is no evidence that the prisoner is insincere, substantially burdens religious exercise. *Cf. Lawson v. Singletary*, 85 F.3d 502, 509 (1996)) ("policies grounded on mere speculation" violate RLUIPA). And a six-month removal unquestionably works a substantial burden. *See Nelson v. Miller*, 570 F.3d 868, 880 (7th Cir. 2009) (failure to provide a non-meat diet during 40 days of Lent a substantial burden); *Lovelace v. Lee*, 472 F.3d 174, 194 (4th Cir. 2006) (denying Muslim prisoner special Ramadan meals 24 out of 30 days violates RLUIPA).

2. Defendants' challenged dietary policies are not the least restrictive means of furthering a compelling government interest

As all five challenged dietary policies substantially burden religious exercise, the burden shifts to the Defendants to show that each of these provisions is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000cc-2(b). None of the challenged provisions meet this standard.

a) Blanket Denial of a Kosher Diet

At the time the United States filed its Complaint, Defendants denied a kosher diet to all but a handful of prisoners in a single facility. U.S. Ex. 1; Statement of Undisputed Facts ¶ 19. This near-blanket denial of a kosher diet is not the least restrictive means of furthering a compelling government interest. Indeed, Defendants' recently-announced statewide kosher diet program demonstrates as a matter of law that their challenged dietary policy fails RLUIPA's strict scrutiny test. Defendants cannot argue that they have compelling interests in *denying* a kosher diet while they provide such a diet voluntarily. *See Moussazadeh v. Texas Department of Criminal Justice*, 703 F.3d 781, 794 (5th Cir. 2012) (reversing summary judgment for prison where prison's "argument that it has a compelling interest" . . . "is dampened by the fact that it has been offering kosher meals to prisoners for more than two years"); *Spratt v. Rhode Island Department of Corrections*, 482 F.3d 33, 40 (1st Cir. 2007) (prison system lacked compelling reasons for banning inmate preaching because the prison had previously allowed such preaching); *Koger v. Bryan*, 523 F.3d 789, 799, 801 (7th Cir. 2008) (denying request for a no-meat diet violated RLUIPA where prison offered such a diet to other prisoners); *Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007) (restriction on the number of religious books a prisoner may possess invalid where other facilities in the state system did not have such a restriction);

Warsoldier v. Woodford, 418 F.3d 989, 1001 (9th Cir. 2005) (hair length restriction on male prisoners failed strict scrutiny where prison allowed female prisoners to keep long hair).

Even if Defendants' recent concession that they can provide a kosher diet were not fatal to their legal defense for denying such a diet, the United States is likely to succeed on the merits of its claim for two additional reasons: (1) numerous correctional facilities with interests identical to FDOC are able to offer a kosher diet; and (2) Defendants have not identified any compelling interest furthered only by a blanket denial of a kosher diet.

First, the ability of similar correctional facilities to offer a kosher diet underscores that FDOC can offer such a diet consistent with its penological interests. It is well established that "the policies followed at other well-run institutions [are] relevant to a determination of the need for a particular type of restriction." *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974); *Rich v. Secretary, Slip Op*. at15 (practices of other institutions "are relevant to an inquiry about whether a particular restriction is the least restrictive means by which to further a shared interest"). The Federal Bureau of Prisons' kosher diet program is particularly relevant because 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." *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005). Where BOP accommodates a particular religious exercise, a defendant is unlikely to satisfy RLUIPA's strict scrutiny inquiry "in the absence of any explanation by [the defendant] of significant differences between [its prison] and a federal prison that would render the federal policy unworkable." *Spratt*, 482 F.3d at 42; *see also Warsoldier*, 418 F.3d at 999 (enjoining prison's hair length policy where "[p]risons run by the federal government, Oregon, Colorado, and Nevada all meet the same penological goals without such a policy").

Here, the experience of similar institutions militates strongly against the legality of Defendants' blanket denial of a kosher diet. The Federal Bureau of Prisons, Texas, New York, California, Illinois and at least 31 other states offer a kosher diet to their prisoners. *See* U.S. Exhibits 2, 14, 16, 23. Defendants do not explain how their interests differ from these large correctional institutions. Recognizing this principle, the Eleventh Circuit recently reversed a grant of summary judgment for Defendants in a prisoner's suit seeking a kosher diet "in light of the Defendants' meager efforts to explain why Florida's prisons are so different from the penal institutions that now provide kosher meals such that the plans adopted by those other institutions would not work in Florida." *Rich v. Secretary*, Slip Op. at 15.

Second, Defendants have not identified any compelling interest that is furthered only by a blanket denial of kosher diets. Defendants' chief argument is that denying a kosher diet is the least restrictive means of furthering their compelling interest in controlling cost. While cost control may be a compelling interest in certain situations, *see Rich*, Slip Op. at 11, RLUIPA expressly contemplates that facilitating religious exercise "may require a government to incur expenses in its own operations." 42 U.S.C. § 2000cc-3(c). The costs identified by Defendants in this litigation are not of a compelling magnitude. Indeed, Defendants' expected kosher food expenditures are modest in relation to FDOC's annual budget of nearly $2 billion. Undisputed Facts at ¶ 2. Defendants' argue that the total cost of providing a kosher diet to 1,630 prisoners annually is $3.4 million, calculated based on the percentage of prisoners who applied for the Religious Diet Program at Union C.I. – the lone facility where applications are currently permitted. Opp. at 6. This estimate likely overstates the true cost of a kosher diet, as it fails to account for Union's disproportionate population of Jewish prisoners. *See* U.S. Ex. 31. Indeed, the average enrollment in Defendants' prior kosher diet program was only 250 prisoners. Based

on Defendants' estimate that a kosher diet costs $5.81 more per prisoner each day, Opp. at 6, a comparable participation rate in the new Religious Diet Program would yield a total cost of approximately $530,000 per year.

Regardless, even accepting *arguendo* Defendants' cost estimate, the expense of providing a kosher diet would account for only .0018 of FDOC's budget.[1] No compelling interest is furthered by avoiding such a relatively minor expense. Under the more forgiving standard of review applied in First Amendment cases, the Tenth Circuit has held that avoiding a nearly identical expenditure on kosher food - constituting .0016 of the budget – was not rationally related to a penological interest. *Beerheide v. Suthers*, 286 F.3d 1179, 1191 (10th Cir. 2002); *see also Moussazadeh*, 703 F.3d at 795 ("we are skeptical that saving less than .005% of the food budget constitutes a compelling interest"). Avoiding the modest expense of providing a kosher diet to Florida prisoners is not the least restrictive means of furthering a compelling interest.

Accordingly, the United States is likely to prevail on the merits of its claim that Defendants' blanket denial of a kosher diet violates RLUIPA.

b) The 30-to-90 Day Rule

The Religious Diet Program's requirement that prisoners seeking a kosher diet consume exclusively non-kosher food for a period of 30 to 90 days fails for the same reasons as Defendants' blanket denial of kosher diet. After briefing concluded on the United States' Preliminary Injunction Motion, Defendants announced they were removing this provision from the Religious Diet Program and would implement a kosher program without the 30-to-90 day waiting period. U.S. Ex. 32. This policy change demonstrates as a matter of law that the 30-to-90 day rule cannot withstand strict scrutiny. The provision cannot be the least restrictive means

[1] $3.4 million / 1.94 billion = .0018. If the true cost of Defendants' new kosher diet program is $530,000, this expense would constitute .00027 of Defendants' budget (530,000 / 1.94 billion = .000273).

of furthering a compelling government interest once Defendants have conceded that they can provide a kosher diet without it. *See supra* at 16-18. Regardless, the provision substantially burdens religious exercise by depriving observant prisoners of kosher diet for at least 30 days, *see, e.g., Nelson*, 570 F.3d at 880 (failure to provide a non-meat diet during 40 days of Lent a substantial burden), and is not the least restrictive means of furthering any compelling interest. Indeed, Defendants have not identified any compelling interest related to this provision. *See* Opp. at 21.[2]

c) Religious Orthodoxy Testing

The Religious Diet Program likewise violates RLUIPA by conditioning enrollment in the Program on prisoners satisfying a process of interviews and follow up investigation that focuses on the prisoner's knowledge of religious dogma. *See* U.S. Ex. 3 at 5-6. These provisions allow FDOC chaplains to measure a prisoner's fidelity to a particular religion by conducting internet searches, interviewing clergy and FDOC staff, inspecting prisoner records, and reviewing the prisoner's past religious activities. *See* U.S. Ex. 3 at 6. Indeed, Defendants judge whether applicants to the kosher diet program sufficiently ground their requests in "knowledge of their religion and the requirements of keeping a kosher diet." U.S. Ex. 3. This subordination of prisoners' personal religious beliefs violates federal law.

While RLUIPA "does not preclude inquiry into the sincerity of a prisoner's professed religiosity," *Cutter*, 544 U.S. at 725 n.13, such an inquiry must be "handled with a light touch" and limited "almost exclusively to a credibility assessment." *Moussazadeh*, 703 F.3d at 792. "Prison officials may not determine which religious observances are permissible because orthodox." *Grayson v. Schuler*, 666 F.3d 450, 453-55 (7th Cir. 2012). This principle bars

[2] For the reasons explained on pages 11-13, *supra*, Defendants cannot avoid the Court's decision on the 30-to-90 day rule by changing their policy on the eve of decision. Otherwise, Defendants could constantly evade the Court's review of the challenged rule, and nothing would prevent the Defendants from reinstituting it in the future.

Defendants' policy of excluding prisoners from a kosher diet based on clergy interpretations of religious doctrine. Indeed, "clergy opinion has generally been deemed insufficient to override a prisoner's sincerely held religious belief." *Koger*, 523 F.3d at 799 (holding that RLUIPA covered a prisoner's request for a vegetarian diet even though there were "no dietary restrictions compelled by or central to his professed faith"); *see also Jackson v. Mann*, 196 F.3d 316-320 (2d Cir. 1999) (sincerity of a prisoner's beliefs – not the decision of Jewish religious authorities – determines whether prisoner was entitled to kosher meals); *Newingham v. Magness*, 364 F. App'x. 298, 300 (8th Cir. 2010) (reversing where district court improperly relied on the prison's Islamic coordinator's opinon that a prayer rug was a "convenience" rather than a religious "requirement"); *Grayson*, 666 F.3d at 450 (prison could not force prisoner to cut his hair based on the premise that only those whose faith "'officially' require[s] the wearing of dreadlocks [may] wear them"); *Benning v. Georgia*, 391 F.3d 1299, 1313 (11th Cir. 2004) (finding that RLUIPA's definition of religious exercise "'mitigates any dangers that entanglement may result from administrative review of good-faith religious belief.'") (quoting *Madison v. Riter*, 355 F.3d 310, 320 (4th Cir. 2003)). Defendants' orthodoxy testing strays too far "into the realm of religious inquiry," where government officials "are forbidden to tread." *Moussazadeh*, 703 F.3d at 792.

Other correctional institutions effectively operate kosher diet programs without the rigorous inquiry that Defendants require. The Federal Bureau of Prisons sincerity test consists of a single brief interview with a chaplain. *See* U.S. Ex. 14. The New York correctional system provides a kosher diet to all prisoners who self-identify with a qualifying religion. *See* U.S. Ex. 23. And the Indiana Department of Corrections provides a kosher diet to all prisoners who submit a request in writing. *See* Final Judgment and Injunction, *Willis v. Indiana Dep't of*

Corrections, No. 1:09-cv-815 (S.D. Ind. Dec. 8, 2010), Dkt. No. 110 at 2 (ordering state "to provide certified kosher meals to all inmates who, for sincerely held religious reasons, request them in writing"). The experience of these institutions further demonstrates that Defendants' focus on religious orthodoxy is not the least restrictive means of furthering a compelling interest.

d) Zero Tolerance Removal Provision

The Religious Diet Program's zero tolerance removal provision fails RLUIPA's strict scrutiny requirement for similar reasons. Prisoners who consume any item that Defendants do not officially list as "kosher" are removed for 30 days for a first offense, 120 days for a second offense, and 1 year for all subsequent offenses. U.S. Ex. 3 at 8. A prisoner has no opportunity to explain how the "non-kosher" selection fits within his or her religious beliefs prior to removal from the Program. This provision is incompatible with the principle that, under RLUIPA, "a sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?" *Grayson*, 666 F.3d at 454. Indeed, a "few lapses in perfect adherence do not negate [a prisoner's] overarching display of sincerity." *Moussazadeh*, 703 F.3d at 792. In *Moussazadeh*, the Fifth Circuit held that a Jewish prisoner who repeatedly purchased non-kosher items from the commissary nonetheless "established his sincerity as a matter of law" by requesting a kosher diet and pursuing litigation. *Id*. at 792.

The only compelling interest cited by Defendants in support of the zero tolerance rule is "cost containment." Opp. at 24. Defendants have presented no evidence, however, of how much money the zero tolerance rule would save. Nor have Defendants identified any other institution that imposes a similar restriction. Without such evidence, Defendants cannot demonstrate that the zero tolerance rule is the least restrictive means of furthering a compelling interest. "Policies

grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet [RLUIPA's] requirements." *Rich*, Slip Op. at 12 (citing *Lawson*, 85 F.3d at 509. Thus, the zero tolerance rule violates RLUIPA.

e) Ten Percent Rule

The Religious Diet Program removes prisoners who eat less than 90 percent of available meals even if every meal they consume is kosher. *See* U.S. Ex. 3. Defendants assert that this provision is cost containment and avoiding the waste created by "throw[ing] away" unused meals. Opp. at 23. Like the zero tolerance rule, however, Defendants present no evidence at all of the magnitude of the costs incurred by such waste or the savings attributable to the ten percent rule. Rather, Defendants' rationale for this provision is "mere speculation" that RLUIPA does not countenance. *Rich*, Slip Op. at 12.

Even if there were some evidence of cost, however, Defendants have not demonstrated that this rule is the least restrictive means to avoid "waste." Opp. at 23. Indeed, Defendants can simply track average participation in the Religious Diet Program and adjust their kosher food order accordingly to avoid an excess of meals going to waste. There is no evidence that Defendants have considered this less restrictive alternative. *See, e.g.*, *Washington*, 497 F.3d at 284; *Warsoldier*, 418 F.3d 989, 999 ("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 v. Mo. Dep't of Corr.*, 372 F.3d 979, 989 (8th Cir. 2004) ("It is not clear that MDOC seriously considered any other alternatives, nor were any explored before the district court."). For these reasons, the ten percent rule violates RLUIPA.

* * *

In sum, the United States is likely to prevail on the merits of its claim that Defendants' prior blanket denial of a kosher diet violates RLUIPA, as do each of the four challenged provisions of Defendants' new dietary policies.

B. A Preliminary Injunction is Necessary To Avoid Irreparable Harm

Injunctive relief is necessary to prevent irreparable harm to hundreds of Florida prisoners who believe that keeping kosher is an important part of their religious beliefs. As set forth above, several aspects of Defendants' recently-announced Religious Diet Program will continue to burden prisoners' religious exercise in violation of RLUIPA. These unlawful restrictions on religious exercise constitute irreparable injury. *See*, *e.g.*, *Opulent Life Church v. City of Holly Springs, Miss.*, 697 F.3d 279, 295 (5th Cir. 2012) (finding irreparable harm when RLUIPA is violated); *Warsoldier*, 418 F.3d at 1001-02 (raising a colorable claim of an RLUIPA violation "established that [prisoner] will suffer an irreparable injury absent an injunction"); *Beerheide*, 286 F.3d at 1192 (Failure to provide kosher diet burdens free exercise of religion in violation of the First Amendment). Indeed, it is well-established that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

Moreover, the entire Religious Diet Program is tenuous, as Defendants previously terminated a kosher diet program against the advice of their own study group and continue to argue that they may lawfully deny a kosher diet to all prisoners at any time. Accordingly, judicial intervention is necessary to ensure that Defendants do not eliminate their Religious Diet Program in violation of RLUIPA in the future. This factor weighs in favor of granting a preliminary injunction.

C. The Irreparable Harm to Prisoners Outweighs Any Harm to Defendants

The lack of potential harm to Defendants further demonstrates that a preliminary injunction is warranted. Although Defendants continue to assert that they have no legal obligation to provide a kosher diet, they have announced their intention to provide one by September 2013. *See* U.S. Ex. 3. Thus, an affirmative injunction requiring Defendants to provide such a diet will not impose any costs. Rather it will merely ensure that Defendants honor their commitment.

Enjoining the four challenged provisions of Defendants' new Religious Diet Program is similarly unlikely to harm Defendants in any meaningful way. Indeed, enjoining the four challenged provisions of the Program may lessen the administrative burden on FDOC staff, as these provisions impose significant administrative obligations on FDOC staff to test, track, and monitor the religious exercise of prisoners who desire a kosher diet. Nor are any of the challenged provisions necessary to effectively operate a kosher diet program. Without the challenged provisions, the Religious Diet Program would function similarly to other kosher diet programs, such as the one operated by the Federal Bureau of Prisons. An injunction of these discrete provisions will not interfere with Defendants' stated plan to implement a statewide kosher diet option by September 2013.

Finally, enjoining the challenged provisions of the Religious Diet Program will save Defendants from expending resources to train staff and otherwise implement a policy that is likely to be invalidated. *See Giovani Carandola, Ltd. v. Bason,* 303 F.3d 507, 521 (4th Cir. 2002) (enjoining implementation of a policy that is likely to be found a violation of law does not harm defendants). For these reasons, avoiding the irreparable harm to Florida prisoners outweighs any harm to Defendants from an injunction.

D. Injunction Is in the Public Interest

An injunction that vindicates religious freedoms protected by federal law is in the public interest. *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("Frustration of federal statutes and prerogatives are not in the public interest"). Protection for religious exercise is a cherished ideal, and RLUIPA passed both houses of Congress unanimously as "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." *Cutter*, 544 U.S. at 713. By its terms, RLUIPA is broadly construed in favor of religious liberty "to the maximum extent permitted by [the statute] and the Constitution," 42 U.S.C. § 2000cc-3g, to ensure that "[s]incere faith and worship can be an indispensible part of rehabilitation." 146 Cong. Rec. S6678-02, at S6688-89 (daily ed. July 13, 2000). The number and diversity of organizations that have recently urged Defendants to provide a kosher diet further demonstrates the strong public interest at stake in this litigation. *See* U.S. Ex. 25-28 (amicus briefs filed in *Rich v. Secretary* by, among others, the Aleph Institute, International Mission Board of the Southern Baptist Convention, International Society for Krishna Consciousness, Hindu-American Foundation, National Jewish Commission on Law and Public Affairs, American Civil Liberties Union, Rabbinical Alliance of America, and the American Jewish Committee).

Here, Defendants long-standing efforts to avoid providing a kosher diet demonstrate that injunctive relief is necessary to ensure the religious exercise of Florida prisoners. Defendants discontinued their prior kosher diet program against the advice of their own study group in 2007 and refused to offer a statewide kosher diet program for the next six years. In 2013, eight months after the United States' challenged Defendants' refusal to offer a kosher diet, Defendants announced that they would start providing a kosher in the fall of 2013 and asked the Court to

immediately declare this litigation moot. Despite this announcement, Defendants continue to argue that they may lawfully deny a kosher diet to all Florida prisoners and refuse to commit to providing a kosher diet in the future. Accordingly, an injunction is necessary to guarantee the important rights protected by RLUIPA.

CONCLUSION

For the reasons set forth above, it is hereby ORDERED that the United States' Motion for a Preliminary Injunction against the Defendants is GRANTED as follows:

(1) Defendants are preliminarily enjoined and ordered to provide a certified kosher diet to all prisoners with a sincere religious basis for keeping kosher no later than September 1, 2013;

(2) Defendants are preliminarily enjoined from implementing or re-promulgating Procedure 503.006(5) (30-to-90 Day Rule) of the Religious Diet Program, U.S. Ex. 3, effective immediately; and

(3) Defendants are preliminarily enjoined from implementing the following provisions of the Religious Diet Program, U.S. Ex. 32, effective immediately:

(a) Procedure 503.006(4)(b)-(e) (Orthodox Sincerity Testing);

(b) Procedure 503.006(7)(c) (10 Percent Rule); and

(c) Procedure 503.006(7)(e)(2)-(3) (Zero Tolerance Rule).

DONE AND ORDERED in Miami, Florida, this ____ day of June, 2013.

_____
PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I certify that the foregoing United States' Proposed Findings of Fact and Conclusions of Law was served through the electronic filing service on May 24, 2013, to the following individuals:

Susan A. Maher
Chief Assistant Attorney General
Office of the Attorney General
The Capitol – PL01
Tallahassee, FL 32399
Susan.Maher@myfloridalegal.com

Attorney for Defendants

s/ Michael J. Songer

MICHAEL J. SONGER
Attorney for the United States