No. 09-40400

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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MAX MOUSSAZADEH,

*Plaintiff-Appellant*,

v.

TEXAS DEPARTMENT OF CRIMINAL JUSTICE;
BRAD LIVINGSTON, SOLELY IN HIS OFFICIAL CAPACITY
AS EXECUTIVE DIRECTOR OF TDCJ-CID;
DAVID SWEETEN, SOLELY IN HIS OFFICIAL CAPACITY
AS WARDEN OF THE EASTHAM UNIT OF THE TDCJ-CID,

*Defendants-Appellees*.

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On Appeal from the United States District Court
for the Southern District of Texas, Galveston Division
No. 3:07-CV-00574, Hon. Melinda Harmon

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# SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT MAX MOUSSAZADEH

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Eric C. Rassbach
Luke W. Goodrich
THE BECKET FUND FOR
RELIGIOUS LIBERTY
3000 K Street NW
Washington, DC 20036-1735
(202) 955-0095

Anne W. Robinson
Matthew T. Murchison
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004-1304
(202) 637-2200

January 6, 2012

*Attorneys for Max Moussazadeh*

## CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5TH CIR. R. 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this appeal. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Max Moussazadeh, Plaintiff-Appellant;
2. Latham & Watkins LLP, Counsel for Plaintiff-Appellant (Anne W. Robinson, Matthew T. Murchison);
3. The Becket Fund for Religious Liberty, Counsel for Plaintiff-Appellant (Eric C. Rassbach, Luke W. Goodrich);
4. Texas Department of Criminal Justice, Defendant-Appellee;
5. Brad Livingston, Executive Director of TDCJ-CID, Defendant-Appellee;
6. David Sweeten, Warden of Eastham Unit, Defendant-Appellee;
7. Office of the Attorney General of the State of Texas, Counsel for Defendants-Appellees (Greg Abbott, Kent Sullivan, David Morales, David Talbot, Jr., Celamaine Cunniff);
8. James Mossbarger, Warden of Stringfellow Unit.

s/ Anne W. Robinson
Anne W. Robinson
*Counsel for Plaintiff-Appellant*

## STATEMENT REGARDING ORAL ARGUMENT

Plaintiff-Appellant Max Moussazadeh respectfully requests oral argument. This case presents important questions regarding (1) the interpretation of the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §§ 2000cc *et seq*., and (2) the religious liberty of all inmates incarcerated within the Fifth Circuit. Moussazadeh respectfully submits that oral argument is necessary for a full exposition of the legal issues and relevant facts involved in the case.

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## STATUTES AND REGULATIONS



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## STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction under 28 U.S.C. § 1331. On September 20, 2011, the district court granted Defendants-Appellees' supplemental motion for summary judgment, denied Plaintiff-Appellant's supplemental motion for summary judgment, and disposed of all of Plaintiff-Appellant's remaining claims. This Court has jurisdiction over that decision under 28 U.S.C. § 1291. Plaintiff-Appellant timely filed a notice of appeal on October 14, 2011. *See* Fed. R. App. P. 4(a).

## STATEMENT OF ISSUES

Plaintiff-Appellant Max Moussazadeh, an observant Jewish prison inmate, filed this lawsuit against the Texas Department of Criminal Justice ("TDCJ"), because TDCJ denies him a kosher diet. The district court dismissed Moussazadeh's suit on summary judgment, concluding that Moussazadeh had failed to exhaust his administrative remedies and that Moussazadeh's belief in keeping kosher was insincere. The questions presented in this appeal are:

1. Whether Moussazadeh must re-exhaust his administrative remedies, where, after four years of litigation, TDCJ transferred him to a new unit where it subjected him to the same unlawful conduct.

2. Whether the district court erred in resolving the factual issue of sincerity against Moussazadeh at the summary judgment stage, where Moussazadeh introduced abundant evidence of his sincerity, and where TDCJ's own Jewish authorities verified his sincerity.

3. Whether TDCJ can establish that the denial of kosher food is the least restrictive means of furthering a compelling governmental interest, where it has been providing kosher food to other inmates for over four years without cost or security issues, and where the vast majority of state prison systems and the Federal Bureau of Prisons provide kosher food.

## INTRODUCTION

Moussazadeh is an observant Jewish inmate who was born and raised in a kosher household. He brought suit under the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*, asserting that the denial of a kosher diet imposed a substantial burden on his religious exercise, and that TDCJ's conduct did not satisfy strict scrutiny—particularly where at least two-thirds of state prison systems, as well as the Federal Bureau of Prisons, provide a kosher diet to their observant Jewish prison inmates. But after six years of litigation, TDCJ continues to deny Moussazadeh a kosher diet, and Moussazadeh is still waiting for a ruling on the merits of his claim.

Rather than addressing the merits, the district court has twice dismissed the lawsuit on largely procedural grounds. Both dismissals were erroneous.

The first dismissal occurred in 2009. At that time, TDCJ argued that the case was moot because it had transferred Moussazadeh to a new facility and had begun providing him with kosher food. Moussazadeh, however, pointed out that TDCJ's "voluntary cessation" did not moot the case, because TDCJ could easily transfer Moussazadeh to

another unit and deny him kosher food again. Nevertheless, the district court sided with TDCJ and dismissed the case, concluding that "any claim that plaintiff might be transferred to another unit, where kosher food is unavailable, is too speculative to avoid mooting the case." Orig. USCA5 1293-94.[1]

Sure enough, while this case was pending on appeal, TDCJ transferred Moussazadeh to another unit (Stiles) and again denied him a kosher diet. In light of this development, this Court remanded the case to the district court with instructions to conduct further proceedings.

On remand, the district court again refused to address the issue of strict scrutiny. Instead, it dismissed the case on two alternative grounds. First, it held that Moussazadeh was required to *re-exhaust* his administrative remedies by filing another grievance after his transfer to Stiles—re-grieving the *exact same issue* he has already been litigating for six years. Second, it held that TDCJ had proved as a matter of law that Moussazadeh did not sincerely believe in keeping kosher. Both holdings were erroneous.

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[1] The district court has submitted two Records on Appeal to the Fifth Circuit. Citations to "Orig. USCA5" refer to the Original Record on Appeal, and citations to "Supp. USCA5" refer to the Supplemental Record on Appeal.

First, on the issue of exhaustion, Fifth Circuit law is clear that "prisoners need not continue to file grievances about the same issue." *Johnson v. Johnson*, 385 F.3d 503, 521 (5th Cir. 2004). Indeed, TDCJ's rules prohibit prisoners from "fil[ing] repetitive grievances about the same issue" and impose "sanctions for excessive use of the grievance process." *Id.* Here, it is undisputed that Moussazadeh properly exhausted his administrative remedies by filing multiple grievances in 2005. Those grievances challenged the very same conduct Moussazadeh is experiencing today—denial of a kosher diet—and sought the very same accommodation Moussazadeh is seeking today: "access to kosher meals in the dining hall." It is undisputed that TDCJ continues to deny that accommodation to Moussazadeh, despite the transfer to a new unit. Thus, there is no point, either legally or as a policy matter, in requiring Moussazadeh to file yet another grievance, after six years of ongoing litigation, merely to remind TDCJ that he is still seeking a kosher diet.

Second, the district court erred in resolving the sincerity issue against Moussazadeh on summary judgment. Moussazadeh introduced abundant evidence of his sincerity, including facts about his Jewish upbringing, the importance he and his family place on keeping kosher, the

hardships he has suffered for pursuing and maintaining a kosher diet, and the other ways in which he actively practices Judaism. Moreover, TDCJ's own contract rabbi, in consultation with outside Jewish authorities, has repeatedly deemed Moussazadeh to be sincere. And TDCJ itself acknowledged Moussazadeh's sincerity for the first five years of this litigation—until belatedly challenging it on summary judgment.

Remarkably, despite this evidence, and despite a wealth of case law holding that sincerity cannot be resolved against a plaintiff on summary judgment without making an impermissible credibility determination, the district court concluded that Moussazadeh was insincere *as a matter of law*. In reaching this conclusion, the court relied entirely on TDCJ's contested assertion that Moussazadeh had occasionally purchased non-kosher food at the commissary. Even assuming this were true, it would at most support an argument that Moussazadeh occasionally struggles with his beliefs; it would not, as a matter of law, prove that he is insincere. Indeed, given the abundant evidence of Moussazadeh's sincerity, and the fact that TDCJ itself repeatedly deemed him sincere, there is not even a material factual dispute about his sincerity.

While reversal on the issue of sincerity is thus required, no remand is necessary. This Court can and should resolve this six-year-old lawsuit on the merits by granting summary judgment in Moussazadeh's favor. This Court has already held that the denial of a kosher diet is a substantial burden under RLUIPA. *Baranowski v. Hart,* 486 F.3d 112, 124-25 (5th Cir. 2007). Thus, the only question on the merits is whether the denial of a kosher diet to Moussazadeh is the least restrictive means of furthering a compelling governmental interest.

The undisputed evidence revealed on remand establishes that it is not. TDCJ has now abandoned its asserted interest in security. And TDCJ's own budgetary data show that providing a kosher diet to every observant Jewish inmate in its custody would have a *de minimis* impact of less than *two one-hundredths of one percent* (0.02%) of TDCJ's annual food service expenditures. No court has ever held that avoiding such a small food expenditure constitutes a compelling governmental interest. Indeed, the Tenth Circuit has held that Colorado lacked even a "valid penological interest" in denying a kosher diet—let alone a compelling interest—where the cost of providing a kosher diet was eight times

higher (0.16%). *Beerheide v. Suthers*, 286 F.3d 1179, 1191 (10th Cir. 2002). Thus, summary judgment in favor of Moussazadeh is required.

## STATEMENT OF THE CASE

Plaintiff-Appellant Max Moussazadeh first officially notified TDCJ of his request for a kosher diet by filing a formal administrative grievance with TDCJ on July 15, 2005. Supp. USCA5 511 (Supp. RE 4). In that grievance, Moussazadeh explained that his "beliefs state that [he] must eat kosher foods," and formally requested "access to kosher meals in the prison dining hall." *Id.* After exhausting his administrative remedies, Moussazadeh filed this lawsuit on October 11, 2005, seeking injunctive and declaratory relief requiring TDCJ to provide him with a kosher diet under RLUIPA. Orig. USCA5 22 ¶ 28 (Orig. RE 11).

Six months after the suit was filed, the court granted a stay of discovery to facilitate settlement. Orig. USCA5 235 (Orig. RE 13). After about a year of settlement negotiations, TDCJ transferred Moussazadeh to the Stringfellow Unit on April 27, 2007, and shortly thereafter began providing him with kosher food. Orig. USCA5 433 (Orig. RE 19). Although the parties very nearly reached a settlement, negotiations broke down because TDCJ insisted on retaining the right "to deny [Moussazadeh] any access to nutritionally sufficient kosher meal[s] by trans-

ferring him to a different facility without a kosher diet program." Orig. USCA5 365 (Orig. RE 16).

One month after the district court lifted the stay and discovery commenced, TDCJ filed a motion to dismiss the case as moot or, in the alternative, for summary judgment. Orig. USCA5 431. Moussazadeh opposed TDCJ's motion, filed his own motion for summary judgment, and sought leave to amend his complaint. Orig. USCA5 490-95. On March 26, 2009, the district court denied leave to amend the complaint, denied Moussazadeh's motion for summary judgment, and granted TDCJ's motion to dismiss the case as moot. Moussazadeh appealed that ruling on April 10, 2009. Orig. USCA5 1265 (Orig. RE 2).[2]

On October 13, 2009, while the initial appeal was pending, TDCJ transferred Moussazadeh to another unit—the Stiles Unit—where it again denied him a kosher diet. *See* Moussazadeh 28(j) Letter at 1 (filed Dec. 22, 2009). TDCJ did not notify Moussazadeh's counsel or this Court of the transfer. Moussazadeh notified this Court of the transfer, *id.*, and TDCJ agreed that "kosher meals are not provided to the inmates [at Stiles]," that the case was "no longer moot," and that the dis-

[2] For additional details regarding the procedural history of the case, see Moussazadeh Opening Br. at 7-8 (filed June 15, 2009).

trict court's decision should be vacated. *See* TDCJ 28(j) Letter at 1-2 (filed Jan. 6, 2010). This Court remanded the case to the district court for further proceedings, and explained that "[o]nce the work of the district court has been completed, any party may file a supplemental notice of appeal, which will be considered along with the notice of appeal herein." *Moussazadeh v. Tex. Dep't of Crim. Justice*, 364 F. App'x 110, 110 (5th Cir. 2010) (unpublished),

On remand, the parties conducted discovery and filed cross motions for summary judgment on December 10, 2010. Supp. USCA5 360, 787. The district court granted TDCJ's motion for summary judgment on grounds of exhaustion and sincerity. Moussazadeh timely filed a supplemental notice of appeal on October 14, 2011. Supp. USCA5 1610 (Supp. RE 2).

## STATEMENT OF FACTS

### I. TDCJ Denies a Kosher Diet to Moussazadeh.

Moussazadeh is an observant Jewish inmate incarcerated in the Texas prison system. Orig. USCA5 18 ¶ 4 (Orig. RE 11). Moussazadeh is of Iranian Jewish heritage; he was born to Jewish parents and has always considered himself to be Jewish. Orig. USCA5 19 ¶ 9 (Orig. RE 11); Orig. USCA5 1071 (Orig. RE 25). In accordance with established Jewish tradition and practice, Moussazadeh believes that keeping a kosher diet is fundamental to the Jewish faith and is necessary to conform to the divine will of God, as expressed in the Torah. Orig. USCA5 19 ¶ 10 (Orig. RE 11). Moussazadeh was deemed sincere by TDCJ's Jewish chaplain in consultation with outside Jewish authorities, Supp. USCA5 431-33, and TDCJ did not challenge Moussazadeh's sincerity for the first five years of litigation, Supp. USCA5 1177-79; *see also infra* at 47-49.

Defendant TDCJ administers the Texas state prison system, which includes over 160,000 inmates and has annual food expenditures totaling at least $183.5 million. Supp. USCA5 978; Supp. USCA5 1046 (Supp. RE 10). Observant Jews constitute a very small percentage of

this prison population. In 2008, TDCJ recognized only 70 to 75 active practitioners of Judaism, or less than 0.05% of all inmates. Supp. USCA5 801, 985. By September 2010, that number had dwindled to 50, or roughly 0.03%. Supp. USCA5 801, 988 (Supp. RE 7), 991 (Supp. RE 8).

According to data supplied by TDCJ, the cost of providing kosher food to every observant Jewish inmate in its custody would increase its annual food expenditures by less than *two one-hundredths of one percent* (0.02%). *See infra* at 64. Nevertheless, in 2005 TDCJ was one of the few prison systems in the country that refused to provide kosher food to Jewish inmates. At that time, at least 32 states and the Federal Bureau of Prisons provided kosher food to Jewish prisoners. Orig. USCA5 1116 (Orig. RE 28); *see also* 28 C.F.R. § 548.20 (federal policy). Since then, at least two more states have begun providing kosher food. Supp. USCA5 796.

These prison systems generally provide kosher food through one of three means: (1) prepackaged kosher entrées, (2) kosher kitchens, and/or (3) a "common fare" program. Most states utilize prepackaged kosher entrées. These meals range in price from $2.05 to $2.95, are

available from a variety of vendors, and can be supplemented with kosher items from the state's regular food supplies—such as vegetables, bread, peanut butter, cereal and eggs. Supp. USCA5 797-98, 815.

Other states operate "kosher kitchens"—either by dedicating a separate room to kosher food preparation, or by making a small section of their existing kitchens acceptable for kosher food preparation. Supp. USCA5 798-99. In Colorado, for example, work surfaces are made acceptable for kosher food preparation by covering the surface with butcher paper or plastic wrap. Supp. USCA5 799; Supp. USCA5 925.

The Federal Bureau of Prisons has adopted a "common fare" program, offering a single diet that satisfies the religious requirements of multiple faiths, including Orthodox Judaism. The common fare diet consists of foods that require little preparation, contain no pork, do not mix meat and dairy products, and are served with utensils that have not come in contact with pork. Supp. USCA5 799. In general, the various state prison systems and the Federal Bureau of Prisons allow inmates to continue receiving a kosher diet even after they have been transferred to a new unit or reclassified for security reasons. Supp. USCA5 800.

Despite the well-established practices of other prison systems, TDCJ has repeatedly forced Moussazadeh to violate his religious beliefs by denying him a kosher diet. At the time he initiated this litigation, Moussazadeh was housed in TDCJ's Eastham Unit, where he faced a choice among three dietary options: meat-free, pork-free, or "regular." Orig. USCA5 19-20 ¶¶ 8, 16-17 (Orig. RE 11); Orig. USCA5 39-40 ¶¶ 9, 12-13 (Orig. RE 12). It is undisputed that none of these options qualified as kosher. *Id.* Moussazadeh now faces the same non-kosher dietary options in his current unit, the Stiles Unit. Supp. USCA5 995 (Supp. RE 6).

Confronted with a choice between violating his religious beliefs and receiving a nutritionally sufficient diet, Moussazadeh filed an administrative grievance with TDCJ on July 15, 2005. Supp. USCA5 511 (Supp. RE 4). In this grievance, Moussazadeh explained his religious belief in keeping kosher and formally requested that TDCJ "please grant me access to kosher meals in the prison dining hall." *Id.* TDCJ denied Moussazadeh's request without explanation a week later. Supp. USCA5 512 (Supp. RE 4). Moussazadeh then filed a second level grievance on August 5, 2005, which TDCJ also denied without explanation

on September 19, 2005. Supp. USCA5 509-10 (Supp. RE 4). Having exhausted his administrative remedies, Moussazadeh filed suit in the Eastern District of Texas on October 11, 2005, seeking an injunction requiring TDCJ to provide him a kosher diet. Orig. USCA5 22 ¶ 28 (Orig. RE 11).

## II. In Response to Moussazadeh's Suit, TDCJ Adopts a Jewish Dietary Policy.

In April 2007, during settlement negotiations between Moussazadeh and TDCJ, TDCJ revised its Chaplaincy Manual and adopted a new Jewish Dietary Policy. Supp. USCA5 998-1002 (Supp. RE 15); Supp. USCA5 1004-07 (Orig. RE 20). Under the revised Chaplaincy Manual, TDCJ created two types of Jewish units: (1) an "Enhanced Jewish Designated Unit" at the medium-security Stringfellow Unit, and (2) "Basic Jewish Designated Units" at four other facilities, including the Stiles Unit. Supp. USCA5 998 (Supp. RE 15).

The "Enhanced" unit is reserved for inmates who are "[b]orn of a Jewish mother," have "[a] Jewish background with continuous study in the Jewish faith," or have "[c]onverted to Judaism according to Jewish law." Supp. USCA5 999 (Supp. RE 15). It offers weekly Jewish services and a kosher diet.

The "Basic" units are reserved for inmates who are not technically Jewish, but have completed a majority of the "Jewish Interest Correspondence Course," have demonstrated "[k]nowledge of the Jewish faith," and have established their "sincerity." *Id.* Basic units offer services monthly (rather than weekly), and do not provide a kosher diet. Rather, kosher food is limited to meals purchased through the commissary "at the offender's expense." *Id.*

To be eligible for a transfer to either type of Jewish unit, an inmate must be interviewed by TDCJ's Jewish chaplain and, in consultation with outside Jewish authorities, be "confirm[ed]" as Jewish. Supp. USCA5 1000 (Supp. RE 15). TDCJ does not conduct its own screening for sincerity, but instead defers to the "Jewish authorities." Supp. USCA5 1002 (Supp. RE 15).

After adopting the new Jewish Dietary Policy, TDCJ transferred its observant Jewish inmates (including Moussazadeh) to the Stringfellow Unit and began providing kosher meals. TDCJ did not construct any new facilities, but instead made use of an existing storage room and purchased a refrigerator, microwave, stove burner, and various kitchen

supplies, at a total cost of $8,066. Supp. USCA5 730, 802, 1012-13; Supp. USCA5 1009-10 (Orig. RE 24).

The undisputed cost of operating the kosher kitchen at Stringfellow has been minimal. In 2009, the most recent year for which TDCJ provided data, the total increased cost of providing kosher meals to all 27 Jewish inmates at Stringfellow was $42,475.05—*two-hundredths of one percent* (0.02%) of TDCJ's total food expenditures. Supp. USCA5 396; *see also infra* at 64. Moreover, kosher meals have been made available at the Stringfellow Unit without any security incidents or resentment from non-Jewish inmates. Supp. USCA5 1024, 1029 (Supp. RE 9).

Moreover, TDCJ has long offered a variety of therapeutic and other special meals that are provided free at *all* of its units, not just a single unit. TDCJ prepares and serves these medical diets at the unit kitchens, even though these diets must "be prepared differently" from the regular meal options and must be cooked and served in a different part of the kitchen. Supp. USCA5 877-78 (Supp. RE 5). Each TDCJ unit, regardless of its kitchen design, has found its own way to resolve these and other administrative issues associated with special medical meals. Supp. USCA5 878-79 (Supp. RE 5).

In contrast to the kosher kitchen at Stringfellow, the kitchens at the Basic Jewish Designated Units, including Stiles, do not provide kosher meals to observant Jewish inmates. At these units, TDCJ offers the same non-kosher options that were available at Eastham when this lawsuit was originally filed. Orig. USCA5 19-20 ¶¶ 8, 16-17 (Orig. RE 11); Orig. USCA5 39-40 ¶¶ 9, 12-13 (Orig. RE 12); Supp. USCA5 995 ¶ 8 (Supp. RE 6); Supp. USCA5 1019-20 (Supp. RE 9). If an inmate at one of these units desires kosher food, he must purchase it from the commissary at his own expense. Supp. USCA5 999 (Supp. RE 15); Supp. USCA5 1004 (Orig. RE 20 at 463).

## III. TDCJ Transfers Moussazadeh, and the District Court Dismisses the Case As Moot.

TDCJ transferred Moussazadeh to the Stringfellow Unit on April 27, 2007, and he began receiving kosher meals in the Stringfellow dining hall on May 25, 2007. Orig. USCA5 433 (Orig. RE 19). During his two years at Stringfellow, Moussazadeh consistently chose to eat the available kosher meals instead of the "regular" meals, even though the kosher meals were inferior, often consisting only of tofu. Orig. USCA5 1014, 1072; Supp. USCA5 995; Supp. USCA5 1600 (Supp. RE 3). Moussazadeh persisted in his efforts to keep kosher at Stringfellow even

when suffering harassment and abuse from prison guards, which he believed to be in retaliation for his lawsuit. Orig. USCA5 429-30.

After Moussazadeh's transfer to Stringfellow, the parties continued settlement negotiations, but those negotiations ultimately broke down because TDCJ insisted on reserving the right to transfer Moussazadeh away from Stringfellow—and deny him a kosher diet—at any time. Orig. USCA5 365 (Orig. RE 16). The district court subsequently lifted the stay and TDCJ filed a motion to dismiss the case as moot or, in the alternative, for summary judgment. Orig. USCA5 427 (Orig. RE 18); Orig. USCA5 431. On March 26, 2009, Judge Harmon granted TDCJ's motion to dismiss, finding the case moot, and denied Moussazadeh's motion for summary judgment. Orig. USCA5 1294.

## IV. TDCJ Again Denies a Kosher Diet to Moussazadeh.

On October 13, 2009, while Moussazadeh's appeal was pending, TDCJ transferred him from the Enhanced Jewish Designated Unit at Stringfellow to the Basic Jewish Designated Unit at Stiles. Moussazadeh 28(j) Letter at 1. Moussazadeh notified this Court of his transfer and informed the Court that TDCJ was again denying him a kosher diet. *Id.* TDCJ then filed a letter confirming that, "[a]t the Stiles Unit,

kosher meals are not provided to the inmates" as TDCJ does not "provide kosher meals at prisons in addition to the Stringfellow Unit." TDCJ 28(j) Letter at 1-2 (filed Jan. 6, 2010). The case was therefore remanded for further proceedings in the district court. *Moussazadeh v. Tex. Dep't of Crim. Justice*, 364 F. App'x 110, 110 (5th Cir. 2010) (unpublished).

Moussazadeh has now been housed at Stiles for over two years. Throughout this time, Moussazadeh has been denied a kosher diet. Although the Chaplaincy Manual calls for kosher items to be made available at Basic Jewish Designated Units "through the unit commissary for purchase at the offender's expense," TDCJ caps the amount inmates can spend at the commissary. Thus, even if Moussazadeh could afford to purchase three kosher meals every day from the commissary, he would be unable to do so under TDCJ's own rules. *See* Supp. USCA5 995-96 (Supp. RE 6) (Decl. of Max Moussazadeh) ("TDCJ's regulations have prohibited me from spending more than $25.00 every two weeks at the Commissary. … Thus, it has been impossible for me to keep kosher by purchasing kosher meals at the commissary."); Supp. USCA5 1050 (Supp. RE 11).

TDCJ argued below that its spending limits did not apply to kosher purchases, despite the clear statements to the contrary in TDCJ's policy manuals and in sworn testimony, as well as Moussazadeh's own experience in attempting to purchase kosher meals at the Stiles Unit commissary. *See* Supp. USCA5 1344-45. In practice, TDCJ has lifted its spending limits for kosher purchases only during Passover. Supp. USCA5 804, 1056. When TDCJ has lifted the spending restriction during Passover and stocked the Stiles commissary with kosher Passover meals, Moussazadeh has consistently purchased those Passover meals in order to meet his religious requirements. Supp. USCA5 996 (Supp. RE 6). Moussazadeh has also attended religious services at Stiles whenever possible. Supp. USCA5 995 (Supp. RE 6).

## V. The District Court Again Dismisses the Case on TDCJ's Dispositive Motion.

On December 10, 2010, Moussazadeh and TDCJ filed cross-motions for summary judgment. The district court granted summary judgment in TDCJ's favor on two grounds. First, it held that Moussazadeh had not adequately exhausted his administrative remedies. Supp. USCA5 1597 (Supp. RE 3). The court acknowledged that Moussazadeh had properly exhausted his administrative remedies at East-

ham, and that "the core issue with respect to his request for a permanent injunction remains [the same]." *Id.* Nevertheless, the court held that the transfer to a new unit required Moussazadeh to file a new administrative grievance about the same issue. *Id.*

Second, the court held that TDCJ had proved *as a matter of law* that Moussazadeh's belief in keeping kosher was insincere. Supp. USCA5 1606 (Supp. RE 3). The court acknowledged that "[Moussazadeh] is Jewish by birth, he was raised in a kosher household, he did not falsely profess his belief in Judaism to gain a benefit, he endured hardship by eating distasteful kosher food on the Stringfellow Unit, he suffered retaliation at the hands of Stringfellow prison officials for his beliefs and for filing suit, and … he professes a sincerity of belief." Supp. USCA5 1604-05 (Supp. RE 3). Nevertheless, the court held that all of this evidence was outweighed as a matter of law by TDCJ's evidence that Moussazadeh occasionally "purchased non-kosher food items for consumption," that "he has not purchased a kosher meal [while at Stiles] except for the yearly Passover Meal," and that he has not indicated "a desire to return to the Stringfellow Unit where kosher meals are provided." Supp. USCA5 1602, 1605 (Supp. RE 3).

Moussazadeh timely appealed. Supp. USCA5 1610 (Supp. RE 2).

## SUMMARY OF THE ARGUMENT

I. Moussazadeh fully exhausted his administrative remedies before filing this lawsuit. The district court's conclusion that he must exhaust his administrative remedies *again*—despite the fact that he is complaining about the very same conduct he has been litigating for over six years—is contrary to both this Court's precedent and the purposes of exhaustion. Under this Court's precedent, Moussazadeh "need not continue to file grievances about the same issue." *Johnson v. Johnson*, 385 F.3d 503, 521 (5th Cir. 2004). His original grievance fully notified TDCJ that, as a sincere adherent to Judaism, he sought "access to kosher meals in the prison dining hall." It is undisputed that TDCJ denied Moussazadeh "access to kosher meals in the prison dining hall" at Eastham and continues to do so at Stiles, despite intervening changes in prison policies. Because Moussazadeh is complaining about the very same conduct he has already grieved, re-exhaustion is not required. Indeed, requiring re-exhaustion at this stage of the litigation would only breed inefficiency and create a perverse incentive for TDCJ to engage in gamesmanship with respect to transfers and policy revisions.

II. The district court also erred in granting TDCJ summary judgment on sincerity grounds. Moussazadeh introduced substantial evidence of his sincerity, including facts about his Jewish upbringing, the importance he and his family place on keeping kosher, the hardships he has suffered for pursuing and maintaining a kosher diet, and the various other ways in which he actively practices Judaism. Moreover, TDCJ and its outside Jewish authorities acknowledged Moussazadeh's sincerity on multiple occasions. In light of this evidence, the district court could not grant summary judgment against Moussazadeh on this issue without making an impermissible credibility determination. Furthermore, the alleged evidence of Moussazadeh's insincerity lacked probative value and was based on incorrect assumptions about Jewish law. It thus failed even to create a material factual dispute about Moussazadeh's sincerity.

III. Finally, the district court erred in denying Moussazadeh's motion for summary judgment on the merits. Moussazadeh has demonstrated that the denial of a kosher diet substantially burdens his religious exercise. Moreover, TDCJ cannot demonstrate that the denial of a kosher diet is the least restrictive means of furthering a compelling

governmental interest. Specifically, the undisputed cost of providing a kosher diet to Moussazadeh is *de minimis*, representing less than two one-hundredths of one percent (0.02%) of TDCJ's annual food budget. And TDCJ failed to consider several less restrictive alternatives, including: (1) supplementing the regular diet with prepackaged kosher meals; (2) establishing another kosher kitchen at another unit; (3) using the kosher kitchen at Stringfellow to supply kosher meals to other units; or (4) providing prepackaged kosher meals through the commissary for free.

## STANDARD OF REVIEW

The Fifth Circuit "review[s] the district court's grant of summary judgment *de novo*, applying the same standard as did the district court." *Mayfield v. Tex. Dep't of Crim. Justice*, 529 F.3d 599, 603-04 (5th Cir. 2008). Summary judgment is appropriate when the pleadings, affidavits, and other evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Boudreaux v. Swift Transp. Co.*, 402 F.3d 536, 540 (5th Cir. 2005).

Special rules of construction apply to RLUIPA cases. RLUIPA must be "construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g). Because of this, the government must prove that any substantial burden on the plaintiff's religious exercise furthers "a compelling interest and that the regulation is the least restrictive means of carrying out that interest." *Mayfield,* 529 F.3d at 613.

## ARGUMENT

### I. Moussazadeh Fully Exhausted His Administrative Remedies

Moussazadeh fully exhausted his administrative remedies by filing multiple grievances at Eastham before initiating this lawsuit. The district court did not dispute that these initial grievances were sufficient. Instead, the district court held that Moussazadeh must file *new* grievances—thereby starting the administrative process all over again—simply because TDCJ revised its dietary policy and transferred Moussazadeh to a new unit.

But the policy revision and transfer have changed nothing. To this day, after more than six years of litigation, Moussazadeh is still receiving the *very same* non-kosher diet he was receiving when he initiated this lawsuit. The district court's conclusion that Moussazadeh must re-file his grievances with each policy revision and with each transfer—even when the underlying violation of his rights remains unchanged—is contrary to this Court's precedent, to the policy reasons underlying the exhaustion requirement, and to common-sense principles of judicial economy.

### A. Moussazadeh Need Not File Repeated Grievances About the Same Unlawful Conduct.

The exhaustion requirement comes from the Prison Litigation Reform Act, which provides: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). The purpose of exhaustion is to give prison officials "'time and opportunity to address complaints internally.'" *Johnson*, 385 F.3d at 516 (citation omitted). Thus, a grievance is sufficient if it "gives officials a fair opportunity to address the problem that will later form the basis of the lawsuit." *Id.* at 517.

As this Court explained in *Johnson*, TDCJ has "a two-step formal grievance process." *Id.* at 515. Step 1 grievances are handled "within the prisoner's facility"; Step 2 grievances are handled "at the state level." *Id.* Once a prisoner has pursued a grievance through both steps, the grievance is exhausted. *Id.*

Here, it is undisputed that Moussazadeh proceeded through both steps of the grievance process before filing suit. In his Step 1 grievance,

Moussazadeh explained his religious belief in keeping kosher and requested a kosher diet to be provided through the prison dining hall:

> I am a jewish inmate. My beliefs state that I must eat kosher foods. I am born and raised jewish and both of my parents are jewish. Since I have been in the prison system, I have been forced to eat non kosher foods. All of my life my family has kept a kosher house hold. I feel that I am going against my beliefs and that I will be punished by God for not practicing my religion correctly. … In my requests I asked that I be allowed to receive kosher meals because it is part of my religious duty. … *I am asking that you please grant me access to kosher meals in the prison dining hall.*

Supp. USCA5 511 (Supp. RE 4) (emphasis added). TDCJ denied Moussazadeh's request without explanation on July 21, 2005. Supp. USCA5 512 (Supp. RE 4). Moussazadeh then filed a Step 2 grievance, which TDCJ denied without explanation on September 19, 2005. Supp. USCA5 509-10 (Supp. RE 4).

The district court did not dispute that this process fully exhausted Moussazadeh's administrative remedies. Nor did it dispute that "the core issue with respect to his request for a permanent injunction remains [the same]"—*i.e.*, he is not receiving kosher meals from the dining hall. Supp. USCA5 1597 (Supp. RE 3). Instead, it held that Moussazadeh must *re-exhaust* his administrative remedies because TDCJ adopted "a different dietary policy" in 2007, temporarily provided ko-

sher meals when Moussazadeh was "transferred to the Stringfellow Unit," and now makes kosher meals "available for purchase" at Stiles. *Id.* Thus, according to the district court, Moussazadeh's original grievance, combined with six years of ongoing litigation, "did not give TDCJ officials fair notice and the opportunity to address his complaint." *Id.*

This conclusion is directly contrary to this Court's decision in *Johnson*. There, a homosexual inmate filed grievances alleging that prison officials failed to protect him from repeated sexual assaults by fellow inmates. TDCJ argued that these grievances failed to exhaust any claims that arose after the grievances were filed, because the inmate did not file a new grievance every time that he was assaulted. This Court squarely rejected TDCJ's argument, concluding that "*prisoners need not continue to file grievances about the same issue*." 385 F.3d at 521 (emphasis added). Indeed, the Court emphasized that "TDCJ rules specifically direct prisoners *not* to file repetitive grievances about the same issue and hold out the threat of sanctions for excessive use of the grievance process." *Id.* (emphasis in original). Thus, the prisoner's initial grievances "were sufficient to exhaust claims that arose from *the*

*same continuing failure* to protect him from sexual assault." *Id.* (emphasis added).

The same analysis applies here. Moussazadeh's lawsuit challenges "the same continuing failure" to provide a kosher diet that he fully grieved in 2005. That grievance stated that TDCJ had "forced [him] to eat non kosher foods," and that grievance requested that TDCJ "please grant me access to kosher meals in the prison dining hall." Supp. USCA5 511 (Supp. RE 4). Six years later, Moussazadeh is still being forced to eat non-kosher food, and he is still denied "access to kosher meals in the prison dining hall." As the district court acknowledged, "the core issue with respect to [Moussazadeh's] request for a permanent injunction remains [the same]." Supp. USCA5 1597 (Supp. RE 3).[3]

The fact that TDCJ transferred Moussazadeh to a new unit (Stiles) where he complains of the same conduct does not require re-

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[3] The district court's holding on this issue is impossible to square with its preceding ruling in the Opinion that Moussazadeh was not required to amend his Complaint even though it referred to conditions at Eastham. Supp. USCA5 1594 (Supp. RE 3). If TDCJ had sufficient notice for purposes of Rule 8 that Moussazadeh still sought "a nutritionally sufficient kosher diet," *id.*, then TDCJ also had sufficient notice of the basis of Moussazadeh's lawsuit for purposes of exhaustion.

exhaustion. Other courts have rejected exactly that result. *See*, *e.g.*, *Howard v. Waide*, 534 F.3d 1227, 1244 (10th Cir. 2008) ("[T]he fact that [the inmate] was later transferred to a different unit within the same division did not require him to file a new set of grievances.") (citing *Johnson*); *Sulton v. Wright*, 265 F. Supp. 2d 292, 298 (S.D.N.Y. 2003) ("An inmate [who was transferred among three units] is not required under the PLRA to continue to complain, as here, after his grievance has been addressed, but the problem has not been corrected."). Were the law otherwise, prison officials could defeat lawsuits merely by transferring inmates to a new unit and making them start the administrative process over again.

Nor does it matter that Moussazadeh temporarily received kosher meals while at Stringfellow. As the Second Circuit explained in *Abney v. McGinnis*, 380 F.3d 663, 668-69 (2d Cir. 2004), prisoners need not file a new grievance merely because prison officials temporarily responded to their grievance favorably: "'If a prisoner had to grieve non-compliance with favorable decisions under the PLRA, prison officials could keep prisoners out of court indefinitely by saying "yes" to their grievances and "no" in practice.'" *Id.* at 669 (citation omitted).

Finally, it makes no difference that TDCJ adopted a "different dietary policy," Supp. USCA5 1597 (Supp. RE 3), because that dietary policy has not remedied Moussazadeh's grievance or resolved the issue underlying this lawsuit. The new policy *still* denies Jewish inmates at Stiles "access to kosher meals in the prison dining hall." Supp. USCA5 998-99 (Supp. RE 15); Supp. USCA5 1004 (Orig. RE 20 at 463). At most, it allows inmates to *purchase* kosher meals at the *commissary*, subject to a spending cap. Supp. USCA5 999 (Supp. RE 15). That does nothing to resolve Moussazadeh's grievance regarding TDCJ's failure to provide free access to kosher meals in the dining hall, and it does nothing to resolve his RLUIPA claim. Moussazadeh "need not continue to file grievances about the same issue," *Johnson*, 385 F.3d at 521, and the district court's decision to the contrary requires reversal.

### B. The District Court's Exhaustion Ruling Undermines the Purposes of the Exhaustion Requirement.

The district court's exhaustion ruling is also contrary to the purposes of the exhaustion requirement. As this Court has explained, the purpose of exhaustion is to "give[] officials a fair opportunity to address the problem that will later form the basis of the lawsuit." *Johnson*, 385 F.3d at 517. Similarly, the Supreme Court has noted that exhaustion

"allow[s] a prison to address complaints about the program it administers before being subjected to suit, reduc[es] litigation to the extent complaints are satisfactorily resolved, and improv[es] litigation that does occur by leading to the preparation of a useful record." *Jones v. Bock*, 549 U.S. 199, 219 (2007).

None of these purposes is served by requiring Moussazadeh to re-exhaust. Moussazadeh's initial grievances provided TDCJ with ample opportunity to address his claims before the filing of a lawsuit. In response to his second-level grievance, TDCJ plainly stated that it would "take no further action in this matter." Supp. USCA5 510 (Supp. RE 4). Indeed, had Moussazadeh filed repeated grievances about the denial of kosher food, he would have been in violation of TDCJ rules directing prisoners "not to file repetitive grievances about the same issue," and he would have been subject to "sanctions for excessive use of the grievance process." *Johnson*, 385 F.3d at 521.

If Moussazadeh's initial grievances didn't give TDCJ enough notice or opportunity to respond, then six years of litigation surely have. For the entirety of the litigation, Moussazadeh has requested "access to kosher meals in the prison dining hall," Supp. USCA5 511 (Supp. RE 4),

regardless of where he is transferred. If TDCJ wanted to "address the problem," *Johnson*, 385 F.3d at 517, it could settle this lawsuit today by agreeing to provide Moussazadeh a kosher diet wherever he is transferred. But for six years, TDCJ has staunchly reserved the right to transfer Moussazadeh away from Stringfellow and deny him a kosher diet for any reason and at any time. As Magistrate Judge Guthrie explained: "The source of the breakdown in [settlement] negotiations is the prison system's insistence that they be allowed to deny the Plaintiff any access to nutritionally sufficient kosher meal[s] by transferring him to a different facility without a kosher diet program." Orig. USCA5 365. Given the six years of deadlock, with constant negotiation and litigation between the parties, the district court's assertion that "Moussazadeh did not give TDCJ officials fair notice and the opportunity to address his complaint" is absurd. Supp. USCA5 1597 (Supp. RE 3).

Nor would requiring Moussazadeh to re-exhaust "improve[e] litigation … by leading to the preparation of a useful record." *Jones*, 549 U.S. at 219. The record already includes the relevant prison policies, the data on costs of providing kosher food, and Moussazadeh's explanation of why the denial of kosher food burdens his religious exercise.

Nothing would be gained from forcing Moussazedah to re-file an identical administrative grievance now, as all of the benefits of exhaustion have already been achieved by the filing of his initial grievances.

Re-exhaustion is not only pointless, but also would create perverse incentives for prison officials. Under the district court's opinion, every time TDCJ transfers an inmate to a new unit the inmate must re-exhaust. Thus, if an inmate's lawsuit gains momentum, TDCJ can simply transfer the inmate elsewhere, delaying the lawsuit indefinitely. Similarly, a policy revision that has no practical effect on the inmate's situation could require re-filing of a grievance. And if the inmate fails to re-file a Step 1 grievance within fifteen days, or fails to file a Step 2 grievance within ten days of the denial of the first grievance, the lawsuit will be barred entirely—even if it has been proceeding for over six years. *See Johnson*, 385 F.3d at 515.

In short, TDCJ has had notice of Moussazadeh's claims and opportunity to address them for over six years of litigation. The notion that Moussazadeh must re-grieve the same denial of a kosher diet, merely because it occurs at a different unit, flies in the face of this Court's precedent and the purposes of exhaustion.

## II. Moussazadeh Sincerely Believes In Keeping Kosher

The district court's grant of summary judgment on the issue of sincerity is equally flawed. According to the district court, TDCJ established Moussazadeh's insincerity as a matter of law because Moussazadeh allegedly "purchased non-kosher food items for his personal consumption," and did not affirmatively request "to return to the Stringfellow Unit where kosher meals are provided." Supp. USCA5 1604-05 (Supp. RE 3). But the issue of sincerity, at bottom, is one of credibility: Moussazadeh claims that he sincerely believes in keeping kosher; TDCJ asserts that he is lying. At most, then, TDCJ's evidence of non-kosher purchases would merely create a disputed issue of material fact. But as explained below, TDCJ's evidence did not even do that. Rather, Moussazadeh has established his sincerity as a matter of law.

### A. The Issue of Sincerity Cannot Be Resolved Against Moussazadeh at the Summary Judgment Stage Without Making an Impermissible Credibility Determination.

This Court "has had few occasions to [address sincerity], as the sincerity of a religious belief is not often challenged." *McAlister v. Livingston*, 348 F. App'x 923, 935 (5th Cir. 2009). Sincerity is relevant under RLUIPA because an inmate must establish that the government

has imposed "a substantial burden on [his] *religious exercise*." 42 U.S.C. § 2000cc-1(a) (emphasis added). "[R]eligious exercise" is defined broadly under RLUIPA as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). Under this definition, "[t]he practice burdened need not be central to the adherent's belief system, but the adherent must have *an honest belief* that the practice is important to his free exercise of religion." *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 332 (5th Cir. 2009) (emphasis added); *see also McAlister*, 348 F. App'x at 935 ("[T]he important inquiry [is] what the prisoner claimed was important to him."). In *A.A. ex rel. Betenbaugh v. Needville Independent School District*, this Court recently emphasized the "longstanding judicial shyness with line drawing" in the area of sincerity, in part because "when a plaintiff draws a line, 'it is not for the Court to say it is an unreasonable one.'" 611 F.3d 248, 261-62 (5th Cir. 2010) (quoting *Thomas v. Review Bd. of the Ind. Emp't Sec. Div.*, 450 U.S. 707, 715 (1981)).

Moreover, as numerous courts have recognized, "'[t]he inquiry into the sincerity of a free-exercise plaintiff's religious beliefs is almost exclusively a credibility assessment.'" *Kay v. Bemis*, 500 F.3d 1214, 1219

(10th Cir. 2007). As a result, "summary dismissal on the sincerity prong is appropriate only in the very rare case in which the plaintiff's beliefs are so bizarre, so clearly nonreligious in motivation that they are not entitled to … protection." *Id.* at 1219-20 (internal quotation marks, citations, and alterations omitted); *see also EEOC v. Union Independiente de la Autoridad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56 (1st Cir. 2002) ("Credibility issues such as the sincerity of [a plaintiff's] religious belief are quintessential fact questions. As such, they ordinarily should be reserved 'for the factfinder at trial, not for the court at summary judgment.'") (citation omitted); *Van Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009) ("Whether Sisney can establish the truth or sincerity of this belief is a matter to be decided at trial, but we cannot say that his evidence is insufficient as a matter of law to withstand summary judgment."), *cert. denied*, 130 S. Ct. 3323 (2010); *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (explaining that courts should "hesitate to make judgments about whether a religious belief is sincere or not" when the government seeks dismissal on summary judgment). The district court's finding of insincerity as a matter of law contravenes this well-established line of cases.

Summary judgment against the plaintiff is particularly inappropriate where, as here, the plaintiff has introduced probative evidence regarding his sincerity. In *Mosier v. Maynard*, 937 F.2d 1521, 1527 (10th Cir. 1991), for example, the district court granted summary judgment against an inmate on grounds of sincerity, but the Tenth Circuit reversed. As that court explained, summary judgment was inappropriate because "the plaintiff came forward with significantly probative evidence concerning … his sincerity," including "a prior determination by the corrections department that his beliefs were sincere enough for him to be granted an exemption," and "a statement explaining his personal beliefs." *Id.*

The same is true here. Moussazadeh has introduced abundant evidence of his sincerity, including a declaration explaining his beliefs, facts about his Jewish upbringing, the importance he and his family place on keeping kosher, the hardships he has suffered for pursuing and maintaining a kosher diet, and the other ways in which he actively practices Judaism. Moreover, TDCJ itself made "a prior determination … that his beliefs were sincere enough for him to be granted an exemption," *id.*, and did not challenge his sincerity for the first five years of

litigation. Given this evidence of Moussazadeh's sincerity, the district court could not resolve this issue against him without "weighing … the evidence" and making "credibility determinations"—both of which are forbidden on summary judgment. *Sandstad v. CB Richard Ellis, Inc.*, 309 F.3d 893, 896 (5th Cir. 2002); *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 380 n.25 (5th Cir. 2010) ("[W]e do not make credibility determinations at the summary judgment stage ...."). Thus, the district court's award summary judgment against Moussazadeh was inappropriate.

### B. TDCJ Failed to Create a Material Factual Dispute Regarding Moussazadeh's Sincerity.

But that does not end the inquiry. The question remains whether TDCJ even raised a triable issue of fact on the issue of sincerity. It did not. As explained below, (1) Moussazadeh offered abundant, undisputed evidence of his sincerity; (2) TDCJ itself confirmed his sincerity; and (3) the only evidence relied upon by the district court was not competent to create a disputed issue of fact.

#### 1. Moussazadeh Introduced Ample Evidence of His Sincerity.

Moussazadeh offered abundant and undisputed evidence demonstrating his sincere belief in the importance of keeping kosher. First, he

offered a declaration explaining his religious belief in keeping kosher. Orig. USCA5 1070-72 (Orig. RE 25). In it, he explains that "[t]he primary reason I want to observe a kosher diet is to conform to the will of G-d as expressed in the Torah." Orig. USCA5 1071 (Orig. RE 25). And it is undisputed that Moussazadeh was born and raised Jewish, that both of his parents are Jewish, and that "[a]ll of [his] life [his] family has kept a kosher household." *Id.* Moussazadeh's Judaism therefore has deep roots in his life and heritage, and his desire for a kosher diet is a natural outgrowth of his Jewish upbringing.

It is also undisputed that Moussazadeh requested a kosher diet long before TDCJ established the kosher kitchen at Stringfellow. Supp. USCA5 1178. This is not a case where an inmate was "'looking longingly at the plump, fresh vegetables and the gourmet TV dinners [on the kosher menu]'" and decided that he wanted to be Jewish. *Beerheide*, 286 F.3d at 1193 n.2 (Owen, J., concurring) (quoting record). Rather, Moussazadeh requested a kosher diet without any guarantee that he would receive one—and without any assurance that the food would be on par with TDCJ's other dietary options. Indeed, the kosher meals provided at Stringfellow were severely lacking in taste and nutritional

value. Orig. USCA5 1014, 1072. Yet Moussazadeh continued to consume them rather than the non-kosher diet.

As further evidence of his sincerity, Moussazadeh continued participating in the kosher program at Stringfellow even when suffering significant hardships. While housed at Stringfellow, Moussazadeh endured numerous incidents of harassment at the hands of prison officials—including anti-Semitic comments, unfounded disciplinary actions, and examination of his legal mail—all of which he believed were in retaliation for his religious convictions and for filing a lawsuit against TDCJ. *See* Orig. USCA5 429-30. Despite these hardships, Moussazadeh never requested to be removed from the kosher program. As he explained, the reason for his persistence is simple: He believes that he must observe a kosher diet "to conform to the will of G-d as expressed in the Torah," and if he fails to do so, he "fear[s] that [he] will be punished by G-d for violating [his] religious beliefs." Orig. USCA5 1071 ¶ 5.

Finally, Moussazadeh has attempted to practice his religious beliefs beyond keeping a kosher diet. It is undisputed that Moussazadeh has attempted "to attend Jewish religious services at Eastham, Stringfellow, and Stiles when possible." Supp. USCA5 995 ¶ 6 (Supp. RE 6).

It is also undisputed that he observes Passover by purchasing Passover meals at his own expense and consuming them in his cell. Supp. USCA5 996 ¶ 11 (Supp. RE 6). Thus, abundant evidence—including Moussazadeh's own testimony, his family heritage, his personal initiative, his persistence in the face of hardship, and his comprehensive Jewish practices—confirms the sincerity of Moussazadeh's belief in keeping kosher.

**2. TDCJ Has Recognized Moussazadeh's Sincerity.**

TDCJ itself has expressly determined that Moussazadeh was sincere on multiple occasions. TDCJ's Chaplaincy Manual includes strict eligibility requirements for transfer to a Jewish-designated unit. According to the Chaplaincy Manual, an inmate "shall be considered for reassignment to one of the Jewish-designated units" only when "qualified as Jewish according to Jewish authorities." Supp. USCA5 428. These authorities include TDCJ's own "Jewish chaplain," who is an Orthodox Jewish rabbi, as well as "the Aleph Institute," a nationally recognized ministry to Jewish prisoners. Supp. USCA5 1000 (Supp. RE 15). Both of these authorities, in consultation, must "confirm the offender as Jewish." *Id.*

This rule governs transfers to *both* the Enhanced Jewish Designated Unit at Stringfellow *and* the Basic Jewish Designated Units, including Stiles. *See* Supp. USCA5 1002 (Supp. RE 15) (requiring inmates to be "verified by Jewish authorities as Jewish" before transfer to a Jewish designated unit). For transfers to Stringfellow, the Jewish chaplain must be satisfied that the inmate was "[b]orn of a Jewish mother," has a "Jewish background with continuous study in the Jewish faith," or has "[c]onverted to Judaism according to Jewish law." Supp. USCA5 999 (Supp. RE 15). And for transfers to Stiles, the Jewish chaplain still must evaluate the inmate's "knowledge of the Jewish faith" and the "sincerity of the offender." *Id.*

Thus, each time TDCJ deemed Moussazadeh eligible for transfer to one of its Jewish designated units, it was required to confirm with the Jewish authorities that Moussazadeh was sincere. This includes when TDCJ transferred Moussazadeh to Stringfellow in 2007; when it transferred him to Stiles in 2009; and when it deemed him eligible for a possible transfer back to Stringfellow in 2010.

TDCJ has not proffered any evidence suggesting that it has ignored its own policies, or that the Jewish authorities have changed

their mind since verifying Moussazadeh's sincerity in 2007, 2009, and 2010. In fact, when questioned on the issue, TDCJ's Director of Chaplaincy Operations affirmed Moussazadeh's sincerity: "[I]n Max Moussazadeh's case, I've never questioned whether he was Jewish or not." Supp. USCA5 1228 (Supp. RE 13). Indeed, for over five years of litigation, TDCJ never challenged Moussazadeh's sincerity, and never even suggested it was at issue in the case. Only in its final summary judgment brief, after the close of discovery, and after Moussazadeh had adduced powerful evidence on the issue of strict scrutiny, did TDCJ reverse course and challenge his sincerity. Such a reversal strongly smacks of litigation gamesmanship.

It is also barred by the doctrine of judicial estoppel. Courts apply judicial estoppels to prevent a party from "'"playing fast and loose" with the courts,'" *Hall v. GE Plastic Pac. PTE Ltd.*, 327 F.3d 391, 396 (5th Cir. 2003) (citation omitted), and "'deliberately changing positions according to the exigencies of the moment,'" *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (quoting *United States v. McCaskey*, 9 F.3d 368, 378 (5th Cir. 1993)). Here, it is troubling that TDCJ endorsed Moussazadeh's sincerity for several years, and then challenged it only after

the close of discovery. This belated change of position deprived Moussazadeh of the opportunity to offer even more evidence of his sincerity—including, for example, declarations from the Jewish chaplain, from Aleph Institute, from his family, and from his fellow inmates, all of whom would affirm his sincerity.

### 3. The District Court Record Lacked Any Competent Evidence Rebutting Moussazadeh's Sincerity.

Ignoring the overwhelming evidence of Moussazadeh's sincerity, the district court held that TDCJ had proved his insincerity as a matter of law based on three pieces of evidence: (1) Moussazadeh occasionally "purchased non-kosher food items for his personal consumption"; (2) he "has not purchased a kosher meal [at Stiles] except for the yearly Passover Meal"; and (3) he "has [not] indicated, by an affirmative expression or by his conduct, a desire to return to the Stringfellow Unit where kosher meals are provided." Supp. USCA5 1604-05 (Supp. RE 3). None of this evidence creates a triable issue of fact about Moussazadeh's sincerity.

*First,* the evidence of commissary purchases is not probative evidence of insincerity. As an initial matter, and as discussed further be-

low, TDCJ never established that Moussazadeh's commissary purchases were in fact "non-kosher." But even if TDCJ could show that Moussazadeh had bought and consumed non-kosher items, that still does not establish insincerity, as courts have routinely rejected challenges to sincerity based on similar evidence of sporadic non-observance.

For instance, in *A.A ex rel. Betenbaugh. v. Needville Independent School District*, this Court held that the plaintiffs, a Native American kindergarten student and his parents, were sincere in their belief regarding the wearing of long hair despite their varying articulations of their religious beliefs and the father's inconsistent practices on the issue. 611 F.3d at 253-54, 261 (applying the Texas Religious Freedom Restoration Act). The Court explained that, when evaluating the sincerity prong, "we must refuse to dissect religious tenets just 'because the believer admits that he is "struggling" with his position.'" *Id.* at 261 (quoting *Thomas*, 450 U.S. at 715). Numerous other courts have reached the same conclusion that "backsliding" is not conclusive evidence of insincerity. *See, e.g., Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988) (Posner, J.) ("The fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere."); *Love*

*v. Reed*, 216 F.3d 682, 688 (8th Cir. 2000) ("It is not the place of the courts to deny a man the right to his religion simply because he is still struggling to assimilate the full scope of its doctrine."); *Shaheed-Muhammad v. DiPaolo*, 393 F. Supp. 2d 80, 91 (D. Mass. 2005) ("[E]ven if defendants could demonstrate backsliding, I would not consider it definitive evidence of insincerity.").

For example, in a highly analogous case, *Young v. Lane*, 733 F. Supp. 1205 (N.D. Ill. 1990), *rev'd on other grounds*, 922 F.2d 370 (7th Cir. 1991), the court rejected an attack on the plaintiffs' sincerity similar to the one leveled at Moussazadeh here. The prison officials in that case asserted that the inmates were insincere and attempting simply to "gain financially in regard to damages" by "cit[ing] instances where some Plaintiffs were seen eating non-kosher food when kosher food was available." *Id.* at 1209. The court rejected this argument, concluding that plaintiffs were sincere in their beliefs, and "[t]he fact that some Plaintiffs, in this case, were observed eating non-kosher food is not conclusive evidence of insincerity." *Id.* The court agreed with Seventh Circuit precedent holding that "a person need not steadfastly adhere to every tenet of his religious faith in order to be found to be sincere in his

beliefs." *Id.* (noting that "'it would be bizarre for prisons to undertake in effect to promote strict orthodoxy, by forfeiting the religious rights of any inmate observed backsliding, thus placing guards and fellow inmates in the role of religious police.'") (quoting *Reed*, 842 F.2d at 963).

The same is true here. Indeed, even TDCJ itself did not consider Moussazadeh's commissary purchases to demonstrate insincerity. According to the Chaplaincy Policy, the "purchase, possession and/or consumption of non-kosher food items may result in disciplinary proceedings and [the inmate's] subsequent removal from the Kosher Diet Program." Supp. USCA5 434. Yet despite the fact that TDCJ knew of Moussazadeh's commissary purchases *for several years*—throughout his time at Stringfellow and Stiles—it never once initiated "disciplinary proceedings" under the Chaplaincy Policy or threatened his "removal from the Kosher Diet Program." Rather, TDCJ's Jewish authorities continued to deem Moussazadeh sincere, and TDCJ continued to grant him eligibility for housing at the Jewish designated units. The alleged sincerity concerns were a summary-judgment afterthought.

Perhaps even more importantly, the district court erroneously assumed—without any competent evidence in support—that the food

Moussazadeh purchased was non-kosher. According to the district court, the food purchased by Moussazadeh was non-kosher because it was not "denoted as kosher" by the manufacturer. Supp. USCA5 1603 (Supp. RE 3). But that assumption is based on a fundamental misunderstanding of Jewish law. Many foods that are not labeled with an official kosher certification can nevertheless be "kosher" under the laws of *kashruth*. *See McElyea v. Schriro*, No. CV 04-1102-PHX-SMM (HCE), 2006 U.S. Dist. LEXIS 6765, at *14 (D. Ariz. Feb. 13, 2006) (recognizing the existence of "non-certified, yet Kosher items"). That includes at least some of the items relied upon by the district court. *See* Supp. USCA5 1602 n.7 (Supp. RE 3). The absence of a "kosher" label simply means that no authority in Jewish law has affirmatively certified that the food is kosher. Thus, without an expert in Jewish law corroborating the assumption that these items were non-kosher, the evidence of Moussazadeh commissary purchases is simply irrelevant to the issue of his sincerity.

In fact, the only competent evidence on the relevance of the commissary purchases came in an affidavit from Moussazadeh's expert, Rabbi Moshe Heinemann, which the district court improperly struck.

Rabbi Heinemann is one of the leading experts on Jewish law and kosher certification, and his affidavit authoritatively and comprehensively demonstrated that the purchases TDCJ claimed were non-kosher could actually have been kosher. Supp. USCA5 1234-35 (Supp. RE 14). In addition, Rabbi Heinemann's affidavit offered a thorough explanation of one of Judaism's central tenets: that even sinners can be sincere. Supp. USCA5 1231-32 (Supp. RE 14). Rabbi Heinemann's affidavit affirmed what should already have been clear from the other evidence Moussazadeh has introduced—that Moussazadeh established his sincerity as a matter of law.

Rather than acknowledge the significance of this evidence, the district court excluded the affidavit as procedurally improper. Supp. USCA5 1591 (Supp. RE 3). It held that "discovery ha[d] ceased" under court orders setting deadlines for fact discovery. Supp. USCA5 1590 (Supp. RE 3); *see also* Supp. USCA5 90 (original scheduling order requiring "[c]ompletion of [f]act [d]iscovery" before filing of dispositive motions). But this decision was an abuse of discretion because it was "'based on an erroneous view of the law.'" *Arete Partners, L.P. v. Gunnerman*, 643 F.3d 410, 412 (5th Cir. 2011) (citation omitted). Under

Rule 26, fact discovery and expert discovery are not the same thing. Thus, under both the Federal Rules and the clear terms of the district court's orders, expert discovery was not yet closed, and Moussazadeh was under no obligation to "file a motion to reopen discovery." Supp. USCA5 1590 (Supp. RE 3).[4]

*Second*, the district court held that Moussazadeh was insincere as a matter of law because he "has not purchased a kosher meal [at Stiles] except for the yearly Passover Meal." Supp. USCA5 1605 (Supp. RE 3).

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[4] The Federal Rules do not require disclosure of experts before the summary judgment stage. *See* Fed. R. Civ. P. 26(a)(2)(D) (requiring, in the absence of a date set by the court, that expert disclosures be made 90 days before the date set for trial or within 30 days of another party's introduction of expert evidence if intended solely to rebut that evidence); *see also Allen v. Norfolk S. Ry. Co.*, 248 F.3d 1156, 2000 U.S. App. LEXIS 33486, at *2 (7th Cir. 2000) (unpublished) ("Rule 26(a) requires the parties to disclose, at a time set by the court or in the alternative by the rule, any expert witnesses whom they intend to present at trial."); *Strougo v. BEA Assocs.*, 188 F. Supp. 2d 373, 379-80 (S.D.N.Y. 2002) ("[T]here is no requirement that a party disclose its experts prior to filing a motion for summary judgment."). Moreover, as the district court itself noted in its opinion, it never set a deadline for expert discovery or for trial. *See* Supp. USCA5 1589-90 (Supp. RE 3) ("In this case, the Court did not stipulate or order when the parties were to disclose the identity or testimony of expert witnesses."); *see also* Supp. USCA5 89-91 (order setting deadlines for the end of "fact discovery" and for dispositive motion briefing after remand from Fifth Circuit, but no trial date or expert disclosure deadline); Supp. USCA5 100, 118, 126, 279, 313, 325, 350 (orders granting extensions of fact discovery and briefing schedules but not setting any trial or expert disclosure dates).

This, too, has no probative value on the question of sincerity. In practice, TDCJ's spending caps have prevented Moussazadeh from using commissary purchases alone to maintain a kosher diet. As a G5 offender, Moussazadeh is limited to spending $25 every two weeks at the commissary, and this includes expenditures on hygiene-related items. Supp. USCA 995-96. At a cost of $4.50 per meal, Supp. USCA5 523, Moussazadeh could purchase only five kosher meals every two weeks (out of a total of forty-two meals), regardless of how much money was in his trust account. Even if TDCJ lifted those spending caps for the purchase of kosher meals—a fact that is in dispute, *see* Supp. USCA5 995-96 (Supp. RE 6), 1050 (Supp. RE 11)—that policy was never communicated to Moussazadeh, so he had no way of knowing he could pay hundreds of dollars a month for the "privilege" of being an observant Jew. And, of course, even if he knew, he cannot afford to pay for all of his own meals, and he is not required under RLUIPA to pay a severe financial penalty on his religious exercise.

*Third*, the lack of an official request for a transfer back to Stringfellow is not probative of Moussazadeh's supposed insincerity. TDCJ concedes that Moussazadeh has been ineligible for transfer back to

Stringfellow for most of his time at Stiles, thus making any such request futile. Supp. USCA5 1556 n.3 (noting that, because Moussazadeh is "currently classified as G5," he is "ineligible for housing at the Stringfellow Unit"). And for the brief time when his custody status would have allowed such a transfer, Moussazadeh expressed legitimate concerns regarding earlier abusive treatment by the guards at Stringfellow, and was understandably reluctant to subject himself to the same retaliation. *Id.*; *see also* Orig. USCA5 429-30 (documenting the harassment suffered by Moussazadeh while housed at Stringfellow). He thus requested a kosher diet at Stiles. His desire to avoid harassment at Stringfellow doesn't mean he is insincere; it means he wants a kosher diet without harassment.

Finally, the district court suggested that Moussazadeh brought all of this trouble on himself by "voluntarily committ[ing] major disciplinary violations." Supp. USCA5 1603 (Supp. RE 3). But courts of appeal have roundly rejected that rationale, repeatedly holding that prisoners do not forfeit their right to exercise their religious beliefs merely because of disciplinary infractions. *See, e.g., Lovelace v. Lee,* 472 F.3d 174, 188 (4th Cir. 2006) ("It makes no difference to this analysis that the

burden on [an inmate's] religious exercise resulted from discipline (punishment for his alleged infraction), rather than from the prison's failure to accommodate his religious needs in the first instance."); *McEachin v. McGuinnis*, 357 F.3d 197, 204 (2d Cir. 2004) ("[I]nmates do not forfeit their free exercise rights when the burden on their religious practice results from discipline imposed for violating prison rules."); *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1213-14 (10th Cir. 1999) (finding that delivery of meals to a Muslim inmate during daylight hours, instead of after sunset as required by his religion, could not be justified by prison system's confinement of inmate in punitive segregation). In sum, the district court granted summary judgment to TDCJ without any competent evidence rebutting Moussazadeh's sincerity[5]

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[5] If this Court remands for trial on sincerity, Moussazadeh respectfully requests that the case be transferred to a different judge within the Southern District of Texas. *See, e.g.*, *In re DaimlerChrysler Corp.*, 294 F.3d 697, 700-01 (5th Cir. 2002) (reassignment on remand is appropriate to "'preserve the appearance of justice,'" particularly where "'reassignment would [not] entail waste and duplication out of proportion to any gain in preserving the appearance of fairness'") (citations omitted). Judge Harmon's opinion displays remarkable hostility towards Moussazadeh. Putting aside its erroneous legal determinations, the opinion pejoratively and repeatedly characterizes Moussazadeh's arguments as "complain[ing]," Supp. USCA5 1584, 1587, 1588, 1601 (Supp. RE 3), and asserts that he has no serious interest in kosher food, but that his conduct is driven instead by "his personal desire to harass de-

## III. Moussazadeh Is Entitled To Summary Judgment

This Court should not only reverse the district court's grant of summary judgment for TDCJ, but should also render summary judgment in Moussazadeh's favor.[6] Under RLUIPA, Moussazadeh bears the burden of proving that TDCJ has imposed a "substantial burden" on his religious exercise. 42 U.S.C. § 2000cc-1(a). The burden then shifts to TDCJ to prove, as an affirmative defense, that the imposition of the burden on Moussazadeh "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that

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fendants with an unnecessary lawsuit," Supp. USCA5 1605 (Supp. RE 3). From the opinion's tone and tenor, it appears that the court made up its mind about Moussazadeh's case long ago, and "it would be exceedingly difficult for the district court to regain some impartiality in this case." *DaimlerChrysler*, 294 F.3d at 701. Reassignment would not result in undue waste or duplication; the facts are relatively straightforward, and the parties largely agree on the most complex aspect of the case—the cost of providing kosher food in the Texas prison system. *See Cooper Tire & Rubber Co. v. Farese*, 248 F. App'x 555, 561 (5th Cir. 2007) (unpublished) (granting request for reassignment where "the underlying facts in the case are not exceptionally complex").

[6] This Court has discretion as a matter of judicial economy to do so because "remand is unnecessary" where, as here, "the factual record is effectively conceded to be complete." *Vela v. City of Houston*, 276 F.3d 659, 671 & n.17 (5th Cir. 2001) ("In situations involving cross-motions for summary judgment and upon finding no genuine issues of material fact, this court regularly reverses grants of summary judgment and enters judgment for the opposite party.").

compelling governmental interest." *Id.* Moussazadeh is entitled to summary judgment on both issues.

### A. TDCJ's Denial of a Kosher Diet Imposes a Substantial Burden on Moussazadeh's Religious Exercise

There is no dispute that denying a kosher diet to Moussazadeh imposes a substantial burden on his religious exercise. In *Baranowski v. Hart*, 486 F.3d 112, 124 (5th Cir. 2007), this Court recognized that "keeping kosher … qualif[ies] as 'religious exercise[]' for the practice of Judaism under RLUIPA's generous definition." It also held that, "[g]iven the strong significance of keeping kosher in the Jewish faith," the failure to provide a kosher diet to an observant Jewish inmate "may be deemed to work a substantial burden upon [the Jewish inmate's] practice of his faith." *Id.* at 125. Thus, the denial of a kosher diet imposes a substantial burden on Moussazadeh.

At the district court, TDCJ argued that there was no substantial burden because Moussazadeh could purchase kosher meals at his own expense from the commissary. But numerous courts have rejected this argument, holding that a financial penalty on maintaining a religious diet plainly qualifies as a substantial burden. *See Abdulhaseeb v. Calbone,* 600 F.3d 1301, 1316-18 (10th Cir.), *cert. denied,* 131 S. Ct. 469

(2010) (finding a substantial burden where a prison policy required a Muslim inmate to purchase his own halal food); *Beerheide*, 286 F.3d at 1187-89 (striking down a "co-payment" of "25% of the additional cost of providing [kosher] meals"); *Thompson v. Vilsack*, 328 F. Supp. 2d 974, 976 (S.D. Iowa 2004). Indeed, a financial penalty on engaging in religious exercise is the *quintessential example* of a substantial burden. *See Adkins v. Kaspar*, 393 F.3d 559, 569-70 (5th Cir. 2004) (defining "substantial burden" based on *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board*, 450 U.S. 707 (1981), both of which involved financial penalties on religious exercise).

### B. TDCJ Has Failed to Demonstrate That the Denial of a Kosher Diet Is the Least Restrictive Means of Furthering a Compelling Governmental Interest.

Because TDCJ has imposed a substantial burden on Moussazadeh's religious exercise, the burden shifts to TDCJ to demonstrate that the denial of a kosher diet is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a); *Baranowski*, 486 F.3d at 125. As this Court has recently explained, the compelling interest standard is the "'most demanding test known to constitutional law.'" *Needville,* 611 F.3d at 267 (citation omitted). In-

deed, the "justification" needed to satisfy this standard "can be found only in interests of the highest order." *Id.* at 266 (citation and internal quotation marks omitted). And the government's burden does not end there; in addition to identifying a compelling interest, the government must also demonstrate that its action actually furthers that interest, and that its action is the least restrictive means of doing so. 42 U.S.C. § 2000cc-1(a).

TDCJ cannot meet that burden here. Moussazadeh addressed this issue at length in his opening brief (at 41-56), and will not repeat those arguments here. In brief: This case is distinguishable from *Baranowski* (*id.* at 43-44); TDCJ has already been providing kosher food to other Jewish inmates for several years without difficulty (*id.* at 45-47); the vast majority of states and the federal government provide kosher meals to all observant Jewish inmates in their custody (*id.* at 47-50); and TDCJ has provided kosher food at minimal cost (*id.* at 50-53).

Since remand, the evidence on strict scrutiny has become even stronger. Specifically, Moussazadeh has offered undisputed evidence that (1) TDCJ can provide a kosher diet to every observant inmate in its custody for less than two one-hundredths of one percent (0.02%) of its

annual food budget; and (2) TDCJ has failed to consider several less restrictive means of advancing its asserted interests. Thus, Moussazadeh is entitled to summary judgment.

### 1. TDCJ Has Not Identified a Compelling Governmental Interest.

TDCJ has now abandoned the argument that kosher food compromises prison security. *See* Moussazadeh Opening Br. 52-53. It has also conceded that neither the kosher kitchen at Stringfellow nor the kosher meals at commissaries has created a single security problem. *See* Supp. USCA5 1024 (Supp. RE 9) (testimony that there have been no security or administrative issues related to selling prepackaged meals at the Basic Unit commissaries); Supp. USCA5 1029 (Supp. RE 9) (testimony that there has been no resentment from inmates due to the availability of kosher food at Stringfellow). Accordingly, the *only* remaining interest identified by TDCJ is an interest in controlling costs.[7]

But the undisputed evidence adduced on remand demonstrates that the cost of providing a kosher diet, which TDCJ has been doing at Stringfellow for over four years, has been *de minimis*. According to

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[7] This fact alone distinguishes this case from *Baranowski*, where the Court relied on dual interests in controlling costs *and* maintaining security. 486 F.3d at 125.

TDCJ's own data, the availability of kosher meals at Stringfellow has led to a mere 7-cent increase in the per-day, per-offender cost of providing food services to inmates there. Supp. USCA5 395 ($3.83 per day per inmate at the regular Stringfellow kitchen, versus $3.90 per day per inmate at Stringfellow overall). In fact, even with this 7-cent increase, the daily cost of providing food services at Stringfellow in 2009 ($3.90) was less than at other units, such as Stiles ($3.91) and Jester III ($3.95). Supp. USCA5 1046 (Supp. RE 10). Moreover, providing kosher meals at Stringfellow added only $42,475.05 to TDCJ's food costs in 2009, Supp. USCA5 396, which represents approximately *two-hundredths of one percent* (0.02%) of the $183.5 million TDCJ spent on food services in 2009.[8]

No court has ever found that avoiding such a minimal expenditure is a compelling governmental interest. In fact, in *Beerheide*, 286 F.3d at 1191, the cost of providing kosher meals in the Colorado prison system was eight times higher: ".158 percent" of the annual food budget. Yet the Tenth Circuit held that this sum did not even amount to a "valid

[8] $42,475 annual increased cost / $183,519,541 annual food service expenditure = approximately 0.00023. *See* Supp. USCA5 1046 (Supp. RE 10) (showing that TDCJ's total food services expenditure in 2009 was $183,519,541).

penological interest"—much less a compelling interest. *Id.* The same is true here.

Moreover, the undisputed evidence demonstrates that the cost of providing a kosher diet via prepackaged meals is even cheaper. Kosher food suppliers have offered to sell prepackaged kosher entrées to TDCJ for as low as $2.05 per meal. Supp. USCA5 909, 911, 916. Although TDCJ estimates that the typical prepackaged meal "would cost approximately $2.99," Supp. USCA5 389, the cost of providing such meals to an observant Jewish inmate, even under TDCJ's high-end estimate, is vanishingly small. TDCJ's own internal studies show that it needs only one prepackaged meal per day to provide a kosher diet; other meals, such as oatmeal and eggs for breakfast, can be provided from the regular prison fare menu. Supp. USCA5 914-16 (Orig. RE 29). Thus, TDCJ can purchase a year's worth of pre-packaged kosher meals for Moussazadeh for just $1,091[9]—which, as a percentage of TDCJ's annual food expenditures, does not even register when rounded to the nearest

[9] One pre-packaged kosher meal per day at $2.99 * 365 days = $1,091.35.

one-hundredth of a percent (0.00%).[10] If TDCJ were to supply a year of pre-packaged meals to all 27 inmates in the kosher food program, Supp. USCA5 392, it would cost only $29,466,17, or roughly *one-and-a-half one-hundredths of one percent* (0.016%) of its total food expenditures in 2009.[11] Indeed, even providing every observant Jewish inmate with *three* pre-packaged meals per day—more than any other state and more than TDCJ's own estimates—would cost just $88,399,19,[12] or less than *five one-hundredths of one percent* (0.05%) of its total food expenditures in 2009.[13] As with operating the kosher kitchen at Stringfellow, avoiding such a small effect on TDCJ's food services budget is too insignificant as a matter of law to be a compelling interest. *Beerheide*, 286 F.3d at 1191-92.

Additionally, TDCJ cannot claim a compelling interest in cost when it provides special meals for medical reasons. As the Third Cir-

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[10] $1,091.35 / $183,519,541 annual food service cost in 2009 = approximately 0.000006, or six ten-thousandths of one percent (0.0006%).

[11] $29,466.45 / $183,519,541 annual food service cost in 2009 = approximately 0.00016.

[12] 3 pre-packaged meals per day * $2.99 per meal * 27 inmates * 365 days = $88,399.35.

[13] $88,399.35 / $183,519,541 annual food service cost in 2009 = approximately 0.00048.

cuit held in *Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366-67 (3d Cir. 1999) (Alito, J.), a defendant cannot claim that it has a compelling interest in prohibiting a practice for religious reasons when it allows such a practice for medical reasons. TDCJ currently offers special medical diets, including a gluten-restricted diet, a renal diet, a dental diet, and a "diet for health," Supp. USCA5 874-75, 1080-84, and even develops individualized diets for specific inmates in some circumstances. Supp. USCA5 876, 880. TDCJ cannot, therefore, assert that it has a compelling government interest in refusing to provide a special diet to a small subset of prisoners on religious grounds while doing precisely that for a different subset of prisoners on medical grounds.

Finally, there is no evidence that making kosher meals available for free at other units, as TDCJ has done at Stringfellow, would lead to a flood of religious dietary requests. As an initial matter, a risk of increased religious requests is not a compelling government interest. *See Love*, 216 F.3d at 691 (rejecting the prison system's asserted concern that if it accommodated the plaintiff's religious dietary request, "other prisoners will request *other* accommodations of their dietary prefer-

ences"); *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006) ("The Government's argument echoes the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions."). And even if the risk of copycat requests were a cognizable interest, the record shows that the number of inmates identifying themselves as Jewish and making themselves eligible for the kosher program has *decreased*, not increased, since TDCJ first began providing kosher food at Stringfellow in 2007. *Compare* Supp. USCA5 985 *with* Supp. USCA5 988 (Supp. RE 7) (showing a decrease in Jewish inmate population levels from 900 to 839); *see Shakur v. Schriro*, 514 F.3d 878, 887 (9th Cir. 2008) (rejecting concern over increased dietary requests where "there is no indication that other … prisoners would demand kosher meals if Shakur's request were granted").

### 2. TDCJ Has Not Shown That Denying Moussazadeh a Kosher Diet Is the Least Restrictive Means of Advancing Any Asserted Governmental Interest

Nor has TDCJ employed the least restrictive means of advancing its allegedly compelling interest. The kosher kitchens at Stringfellow and in other states, as well as to the pre-packaged meal programs in 29

additional states, demonstrate that less restrictive means exist. *See* Moussazadeh Opening Br. 47-48. Beyond that, Moussazadeh has introduced evidence of four readily available alternatives to the denial of a kosher diet, none of which TDCJ has seriously considered: (1) supplementing the regular diet with prepackaged kosher meals; (2) establishing another kosher kitchen at another unit; (3) using the kosher kitchen at Stringfellow to supply kosher meals to other units; or (4) providing prepackaged kosher meals through the commissary for free.

*First*, TDCJ could follow the majority of prison systems and provide a kosher diet to Moussazadeh, and other Jewish inmates not in Stringfellow, by supplementing the regular prison fare with prepackaged kosher meals. Although Moussazadeh's counsel provided TDCJ information on how several states utilize this option, TDCJ dismissed it out of hand. *See, e.g.,* Supp. USCA5 901 (testimony that TDCJ did not consider implementing the Colorado model of providing prepackaged kosher meals because, among other reasons, Colorado is "more liberal" than Texas); Supp. USCA5 903-05 (testimony conceding that no discussion was had with California Department of Corrections on how to resolve potential logistical issues with providing kosher meals to trans-

ferred inmates). TDCJ has never considered "the option of providing pre-packaged meals [at] Stiles." Supp. USCA5 892 (Supp. RE 5).

*Second*, TDCJ could provide a kosher diet to Moussazadeh and other Jewish inmates not in Stringfellow by establishing another kosher kitchen like the one at Stringfellow. It cost only $8,066 to establish a kosher kitchen at Stringfellow, Supp. USCA5 1009-10 (Orig. RE 24), and TDCJ has conceded that it did not even consider establishing kosher kitchens at other Basic Jewish Designated Units. Supp. USCA5 888 ("Q. Has TDCJ explored creation of a kosher kitchen at this level of detail at the other basic designated Jewish units like Darrington and Wynne? A. No, sir, just Stiles."). As for the Stiles unit, TDCJ has only considered constructing a free-standing building to serve as a kosher kitchen—something Moussazadeh has never even suggested—and has not adequately explained why it cannot find some preexisting space in the unit to serve as a kosher preparation area, as it did at Stringfellow. Supp. USCA5 828-29. Nor has TDCJ considered adapting its existing kitchens to implement a program similar to the "common fare" religious diet program employed in federal prisons. Supp. USCA5 829.

*Third*, TDCJ could provide a kosher diet to Moussazadeh by preparing kosher meals at Stringfellow and then distributing the meals at Stiles. *See* Supp. USCA5 798-99 (citing description of Wyoming's program in Sandra Hansen, *Prison Ushers in New Era for Torrington*, Star Herald, Mar. 31, 2010). TDCJ conceded that though this option is "possible," it has not considered preparing kosher meals at Stringfellow and distributing them to other units. Supp. USCA5 895-96 (Supp. RE 5).

*Fourth*, TDCJ already contracts to carry prepackaged kosher meals at several of its commissaries; it could easily allow Moussazadeh to maintain a kosher diet simply by making the commissary meals available for free. TDCJ could allow Moussazadeh to pick up the meals from the commissary, deliver the meals to his cell, or provide him with several days' worth of meals at once (as he receives his prepackaged kosher meals during Passover). *See* Supp. USCA5 996 (Supp. RE 6). If necessary, TDCJ could supplement these meals with items from its cannery, which is already kosher, and with kosher items from its existing menu. Supp. USCA5 893. Yet TDCJ never even considered these options. *See* Supp. USCA5 1043-44 (internal TDCJ memo setting forth

only two options—establishing a kosher kitchen at a single unit or selling prepackaged meals to inmates).

TDCJ's failure to seriously consider even one of these less restrictive alternatives to the denial of kosher meals requires summary judgment for Moussazadeh. *See, e.g.*, *Sossamon*, 560 F.3d at 334-35 (rejecting TDCJ's assertion that the policy employed furthered compelling governmental interest by the least restrictive means when the State failed to address the feasibility of other options and to articulate its reasoning); *Merced v. Kasson*, 577 F.3d 578, 595 (5th Cir. 2009) (failure to consider alternatives offered by plaintiff constituted failure to use least restrictive means); *Koger v. Bryan*, 523 F.3d 789, 801 (7th Cir. 2008) ("One less restrictive means … is sufficient for us to conclude that the prison officials failed to meet their burden that they were employing the least restrictive means of furthering compelling governmental interests."); *Warsoldier v. Woodford,* 418 F.3d 989, 999 (9th Cir. 2005) ("CDC cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice."). TDCJ's refusal to provide a kosher diet to Moussazadeh cannot survive strict

scrutiny when it has not considered the numerous, readily available means of providing Moussazadeh a kosher diet, and cannot adequately demonstrate why these alternatives, which are widely used in other prison systems, are infeasible in Texas.

## CONCLUSION

Moussazadeh respectfully requests that this Court reverse the district court's grant of summary judgment in TDCJ's favor and remand with instructions to enter summary judgment in Moussazadeh's favor. In the alternative, if this Court remands the case for further proceedings, Moussazadeh respectfully requests that this court exercise its supervisory power and transfer this case to a different district court judge within the Southern District of Texas.

Respectfully submitted,

s/ Anne W. Robinson

Eric C. Rassbach
Luke W. Goodrich
THE BECKET FUND FOR RELIGIOUS LIBERTY
3000 K Street NW
Washington, DC 20036-1735
(202) 955-0095

Anne W. Robinson
Matthew T. Murchison
LATHAM & WATKINS LLP
555 Eleventh Street NW
Suite 1000
Washington, DC 20004-1304
(202) 637-2200

*Attorneys for Max Moussazadeh*

January 6, 2012

## CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this the 6th day of January, 2012, I electronically filed the foregoing Supplemental Brief of Plaintiff-Appellant Max Moussazadeh with the Clerk of the Court using the CM/ECF system, which will send notice of such filing to the following registered CM/ECF users:

Adam Warren Aston
Office of the Attorney General for the State of Texas
209 W. 14th Street
Price Daniels Sr. Building, 8th Floor
Austin, TX 78701-1614
adam.aston@oag.state.tx.us

Celamaine Cunniff
Office of the Attorney General
Law Enforcement Defense Division
300 W. 15th Street
William P. Clements Building, 7th Floor
Austin, TX 78701-1220
cela.cunniff@oag.state.tx.us

Attorneys for Defendants TDCJ, Brad Livingston, and David Sweeten

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

s/ Anne W. Robinson
Anne W. Robinson
*Counsel for Plaintiff-Appellant*

## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,989 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface in Microsoft Word 2003 using 14-point Century Schoolbook font in the text and footnotes.

Executed January 6, 2012.

s/ Anne W. Robinson
Anne W. Robinson
*Counsel for Plaintiff-Appellant*