Appeal No. 00-1086

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CHARLES BEERHEIDE, SHELDON PERLMAN
AND ALLEN FISTELL,

Plaintiffs/Appellees,

v.

JOHN SUTHERS, GERALD GASKO,
DONA ZAVISLAN AND LEE HENDRIX

Defendant/Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT
OF COLORADO, CASE NOS. 95-B-2325, 95-B-2326 & 95-B-2481
HON. LEWIS T. BABCOCK, CHIEF JUDGE

BRIEF OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF APPELLEES AND IN SUPPORT OF AFFIRMING THE DECISIONS OF THE DISTRICT COURT IN CASE NOS. 95-B-2325, 95-B-2326 & 95-B-2481

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December 11, 2000

I. CERTIFICATE OF INTEREST

Counsel for *amicus curiae* the American Civil Liberties Union certifies the following:

1. The full name of every party or *amicus curiae* represented by me is the American Civil Liberties Union.

2. The parent companies, subsidiaries (except wholly owned subsidiaries) or affiliates that have issued shares to the public of the party or *amicus curiae* represented by me are: None.

3. The names of all law firms and the partners or associates that appeared for the party or *amicus curiae* now represented by me in the trial court or agency, or that are expected to appear in this court are:

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IV. STATEMENT OF THE CASE & STATEMENT OF FACTS

The ACLU respectfully adopts and refers this Court generally to the Statement of the Case and Statement of Facts in Appellees' Opening Brief filed with the Court on or about November 20, 2000.

V. INTEREST OF AMICUS CUIAE

Pursuant to Fed. R. App. P. 29, *amicus curiae* the American Civil Liberties Union (the "ACLU") submits this brief in support of appellees Charles E. Beerheide, Sheldon Perlman and Allen Isaac Fistell (collectively, the "Jewish Inmates") to urge this Court to affirm the decisions of the United States District Court for the District of Colorado (the "District Court") in *Beerheide v. Zavaras*, 997 F. Supp. 1405 (D. Colo. 1998) ("*Beerheide I*") and *Beerheide v. Suthers*, 82 F. Supp. 2d 1190 (D. Colo. 2000) ("*Beerheide II*"). Specifically, the ACLU submits this brief in support of the District Court's determinations that (i) the Jewish Inmates are entitled to a kosher diet in accordance with orthodox Jewish law; and (ii) the Colorado Department of Corrections' (the "CDOC") proposed kosher diet co-pay program is an unnecessary burden on the Jewish Inmates' free exercise of their religion in violation of their First Amendment rights.

The ACLU's stated mission is to fight civil liberties violations wherever and whenever they occur. The organization confronts both

traditional and new threats to civil liberties. The implications of *Beerheide I and Beerheide II* extend well beyond the three individual inmates. The CDOC's requested relief threatens not only to violate the First Amendment protections afforded to the Jewish Inmates, but threatens, too, to create an oppressive environment which prevents every inmate from exercising the right to practice their religion according to the dictates of conscience.

A motion for leave to file pursuant to Fed. R. App. P. 29(b) accompanies this brief.

VI. SUMMARY OF ARGUMENT

This Court should affirm the decisions of the District Court for several reasons. First, maintaining a kosher diet is critical to an observant Jew's religious practice. Because the CDOC does not challenge the sincerity of the Jewish Inmates' beliefs, it is axiomatic that a kosher diet is essential to their ability to practice Judaism.

Second, the Jewish Inmates' right to a diet consistent with their beliefs is protected by the First Amendment. Although prison regulations that burden an inmate's constitutional rights are valid if the regulation is reasonably related to legitimate penological concerns, these "concerns" are often little more than a pretext to justify violations of fundamental rights. Moreover, allowing inmates the right to practice their chosen religion

generally advances penological interests by contributing to their rehabilitation while also reducing the likelihood of recidivism.

Third, the District Court properly applied the *Turner* factors in the underlying litigation. The well-reasoned *Beerheide* decisions are supported by the record below. Fourth, even if the District Court erred in its *Turner* analysis, this Court must nonetheless affirm the results below. Assuming, *arguendo*, the CDOC did not violate the Jewish Inmates' First Amendment rights, the record demonstrates that CDOC's position with respect to a kosher meal plan is abhorrent to the equal protection clause of the Fourteenth Amendment.

Fifth, and finally, the recent enactment of the Religious Land Use and Institutionalized Persons Act of 2000 (the "Religious Land Use Act" or, the "Act"), 42 U.S.C. § 2000cc, reflects the legislative intent to restore a compelling interest/least restrictive means standard when governmental regulations infringe religious freedoms. The Act signals a trend designed to offset the draconian results frequently mandated in the era of *Turner* and *O'lone* (both cited *infra*).

For these reasons, and for the reasons detailed below, this Court should affirm the decisions of the District Court.

VII. ARGUMENT

A. Observant Jews Must Maintain A Kosher Diet.

A complete exposition on Jewish dietary practices and kosher laws is beyond the scope of this brief. It is the understanding of the ACLU that The Aleph Institute and Jewish Prisoner Services International, as *amici curiae*, are filing a brief that addresses kosher dietary regulations in detail. Maintaining a kosher diet, however, is essential to an observant Jew's religious practice. Therefore, the following summary relative to keeping kosher is a necessary predicate to the ACLU's belief that the positions advocated by the CDOC violate the Jewish Inmates' First Amendment rights.

1. The Laws of Kashruth

The Hebrew term "kashruth" is the "collective term for the Jewish laws and customs pertaining to the types of food permitted for consumption and their preparation." Jamie Aron Forman, Note, Jewish Prisoners and Their First Amendment Right to a Kosher Meal, 65 Brooklyn L. Rev. 477, 480 (1999) (footnote and internal quotations omitted). Critically, "[t]here is no 'almost kosher'; a food product is either kosher or not kosher." Karen Ruth Lavy Lindsay, Comment, Can Kosher Fraud Statutes Pass the Lemon Test?: The Constitutionality of Current and Proposed Statutes, 23 Dayton L.

Rev. 337, 338 (1998); *see also* Kashrut: Jewish Dietary Laws at http://www.jewfaq.org/kashrut.htm ("There is no such thing as 'kosher-style' food"). Thus, the CDOC's frequent refrain that the Jewish Inmates are not entitled to a "strict kosher diet" (*see*, *e.g.*, Appellants' Opening Brief ("AOB"), p. 28), or one that meets the "strictest orthodox standards" (*id*, p. 23) is specious. The CDOC's programs either permit the Jewish Inmates to observe the laws of kashruth or they do not. There is no compromise.

The main purpose behind the rules of kasruth, or keeping kosher, is not hygiene, but holiness. "What is involved is the issue of godliness. Each person observing kashruth is treated as if he were in a direct relationship with God. . . ." *Forman*, *supra*, at 481 (footnote and internal quotations omitted). The observant Jew "must forfeit everything he has, company of his wife and children, his entire wealth, to enter into the realm of the most poverty-stricken rather than transgress the Kashruth laws." *United States v. Kahane*, 396 F. Supp. 687, 691 (E.D.N.Y. 1975) (quoting expert witness Orthodox Rabbi Moishe D. Tendler). He is to "allow himself to be subjected to . . . physical torture . . . rather than consume [non-kosher] food."

In short, keeping kosher is not a frivolous notion. Rather, observing the rules of kashruth represents "a critical need of the Jew[s] to relate with [their] God in a series of instructions that have been [their] mark of

distinction from the days that [they] left Egypt . . . thousands of years ago." *Forman* at 481-82 (footnotes and internal quotations omitted). Therefore, to a kosher observant Jew, the "'consumption of forbidden foods defiles the holy spirit, and its sanctity is injured.'" Stephen F. Rosenthal, Food for Thought: Kosher Fraud Laws and the Religion Clauses of the First Amendment, 65 Geo. Wash. L. Rev. 951, 956, n. 43 (1997), quoting Rabbi Yacov Lipschutz, Kashruth: A Comprehensive Background and Reference Guide to the Principles of Kashruth, at 15 (1988). Or, as another commentator has written: "'To the kosher observant Jew, the mistakenly placed non-kosher food is akin to the bottle of Tylenol that has been tampered with. It is a fear, a challenge, indeed a threat.'" *Id.*, *quoting* Rabbi Yosef Wikler, The Food Merchant's Role in the Kosher Food Industry, Kashrus Mag., Dec. 1988, at 35.

2. The Jewish Inmates' Religious Beliefs are Sincere.

The CDOC has never disputed that Mr. Perlman's religious beliefs are sincere. *Beerheide II*, 82 F. Supp.2d at 1194. Furthermore, the District Court held that both Messrs. Beerheide and Fistell are likewise sincere in their beliefs. *See Beerheide v. Suthers*, 82 F. Supp.2d 1190, 1194-95 (D. Colo. 2000) ("*Beerheide II*"). (*See also* App. III, 827:6 – 828:9; App. III. 848:3 – 849:20 (supporting testimony of Rabbi Engel); App. III, 959:11- 24

(supporting testimony of Rabbi Foster)). The CDOC does not "challenge the factual findings of the [District] Court" on appeal. (AOB, p. 13.) Therefore, it is not disputed that each of the Jewish Inmates is sincere in his request for a kosher diet.

Because a kosher diet is an essential component of the Jewish Inmates' beliefs, existing law and the record below support only one reasonable conclusion: the Jewish Inmates' right to a kosher diet is protected by the First Amendment. Accordingly, the decision of the District Court must be affirmed.

B. An Inmate's Right To Practice His Religion Is Protected By The First Amendment.

1. Inmates do not Relinquish all of the Protections Afforded Them by the Constitution.

The First Amendment provides individuals with the right of free exercise of religion. It is a fundamental tenet of constitutional law that "prisoners do not lose their right to practice their religion when the prison gate closes behind them." *Moskowitz v. Wilkinson*, 432 F. Supp. 947, 948 (D. Conn. 1977) (prison policy statement prohibiting all beards declared unconstitutional as applied to prisoners who declined to remove their beards on the basis of sincerely held religious beliefs). Thus, "reasonable opportunities must be afforded to all prisoners to exercise the religious

freedom guaranteed by the First and Fourteenth Amendments without fear of penalty." *Cruz v. Beto*, 405 U.S. 319, 322, n. 2, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972) (granting plaintiff inmate's motion *in forma pauperis* and petition for *certiorari* when complaint stated, *inter alia*, that inmate, a Buddhist, was prevented from using prison chapel utilized by inmates of other religions).

It is also well established that the "guarantees of the First Amendment are not limited to beliefs shared by all members of a religious sect." *LaFevers v. Saffle*, 936 F.2d 1117, 1119 (10th Cir. 1991) (district court abused its discretion in dismissing inmate's argument that prison's failure to provide inmate, a Seventh Day Adventist, with a vegetarian diet violated inmate's First Amendment rights), *citing Thomas v. Review Bd. of Indiana Employment Security Div.*, 450 U.S. 707, 715-16, 101 S. Ct. 1425, 67 L. Ed. 2d 624, (1981); *see also Prushinowski v. Hambrick*, 570 F.Supp. 863, 867-68 (E.D.N.C. 1983) (Orthodox Jewish inmate's prerogative to exercise his beliefs under the First Amendment is in no way diminished by the fact that his faith requires that he not eat certain food acceptable to most Orthodox Jewish inmates). Rather, an individual is entitled to invoke First Amendment protections if his religious beliefs are sincerely held, notwithstanding that a particular belief may not be shared by all practitioners. *Id.*, *citing*

Frazee v. Illinois Dept. of Employment Security, 489 U.S. 829, 832-33, 109 S. Ct. 1514, 103 L. Ed. 2d 914 (1989).

Thus, a government cannot strip an inmate of his right to practice a sincerely held belief merely "by pointing to other believers who accept less rigorous views and practices." *Moskowitz*, *supra*, 432 F. Supp. at 949-50 (footnote omitted). Similarly "religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection. *Snyder v. Murray City Corp.*, 124 F.3d 1349, 1352 (10th Cir. 1997), *citing Thomas*, *supra*, 450 U.S. at 714.

Still, while convicted prisoners do not forfeit protections afforded by the Constitution, it is acknowledged that lawful incarceration may bring about limitations of "many privileges and rights, a retraction justified by the considerations underlying our penal system. . . . The limitations on the exercise of constitutional rights arise both from the fact of incarceration and from valid penological objectives – including deterrence of crime, rehabilitation of prisoners, and institutional security." *O'lone v. Estate of Shabazz*, 482 U.S. 342, 348, 107 S. Ct. 2400, 2404, 96 L. Ed. 282 (citations and internal quotations omitted).

In *LaFevers*, *supra*, this Court adopted the rule that "a prison regulation which burdens an inmate's constitutional rights is valid if the

regulation is reasonably related to legitimate penological interests." *LaFevers*, at 1119, *citing Turner v. Safley*, 482 U.S. 78, 89 (1987). The reasonableness inquiry considers several factors:

> (1) whether there exists a rational connection between the prison policy or regulation and a legitimate governmental interest advanced as its justification; (2) whether there are alternative means of exercising the right notwithstanding the policy or regulation; (3) what effect accommodating the exercise of the right would have on guards, other prisoners, and prison resources generally; and (4) whether there are ready, easy-to-implement alternatives that would accommodate the prisoner's rights.

Makin v. Colorado Department of Corrections, 183 F.3d 1205, 1209 (10th Cir. 1999) (CDOC directive that meal procedures complying with observance of Ramadan would not apply to inmates in segregation infringed plaintiff's right to exercise his religion), *citing Turner*, 482 U.S. at 89-91. As discussed *infra*, asserted penological interests relative to kosher dietary restrictions are often a pretext. Frequently, the interests do not justify restricting an inmate's constitutional right to maintain a kosher diet.

2. The Nexus Between Dietary Policies and Asserted Governmental Goals does not Withstand Scrutiny.

The CDOC proffered three governmental concerns related to legitimate correctional goals to justify its policy of not providing the Jewish Inmates with a kosher diet: (i) cost considerations; (ii) security concerns; and (iii) proliferation of other lawsuits. *See Beerheide I, supra,* 997 F.Supp. at

1412. Further, in order to justify its co-pay proposal, the CDOC identified budgetary considerations and the prevention of inmate abuse as the alleged legitimate correctional goals. *Beerheide II*, 82 F.Supp.2d at 1196. Each of these concerns may be "legitimate in the abstract" *Beerheide I* at 14012. However, the "nexus between the prison dietary policy and the correctional goals is too tenuous to withstand scrutiny." *Id*.

The District Court's conclusion with respect to the tenuous nexus of governmental interests and prison policy is accurate not only with respect to the peculiar facts of this case, but, as detailed below, the District Court's holding is true with respect to prison dietary policies generally. This brief address three commonly asserted penological interests: budgetary constraints, the proliferation of other lawsuits, and rehabilitation. Although prison officials often cite these interests in response to a prisoner's dietary demands, the interests should not form the basis of policy that prevents an inmate from exercising his religious beliefs.

a. Budgetary concerns with respect to kosher meals are frequently specious, and should not justify preventing an inmate from exercising his First Amendment rights.

Prison officials frequently invoke budgetary concerns to justify prohibitions or limits upon inmates' First Amendment rights. In *Prushinowski v. Hambrick*, *supra*, the United States District Court for the

Eastern District of North Carolina held that Prushinowski, an Orthodox Jewish inmate incarcerated in a Federal Correctional Institution, was entitled to a diet which complied with his religious beliefs. In so holding, the Court rejected the respondents' argument that it would be too expensive to provide the inmate with kosher foodstuffs which met the inmate's standards. "[B]udgetary considerations alone cannot excuse the prison from according Prushinowski his First Amendment rights." *Id.*, at 868-69, *citing Monroe v. Bombard*, 422 F. Supp. 211, 217 (S.D.N.Y. 1976).

With respect to a kosher diet, several courts recognize that such a small fraction of prisoners adhere to the laws of kashruth as to render the cost negligible. *See*, *e.g.*, *Beerheide I*, 997 F. Supp. at 1412 ("mathematically speaking, the actual cost of providing these three inmates with kosher meals, by force of reason, must be regarded as a miniscule portion of the Food Servies' annual budget"); *Luckette v. Lewis*, 883 F. Supp. 471, 480 (D. Ariz. 1998) (acknowledging that "[o]nly a few prisoners have legitimate religious beliefs which require they maintain a Kosher diet, and the expense of providing Kosher meals to these few prisoners is minimal"); *Kahane*, *supra*, at 703 (while the cost of prepackaged kosher dinners might be somewhat higher than regular prison fare, "the government does not contest

the fact that only in the order of a dozen person would have to be provided with such food, so that costs would not be significant").

Courts, in addition, recognize that options may exist to defray from the cost of providing inmates with a kosher diet. For example, in *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997) the court rejected the magistrate judge's determination that providing a kosher diet was necessarily cost prohibitive. Ashelman, an Orthodox Jew who complained that the Arizona Department of Corrections' failure to provide him with a kosher diet violated his right to the free exercise of religion, submitted that the Department of Corrections could provide him with fruits, vegetables, nuts, tinned fish, dairy products and kosher cereals that would satisfy the laws of kashruth, and serve them on disposable plates with disposable utensils – which also would satisfy kashruth. *See id.* at 677. "Most of these things are 'off-the-shelf' and nothing in the record suggests that the cost would be appreciable." *Id*.

Volunteerism likewise can play a role in defraying costs. In *Prushinowski*, *supra*, the district court noted that "the Hasidic community has offered to donate funds . . . so that Prushinowski's dietary needs may be met." 570 F. Supp. at 868. The district court in *Kahane*, *supra*, similarly commented that it "would be satisfactory to allow local or national Jewish community groups to provide kosher foods to orthodox Jewish prisoners."

396 F. Supp. at 702 (collecting cases). Organizations such as *amici curiae* The Aleph Institute and Jewish Prisoner Services International (among other groups) often help fund the furnishing of kosher meals in prison by donating kosher products. *See*, *e.g.*, Forman, *supra*, 65 Brooklyn L. Rev. at 521 (footnotes omitted). Thus, because it is possible to comply with the laws of kashruth "in substantial part at *de minimis* cost, budgetary concerns are an invalid justification for refusing to provide kosher diets." *Id*. (footnote omitted).

So, too, did the District Court hold that the CDOC's cost considerations were without merit. In *Beerheide I*, for example, the District Court concluded that the actual annual cost of providing the three inmates with kosher meals was necessarily *de minimis*. *See id.*, 997 F. Supp. at 1412. Similarly, in *Beerheide II* the district court rejected the CDOC's "evidence concerning the cost of providing kosher diets [as] unreliable and speculative. Therefore, cost considerations cannot form the basis for the co-pay program proposed by the DOC." *Id*., 82 F. Supp. 2d at 1198.

Indeed, the CDOC's proffered evidence was horribly inconsistent. For example, although Dona Zavislan, Food Service Administrator for the CDOC, testified that it would cost $1.4 million dollars per year to provide kosher entrees or kosher TV dinners to the Orthodox Jewish inmates, "there

was no testimony by Ms. Zavislan or any other witness as to the basis for the $1.4 million dollar figure. Nor was there any testimony establishing the annual cost to provide kosher TV dinners to the three plaintiffs." *Beerheide I* at 1412. Further, Ms. Zavislan's estimates as to the cost of providing a kosher meal varied dramatically at trial. *Beerheide II* at 1197-98; *see also* Trial Exhibits 13, 14 ($4.50 per kosher meal) and Trial Exhibit 29 ($2.50 per kosher meal).

Yet Ms. Zavislan testified also that CDOC's inventory, and CDOC's menu, include numerous items that are kosher and that do not need to be specially purchased to satisfy the Jewish Inmates' dietary needs. (Trial Exhibits 20, 21, App. IV, 1153:1-15.) CDOC's costs were necessarily inflated because the figures failed to recognize the fact that leftover or extra kosher food could be distributed among the inmates, rather than left to rot. (App. III, 88:12-19; App. IV, 1060:9 – 1061:7) No wonder that CDOC'S Executive Director, John W. Suthers likewise conceded that the proposed co-pay "takes on a miniscule appearance" in relationship to CDOC's budget. (App. III, 927:7 – 20.)

Cost considerations generally do not justify an institution's failure to provide a sincere inmate with a diet which complies with his religious beliefs. More particularly, cost considerations did not justify either the

requested co-pay, or a failure to provide the Jewish Inmates with a kosher diet in the underlying litigation..

b. Concerns regarding the proliferation of other lawsuits are unfounded.

Another justification often asserted in rejecting an inmate's demand for a diet consistent with his religious beliefs is the fear that it will lead eventually to a proliferation by inmates of myriad other religious-based demands. This concern is speculative on its face. The suspect nature of this fear was perhaps best articulated by the District Court when it reasoned that

> to deny these plaintiffs their right to observe a central tenet of their religion on the ground that it might lead to other lawsuits is specious. The DOC's logic would effectively preclude provision of any accommodations for religious practices in prison. . . . To deny plaintiffs their right to free exercise of their sincerely held religious beliefs because it might lead to other inmates filing lawsuits is unreasonable.

Beerheide I at 1412.

Moreover, the concern is not only speculative, it is also without foundation. To be sure, "[b]ecause religion-based suits cannot win a prisoner his or her freedom, they represent only 2 percent of all prisoner's claims." 139 Cong. Rec. S. 14462 (Oct. 27, 1993) (statement of Sen. Lieberman). In pledging his support for the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb (1994), Senator Lieberman added that

"[s]peaking as a former attorney general, the resources of State attorneys general are not stretched to the breaking point by prisoner's spurious legal claims based on religion." *Id*. Similarly, thirteen State attorneys general, minimizing the potential for concerns relative to any appreciable increase in free exercise claims, expressed their support for RFRA in a letter to the Senate:

> Based on past experience with RFRA's legal standard, the bill will neither jeopardize prison security nor produce significant increases in costs. Although prisoner litigation is indeed an enormous and growing problem, free exercise of religion claims are made in only a tiny fraction of these cases. In New York, for example, only 1% of all cases involve free exercise claims, and the percentage of such cases has remained essentially constant in recent years even as Supreme Court decisions were substantially changing the applicable legal standard.

139 Cong. Rec. S 14351-52 (Oct. 26, 1993) (statement of Sen. Kennedy). Free exercise claims in Ohio constituted an estimated 2% of all prison litigation, while Missouri's former attorney general estimated that "maybe 1 or 2 percent" of prison lawsuits "are based on religion." 139 Cong. Rec. S 14465, 14466 (Oct. 27, 1993) (statements of Sen. Hatch and Sen. Hatfield).

Subsequently, when the Senate passed the Religious Land Use and Institutionalized Persons Act of 2000 (the "Religious Land Use Act" or, the "Act"), 42 U.S.C. § 2000cc, Senator Hatch noted that the Prison Litigation Reform Act "is working effectively to control frivolous prisoner

litigation . . . without barring meritorious claims equally with frivolous ones." 146 Cong. Rec. S 7775 (July 27, 2000) (statement of Sen. Hatch). Senator Hatch submitted that "empirical studies also show that religious liberty claims are a very small percentage of all prisoner claims, that RFRA led to only a very slight increase in the number of such claims, and that on average RFRA claims were more meritorious than most prisoner claims." *Id*., *citing* Lee Boothby & Nicholas P. Miller, Prisoner Claims for Religious Freedom and State RFRAs, 32 U.C. Davis L. Rev. 573 (1999).

Although the Supreme Court ultimately ruled that Congress had exceeded its constitutional power by enacting RFRA, *see City of Boerne v. Flores*, 521 U.S. 507 (1997), strict scrutiny remains the applicable standard in religious liberty cases brought by federal inmates. Even so, the federal Bureau of Prisons experienced only 65 RFRA suits in six years, "most of which also alleged other theories that would have been filed anyway." 146 Cong. Rec. S 7775 (July 27, 2000) (statement of Sen. Hatch). On average, "that's less than 1 case in each federal facility. It's hardly a flood of litigation or a reason to deny this protection to prisoners." 146 Cong. Rec. S 6689 (July 13, 2000) (statement of Sen. Kennedy).

The concern about the proliferation of other religious dietary demands, or other lawsuits, does not justify a prison policy of refusing to

furnish kosher meals to observant Jewish inmates. The District Court properly rejected the CDOC's argument when it concluded that the concern "is speculative at best." *Beerheide I*, 997 F. Supp. at 1412. Very simply, the CDOC will be forced to respond to just as many prisoner lawsuits if it refrains from providing kosher meals as it would if it complies with the inmates' First Amendment rights. In fact, abridging the incarcerated individuals' constitutional rights will only open the door to further court appearances.

c. Free exercise of religion actually promotes rehabilitation and reduces recidivism.

Perhaps the best reason to encourage an inmate's free exercise rights is that penological interests are *advanced* when an inmate is accorded the protections of the First Amendment. "Spiritual development and religious study are perhaps 'the most valuable tools for rehabilitation and to prevent recidivism.'" *Forman*, *supra*, 65 Brooklyn L. Rev. at 484 (footnote omitted); *see also* 139 Cong. Rec. S 14465 (Oct. 27, 1993) (statement of Sen. Hatch ("exposure to religion "is the best hope we have for rehabilitation of a prisoner")). A 1990 study conducted by the Institute for Religious Research at Loyola College in Maryland compared two groups of ex-offenders. The groups were similar in terms of crimes committed, age,

gender and race. One group, however, regularly attended religious programs while the other had not.

> The study found that, overall, offenders who had taken part in the program were nearly 22 percent less likely to be re-arrested than those who had not. Among women, the difference was even more notable. Women who attended [religious] seminars were 60 percent less likely to be arrested. And those who were re-arrested were charged with less serious offenses.

139 Cong. Rec. S. 14466 (Oct. 27, 1993) (statement of Sen. Coates).

Another controlled study involving nearly 1600 medium security male inmates at Lieber Prison in South Carolina found that "less than 10% of those who attended religious programs had infractions, compared to over 23% of those who did not attend." Isaac Jaroslawicz, Symposium: How the Grinch Stole Chanukah, 21 Cardozo L. Rev. 707, 720, n. 40. Further, the more an inmate frequented religious programs, the less likely he was to have any infractions at all. *See id*. Yet another study reported that "inmates who attended 10 or more Bible studies in a year were nearly three times less likely to be rearrested during the 12 months after release than a matched comparison group who did not attend such programs." *Id.* n. 41.

"Sincere faith and worship can be an indispensable part of rehabilitation. . . ." 146 Cong. Rec. S 6688 (July 13, 2000) (statement of Sen. Hatch). Inmates who are permitted the opportunity to practice their religion,

or who are otherwise allowed to join religious outreach groups, have far lower recidivism rates than non-practitioners. With respect to the underlying litigation, penological and societal interests are ultimately advanced by providing the Jewish Inmates with a kosher diet. Accordingly, this Court should affirm the decision of the District Court.

C. The District Court Properly Applied The Turner Factors.

It is beyond peradventure that the District Court properly applied the *Turner* factors. In *Beerheid I*, for example, the CDOC proffered the governmental concerns of cost, security and proliferation of other lawsuits as legitimate correctional goals to justify its policy of not providing religious diets. *See* 997 F. Supp. at 1412. The District Court then determined that the Jewish Inmates had no viable alternative to eating kosher, since most inmates would be unable to obtain kosher food from any source other than the CDOC Food Services. *See id*. None of the concerns identified by the CDOC justified its policy on religious diets because (i) cost was minimal; (ii) CDOC presented no evidence to support its position that providing the Jewish inmates with kosher meals would present security problems; and (iii) CDOC's concern relative to the proliferation of other lawsuits was speculative. *See id*. Finally, the District Court considered the availability of alternative means to accommodate rights at minimal cost. While

acknowledging that the impact on the Food Service budget was a valid concern, the District Court concluded that the CDOC failed to explain why providing the Jewish Inmates with kosher TV dinners would not accommodate the Jewish Inmates at a *de minimis* cost. *See id.* at 413.

The District Court properly applied the *Turner* Factors again in *Beerheide II*. The District Court first concluded that cost and prevention of inmate abuse were both legitimate CDOC interests. *See id.*, 82 F. Supp. 2d at 1197. As in *Beerheide I*, however, the District Court determined that the Jewish Inmates did not "have a viable alternative to observing the essential tenet of Judaism of eating a kosher diet" since, again, inmates would be unable to obtain kosher meals from other sources. *Beerheide II* at 1197. Furthermore, the District Court reasoned that cost considerations could not form the basis of CDOC's co-pay program when (i) CDOC's testimony relative to the cost of providing kosher meals was "unreliable and speculative" and (ii) it could require an inmate to begin parole with a financial debt to CDOC, a policy that "runs counter to [the] laudatory goal of rehabilitation." *Id*., at 1198. Nor could CDOC's asserted concern of program abuse justify the co-pay when CDOC's existing method of testing an inmate's religious sincerity was clearly effective at dissuading inmates from seeking any perceived privilege of a kosher diet. *Id*., at 1199. Finally,

in assessing the availability of alternative means to accommodate rights at minimal cost, the District Court, utilizing CDOC's "own, albeit speculative, estimate cost of kosher food" concluded that providing the Jewish Inmates with kosher meals had a *de minimis* effect on CDOC's Food Services budget. *Id*., at 1200. The kosher diet co-pay program was, accordingly, not rationally related to the legitimate penalogical concerns of cost and abuse. "Therefore, DOC's proposed co-pay program is an unnecessary burden on Plainitffs' free exercise of their religion in violation of the First Amendment to the United States Constitution."

The District Court did not abuse its discretion when it refused to incorporate CDOC's proposed co-pay into the injunctive relief granted to the Jewish Inmates. Furthermore, the District Court's determination requiring the CDOC to provide the Jewish Inmates with a kosher diet is consistent with the law of this Circuit. *See LaFevers*, *supra*. The opinions of the District Court must therefore be affirmed.

D. Even If The District Court Failed To Properly Apply The Turner Factors, This Court Should Nonetheless Grant The Jewish Inmates' Requested Relief Since The CDOC's Proposals Violate The Equal Protection Clause.

Assuming, *arguendo*, that the District Court erred in its Turner analysis, this Court should nonetheless affirm the District Court based on other grounds supported by the record. *See*, *e.g.*, *United States v. Sandoval*,

29 F.3d 537, 542, n. 6 (10th Cir. 1994) ("We are free to affirm a district court decision on any grounds for which there is a record sufficient to permit conclusion of law, even grounds not relied upon by the district court." (citation omitted)). Specifically, this Court should affirm the District Court's opinion because the CDOC position with respect to kosher diets violates the equal protection clause of the Fourteenth Amendment.

The Constitution's equal protection guarantee ensures that prison officials "cannot discriminate against particular religions." *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997) (reversing district court's grant of summary judgment against inmate to the extent that Muslim prisoners were deprived of equal access to religious services). In *Cruz v. Beto*, 405 U.S. 319, 92 S. Ct. 1079, 31 L. Ed. 2d 263 (1972), the Supreme Court made clear that an inmate who is an adherent of a minority religion must be afforded "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts." 405 U.S. at 322. In an explanatory footnote, the Court elucidated the applicable standard:

> We do not suggest, of course, that every religious sect or group within a prison – however few in number – must have identical facilities or personnel. A special chapel or place of worship need not be provided for every faith regardless of size; nor must a chaplain, priest, or minister be provided without regard to the extent of the demand.

> But reasonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendments without fear of penalty.

Id., n.2. Absent a compelling interest, the state cannot favor the religion of one individual over that of another in the context of society at large. Nonetheless, any distinction between the CDOC's treatment of the Jewish Inmates and its treatment of inmates of other faiths may be justified if it is "'reasonably related to legitimate penological interests.'" *DeHart v. Horn*, 227 F.3d 47, __, 2000 U.S. App. Lexis 23255, * 39-40 (3d Cir. 2000) (reversing district court's granting summary judgment against Buddhist inmate on inmate's equal protection claim where neither the district court nor prison officials explained how denial of inmate's request for vegetarian diet was reasonably grounded in legitimate penological concerns).

The evidence at trial is overwhelming that the CDOC provides religious dietary accommodations for non-Jewish inmates. The CDOC purchased microwave ovens and microwavable cookware in order to provide hot meals during the month-long fast of Ramadan. (Trial Exhibit 9; App. IV, 1111:5 – 1112:23). Similarly, the CDOC accommodates other dietary needs of Muslim inmates by, *inter alia*, purchasing requisite ceremonial or holiday foods. (Trial Exhibits 10, 12, 15 and 19; App. IV, 1118:10 – 14.) In addition, counsel for the Jewish Inmates introduced a memorandum at trial

that provides in pertinent part that the "Department of Corrections offers two types of religious diets for Muslims: a pork-free diet or a lacto-ovo-pesco ["LOP"] vegetarian diet. . . . The LOP diet was planned to exclude all haram, or unlawful, foods for the Muslim inmates." (Trial Exhibit 11.) Further, CDOC trains and educates food handlers to provide an environment in which Muslim inmates may observe their religious dietary tenets. (App. IV, 1132:3 – 22.)

In fact, CDOC accommodates a number of religion-based dietary needs. Ms. Zavislan previously stated that it is CDOC's "policy to provide a nutritionally adequate alternate diet when the tenets of the inmate's religion require one." (Trial Exhibit 27, ¶ 3.) Thus, CDOC accommodates the religion-based dietary demands of Hindus (App. IV, 1138:14 – 1140:2, 1142:19 – 1143:3), Buddhists (App. IV, 1142:7 – 18) and Rastafarians (Trial Exhibit 27). On the Christmas and Easter holidays, CDOC provides inmates with a "nicer than normal" meal. (Trial Exhibit 17; App. IV, 1107:18 – 1108:1.)

As previously discussed, the District Court's *Turner* analysis demonstrates that CDOC's actions are not reasonably related to penological interests. Under these conditions, the equal protection clause proscribes the CDOC from favoring other religions (or, as the case may also be, other

branches of Judaism) and disfavoring the sincerely held beliefs of the Jewish Inmates. To be sure, the CDOC appears eager to deny the Jewish Inmates a reasonable opportunity to pursue their faith comparable to opportunities the CDOC affords fellow prisoners. The underlying record reflects the CDOC's inappropriate and disparate treatment of the Jewish Inmates.

Accordingly, assuming, *arguendo*, the District Court erred in its free exercise analysis, this Court should nonetheless affirm the result based upon the CDOC's violation of the equal protection clause.

E. The Recent Passage Of The Religious Land Use and Institutionalized Persons Act Heralds A Return To The Compelling Interest Standard.

Finally, it is significant that in the wake of the Supreme Court's ruling in *City of Boerne v. Flores*, *supra*, the legislature swiftly moved to restore the compelling interest standard reflected in RFRA (and reflected, too, in the Supreme Court's free exercise decisions through the early 1960s. (*see*, *e.g.*, *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)). Thus, on September 22, 2000 the Religious Land Use and Institutionalized Persons Act of 2000 became law.

The Religious Land Use Act is designed to "protect the free exercise of religion from unnecessary governmental interference[,]" 146 Cong. Rec. H 7190 (July 27, 2000) (statement of Cong. Canady). The intent is to ensure that if a government action substantially burdens a prisoner's exercise of

religion, "the government must demonstrate that imposing the burden serves a compelling interests and does so by the least restrictive means." 146 Cong. Rec. S 7774 (July 27, 2000) (statement of Sen. Hatch). The legislation provides in relevant part that

> (a) . . . No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person –
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C.S. § 2000cc-1.

The ire directed toward then-existing standards is manifest in the Congressional Record. During discussion of the proposed Religious Liberty Protection Act (effectively a precursor to the Religious Land Use Act that passed only in the House), Congressman Canady vented:

> This legislation has been introduced and is now being considered by the House because the Supreme Court has taken, as Professor Douglas Laycock has aptly described it, "the cramped view that one has a right to believe a religion, and a right not to be discriminated against because of one's religion, but no right to practice one's religion."

145 Cong. Rec. H 5587 (July 15, 1999). A year later, Senator Hatch, who sponsored the Religious Land Use Act, lamented that under existing standards "institutionalized persons have been prevented from practicing their faith." 146 Cong. Rec. S 6688 (July 13, 2000). And Senator Kennedy likewise asserted that it is "clear that institutionalized persons are often unreasonably denied the opportunity to practice their religion even when their observance would not undermine discipline, order, or safety in the facilities." *Id*.

Signed into law less than two months ago, the Religious Land Use Act has not been put to the test yet by any state or federal entity. Nonetheless, the Act clearly signals a retreat from the rational or reasonable relation tests presently employed by many courts and governments, and places a greater burden on governmental entities to justify activity (or inactivity) which infringes upon an inmate's constitutional rights. There can be no doubt but that CDOC's actions with respect to the Jewish Inmates would not survive scrutiny under the Religious Land Use and Institutionalized Persons Act. If nothing else, the Act reflects a move away from the generally draconian results prisoners have endured during *Turner* reign.

VIII. CONCLUSION

Both public policy and the underlying record point to only one possible conclusion. The District Court's decisions are consistent with the existing caselaw and the intent of the legislature. For the foregoing reasons, the ACLU respectfully requests that this Court affirm the decisions of the District Court.

Respectfully submitted this 11th day of December, 2000.

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