No. 14-10086-D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS;
FLORIDA DEPARTMENT OF CORRECTIONS,

Defendants-Appellants

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

THE UNITED STATES' RESPONSE IN OPPOSITION TO THE APPELLANTS' MOTION FOR PARTIAL STAY

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, counsel for the United States certifies that the following persons may have an interest in the outcome of this case:

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The Honorable Andrea M. Simonton, United States Magistrate Judge

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Date: June 17, 2014

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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THE UNITED STATES' RESPONSE IN OPPOSITION TO THE APPELLANTS' MOTION FOR PARTIAL STAY

The United States respectfully responds in opposition to the State appellants' motion for partial stay of the district court's order of December 6, 2013, pending appeal, pursuant to Federal Rule of Appellate Procedure 27(a)(3). In support of this response, the United States submits the following:

1. On December 6, 2013, the district court issued an order (December 6 Order) granting the United States' motion for a preliminary injunction. Among other things, the December 6 Order ordered the appellants "to provide a certified

kosher diet to all prisoners with a sincere religious basis for keeping kosher no later than **July 1, 2014**." Doc. 106 at 31.

2. On May 13, 2014, the appellants filed an amended motion for partial stay of the court's December 6 Order, seeking a delay of the July 1, 2014, statewide implementation deadline. Doc. 259, 260. The appellants alleged in their motion that full implementation of the certified food option (CFO) for kosher meals in their Religious Diet Program (RDP) by July 1, 2014, would create a "budget crisis," and proposed a quarterly phase-in of the RDP, beginning in October 2014 and ending on July 1, 2015. Doc. 260 at 4-5. On May 23, 2014, the United States filed a response to the appellants' amended motion for partial stay that opposed the stay request, but "d[id] not oppose a modification to the implementation schedule to enable the [appellants] to remedy problems with their implementation of the RDP." Doc. 278 at 2. The United States counter-proposed in its opposition a phase-in of the RDP in three stages beginning in October 2014 and ending in April 2015. Doc. 278 at 10.

3. On June 6, 2013, the district court held a hearing on the appellants' motion for partial stay. Doc. 289, 295. At the hearing, the district court told the parties that it lacked jurisdiction to grant the relief the appellants requested because the preliminary injunction is currently on appeal to this Court. Doc. 307 at 1.

On the same day, the district court issued an order (June 6 Order) addressing the appellants' motion for partial stay. Doc. 296 at 1. The June 6 Order ordered a partial stay of the July 1, 2014, implementation deadline pending the parties filing a motion with this Court that would return jurisdiction of the injunctive relief to the district court, and would set out the district court's proposed implementation schedule. Doc. 296 at 1. The district court further stated that this proposed plan would "adopt the parties' proposed phased roll-out of the RDP, including a safety-net provision with a July 1, 2015 deadline, and * * * would require the State to implement the RDP procedures set out in [the revised RDP filed with the district court] and would allow the State to seek modification of those procedure [sic] for good cause shown." Doc. 296 at 1. The June 6 Order advised the parties to seek "whatever remand the Court of Appeals feels is necessary to implement the proposed plan" and stated that the district court would, upon remand, revise the preliminary injunction and modify the July 1, 2014, statewide implementation deadline. Doc. 296 at 1-2.

4. The State appellants, however, refused to join the United States in filing the joint motion for partial remand the district court requested. Doc. 304. Instead, on June 10, 2014, the appellants filed a renewed motion for partial stay that reiterated their request that the district court postpone the July 1, 2014, statewide implementation deadline. Doc. 305 at 3.

On June 11, 2014, the district court issued an order (June 11 Order) denying the appellants' renewed motion to stay the July 1, 2014, implementation deadline. Doc. 307. The June 11 Order stated that the court could not "simply enter a stay of the implementation deadline because it [could not] rely on [the appellants'] representations that [they] will continue to implement [their] religious diet program in a timely fashion." Doc. 307 at 2. The district court stated that despite representing at the preliminary-injunction hearing that the Religious Diet Program would be implemented statewide by late 2013 or early 2014, the appellants implemented the RDP at only one correctional facility by early 2014, and that facility was required to do so by order of this Court in a separate case. Doc. 307 at 2. The June 11 Order further stated that despite the impending July 1, 2014, statewide implementation deadline, the appellants "have implemented the religious diet program at only a handful of facilities, leaving 51 institutions and associated facilities remaining to implement the religious diet program." Doc. 307 at 2.

5. On June 13, 2014, the appellants filed in this Court the instant motion (Mot.) for partial stay of the December 6 Order pending appeal pursuant to Federal Rule of Appellate Procedure 8(a)(2). This motion seeks to stay the July 1, 2014, statewide implementation deadline to allow the quarterly phase-in of the RDP beginning in October 2014 and ending in July 2015 that the appellants set forth in their amended motion for partial stay. Mot. 8-9.

ARGUMENT

To justify a partial stay of the district court's December 6 Order pending appeal, the appellants must show in their motion: "(1) a likelihood that [they] will prevail on the merits of the appeal; (2) irreparable injury to the [appellants] unless the stay is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest." *In re Grand Jury Proceedings (Twist)*, 689 F.2d 1351, 1353 (11th Cir. 1982) (per curiam). Application of these factors to this case leads to the inescapable conclusion that this Court should not grant this "exceptional" relief. *United States* v. *Hamilton*, 963 F.2d 322, 323 (11th Cir. 1992).

1. First, the appellants fail to demonstrate a likelihood that they will prevail on the merits of the appeal. This factor requires the appellants to show that the district court "was clearly erroneous," or alternatively that they have presented a "substantial case on the merits" when the other stay factors "weigh[] heavily in favor of granting the stay." *Garcia-Mir* v. *Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (internal quotation marks and citations omitted). On this factor, the appellants rehash (Mot. 14-18) their argument that RLUIPA does not require the Florida Department of Corrections to provide kosher meals to religiously sincere prisoners because the State has a compelling governmental interest in controlling the substantial costs of providing such meals. Because this argument is meritless, for the reasons the United States discusses in its responding brief as appellee (Br.

31-40), the appellants can satisfy neither the clear-error nor the substantial-case-on-the-merits standard. Accordingly, the appellants are unlikely to prevail on their challenge to the district court's grant of preliminary injunctive relief.

2. Second, the appellants have not shown that they will be irreparably injured without a partial stay of the December 6 Order. The appellants contend (Mot. 18-19) that, absent this stay, the cost of the CFO given its current number of participants will be between $7 million and $11 million/year, requiring the State to take "dramatic steps to contain costs" that "will have significant impact on safety and security and effective operation of the prison system." As the United States demonstrated in its response to the appellants' amended motion for partial stay (Doc. 278 at 4-7), the appellants' cost estimate is vastly inflated. Even assuming, *arguendo*, that the appellants' estimate is accurate, the ordinary costs of complying with RLUIPA do not establish irreparable harm. See *Freedom Holdings, Inc.* v. *Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005) ("[O]rdinary compliance costs [with a government statute] are typically insufficient to constitute irreparable harm."); *American Hosp. Ass'n* v. *Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980) ("[I]njury resulting from attempted compliance with government regulation ordinarily is not irreparable harm.") (brackets in original); *A.O. Smith Corp.* v. *FTC*, 530 F.2d 515, 527 (3d Cir. 1976) ("Any time a corporation complies with a government regulation that requires corporation action, it spends money and loses profits; yet it

could hardly be contended that proof of such an injury, alone, would satisfy the requisite for a preliminary injunction."). Although this Court has recognized that "safety and cost *can* be compelling governmental interests" for purposes of RLUIPA, the appellants' mere assertion of these interests in general terms failed to satisfy their burden of showing that a stay of the July 1, 2014, implementation deadline would "in fact further[] these two interests." *Rich* v. *Secretary, Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013) (emphasis added).

Outweighing the ordinary harm caused solely by implementation of the court's decision in this case is the substantial harm that will befall other individuals if this Court delays the July 1, 2014, statewide implementation deadline. As the district court observed (Doc. 307 at 2), the appellants implemented the RDP at only one facility by early 2014 despite representing at the preliminary-injunction hearing that statewide implementation would occur by that time, and have implemented the RDP at a mere handful of facilities fewer than three weeks before the deadline. "RLUIPA enforces First Amendment freedoms," and further delay in providing kosher meals will inflict irreparable harm on religiously sincere FDOC inmates who wish to exercise their faith by consuming such meals. *Opulent Life Church* v. *City of Holly Springs*, 697 F.3d 279, 295 (5th Cir. 2012) (finding irreparable harm when RLUIPA is violated). Because irreparable injury occurs where First Amendment freedoms are deprived "for even minimal periods of

time," *Elrod* v. *Burns*, 427 U.S. 347, 373, 96 S. Ct. 2673, 2689 (1976), the appellants' pledge (Mot. 19) that they "will still implement a kosher diet statewide, though at a slower rate" does not mitigate this harm. Indeed, this promise rings hollow in light of the appellants' view that they are free under RLUIPA to discontinue a religious diet program if and when competing fiscal priorities arise, and their consistent failure to fulfill their promises to provide kosher meals in a timely fashion.

3. Finally, the public interest weighs heavily in favor of denying a stay. Enforcement of federal statutes is in the public interest. See *United States* v. *Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012) ("Frustration of federal statutes and prerogatives are not in the public interest."), cert. denied, 133 S. Ct. 2022 (2013). This principle is particularly applicable in the case of RLUIPA, which 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* v. *Wilkinson*, 544 U.S. 709, 714, 125 S. Ct. 2113, 2117 (2005). To that end, RLUIPA provides that it "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by [the statute] and the Constitution." 42 U.S.C. 2000cc-3(g). Because the December 6 Order interprets RLUIPA to protect broadly the religious exercise of FDOC inmates with a sincere religious belief in keeping kosher, retaining the

order's July 1, 2014, statewide implementation deadline best serves the public interest.

4. Although the appellants have failed to make the necessary showing to support a stay, the United States does not oppose modification of the implementation timeline to ensure that the appellants can implement the RDP in an effective and sustainable manner that protects the religious exercise of Florida prisoners.[1] In its June 6 Order, the district court set forth an eminently reasonable procedure for making this modification. The United States remains open and willing to work with the appellants to reach the parties' mutual goal of providing religiously sincere Florida prisoners with the option of a kosher meal in a reasonable amount of time.

[1] The United States is cognizant of the harm that sincere prisoners will experience while awaiting implementation of the RDP, and seeks to move forward as quickly as possible while ensuring that the appellants implement the RDP in a sustainable manner.

For the foregoing reasons, the United States respectfully requests that the Court deny the appellants' motion for partial stay of the December 6 Order pending appeal that seeks a delay in the July 1, 2014, statewide implementation deadline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2014, I electronically filed the foregoing THE UNITED STATES' RESPONSE IN OPPOSITION TO THE APPELLANTS' MOTION FOR PARTIAL STAY with the Clerk of the Court using the appellate CM/ECF system. All participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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