

No. 09-40400

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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.

On Appeal from the United States District Court
of the Southern District of Texas, Galveston Division

BRIEF FOR *AMICUS CURIAE*
AMERICAN JEWISH COMMITTEE
IN SUPPORT OF APPELLANT AND REVERSAL

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities, as described in 5th Circuit Rule 28.2.1, have an interest in the outcome of this case. This representation, supplemental to that of the parties, is made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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**STATEMENT OF IDENTITY AND INTEREST
OF *AMICUS CURIAE***

The American Jewish Committee (“AJC”) is a nonprofit, international advocacy organization established in 1906 to safeguard the civil and religious rights of Jews. Over 100 years later, AJC has over 170,000 members and supporters in the United States and throughout the world, 26 regional offices in the United States and numerous offices abroad. AJC continues its efforts to promote pluralistic and democratic societies and civil and human rights in the United States and globally.

In particular, AJC has been a strong advocate of religious liberty for people of all backgrounds. It has participated in numerous cases and actively supported many legislative proposals designed to protect the constitutional guarantee of free exercise of religion. As part of mission to defend the religious freedoms of all Americans, AJC believes that legislative and administrative action to accommodate the religious rights of incarcerated people is not only constitutional, but commendable and often mandatory.

In accordance with these principles, AJC was instrumental in securing passage of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42 U.S.C. §§ 2000cc *et seq.*, and AJC’s current Associate General Counsel served on RLUIPA’s drafting committee. Since RLUIPA’s

enactment, AJC has authored or joined many briefs in support of the statute's constitutionality in cases throughout the country. For example, AJC filed an *amicus* brief in the U.S. Supreme Court along with a diverse coalition of other religious and civil liberties organizations supporting RLUIPA's constitutionality in *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

AJC is particularly interested in this dispute because it not only pertains to RLUIPA and the religious liberty of inmates in Texas, but also involves specific tenets of Judaism. AJC has taken part in other RLUIPA cases challenging dietary restrictions, and it is concerned that by limiting inmates' ability to keep kosher – a fundamental command of the Jewish faith – Texas is depriving them of the full protection of the statute.¹

INTRODUCTION

The district court dismissed Max Moussazadeh's RLUIPA claim because it found him insincere in his stated desire to keep kosher while incarcerated in Texas. It reached this conclusion despite the undisputed fact that Moussazadeh ate kosher meals while housed at the one Texas prison with a kosher kitchen, and other indicia of his being an observant Jew. To

¹ All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a). This brief was prepared entirely by AJC's counsel on a *pro bono* basis; it was not authored in any part by counsel for a party; and no money was contributed by any party, counsel, or other person to prepare or submit this brief. *See* Fed. R. App. P. 29(c)(5).

the court, supposed lapses and inconsistencies in Moussazadeh's practice of *kashruth*, or keeping kosher, marked him as disingenuous.

AJC respectfully disagrees with this decision and believes that inconsistency in Moussazadeh's adherence to *kashruth* does not conclusively prove he is insincere in wanting to keep kosher. Both Jewish and federal law recognize this. Under Jewish law, it is understood that even believers striving to mend their ways will backslide and fail to observe commandments like the dietary rules on occasion. Judaism does not believe this condemns them as insincere in their quest to do better and ultimately avoid transgression altogether, and if Judaism takes this view, it seems anomalous for courts to insist on greater orthodoxy. Federal decisions also reject the notion that lapses in practice establish insincerity as a matter of law. Moussazadeh should at least have received a trial on the subject.

The district court's specific examples of Moussazadeh's insincerity are also unconvincing. For example, the court found that Moussazadeh's purchase of packaged snacks lacking a kosher certification from the prison commissary meant he had chosen to eat non-kosher food. But uncertified items may in fact be kosher, and the court was in no position to decide that what Moussazadeh ate was unquestionably non-kosher. The court also faulted Moussazadeh for failing to buy prewrapped kosher meals from the

commissary, but it is at least disputed whether Moussazadeh can afford such items, and it is not uncommon for Jews to have to curtail their practice of *kashruth* somewhat because of financial hardship. Doing so does not make them insincere.

In the end, the district court was overly stringent in grading Moussazadeh's religious practice – an exercise always fraught with the dangers of leading courts into inappropriate ecclesiastical judgments and unduly limiting religious exercise. This Court should therefore reverse.

ARGUMENT

I. **Finding Moussazadeh Insincere Because of His Supposed Lapses Disregards Both Jewish and Secular Law**

The district court based its finding that Moussazadeh is insincere in his wish to keep kosher on three supposed lapses or inconsistencies in how Moussazadeh kept kosher: his consumption of snacks lacking a seal of kosher certification, his failure to buy prepackaged kosher meals from the commissary, and his failure to obtain a transfer to the housing unit with a kosher kitchen. Each of these merits individual scrutiny, *see* Point II, *infra*, but there is a larger misunderstanding inherent in the court's decision: that backsliding or imperfect practice definitively establish a claimant's insincerity. This notion is at odds with both Jewish and federal law.

A. Jewish Law Would Not View Moussazadeh as Unequivocally Insincere

The commandments of Judaism can be exacting, and Jewish law contemplates that even observant Jews will sometimes fail to live up to them. As a result, Judaism does not condemn transgressors as necessarily and conclusively insincere in their desire to abide by the rules they violate. The fundamental Jewish principle of *teshuvah* best captures this idea and illustrates why the decision below is hard to reconcile with Jewish law.

In the trial court, Moussazadeh submitted the declaration of Rabbi Moshe Heinemann discussing *teshuvah*. R. 1230-35. Rabbi Heinemann explains that *teshuvah* literally means “return” and refers to the complex process of turning away from sin, resolving not to repeat the error and seeking forgiveness. R. 1232. He posits why Moussazadeh may have lapsed – he had a limited Jewish education and is now cut off from Jewish circles – and notes: “That Mr. Moussazadeh may occasionally err is predictable. But it does not speak at all to his sincerity or desire to comply with Jewish law.” R. 1233. While the district court struck and did not consider Rabbi Heinemann’s declaration, R. 1589-91, the concepts he expresses are elementary and well supported by other secondary sources, which are particularly appropriate for consideration in a case like this. *See Ran-Dav’s County Kosher, Inc. v. New Jersey*, 608 A.2d 1353, 1362 (N.J.

1992) (discussing value of consulting secondary sources in case challenging kosher certification regulations), *cert. denied*, 507 U.S. 952 (1993).

For example, Maimonides, one of Judaism's greatest sages and legal authorities, acknowledged that "an individual cannot but sin and err, either through ignorance – by professing an opinion or a moral quality that is not preferable in truth – or else because he is so overcome by desire or anger." A MAIMONIDES READER, 340 (Isadore Twersky ed., Behrman House 1972).² Nonetheless, *teshuvah* instantly restores the *ba'al teshuvah*, the penitent, to the Jewish community ("My people"), as well as to divine favor:

But yesterday this person was odious before God, abhorred, estranged, an abomination. Today he is beloved, desirable, near [to God], a friend. So you find that the same expression with which God thrusts sinners away from Him, He employs to bring the penitent near to him, whether they are individuals or communities, as it is said, "And instead of that which was said unto them: 'You are not My people,' it shall be said unto them: 'You are children of the living God'" (Hos. 2:1).

Id. at 80 (parentheticals in original).

Indeed, even those intent on performing *teshuvah* will very likely backslide. "A person still hesitantly groping his way toward *teshuvah* may well find his life filled with contradiction and torn between conflicting aims." Adin Steinsaltz, TESHUVAH, A GUIDE FOR THE NEWLY OBSERVANT

² "Moses Maimonides is recognized as one of the supreme *halakhic* authorities of all time. His Mishneh Torah serves as the definitive code of Jewish law." David S. Ariel, WHAT DO JEWS BELIEVE? 167 (Schocken Books 1995).

JEW, 16 (Michael Swirsky, ed. and trans., Free Press 1982).³ Prolonged instruction and acculturation is required, and the *ba'al teshuvah* “is likely to find himself engaged for an extended period in such an educational process. Instead of seeing the intermediate stages as signs of insincerity and ambivalence, as evidence that he is fooling God and himself, he must learn to see them as steps in this process of education.” *Id.* at 19. Unfortunately, lapses are considered to be inevitable:

In this context, the *ba'al teshuvah* often suffers from a certain idealization of the ‘perfect Jew’...

The truth is that such ideal types, people who know no backsliding, have never existed except as figments of the imagination and of literary invention. No Jew, even the greatest leader, saint, or prophet, has ever been free of religious problems, failings, heartaches and doubts. This is an established principle: everyone who takes the religious life seriously and who is thus ever striving onward experiences setbacks along the way.

Id. at 35.

Because this is so, Judaism does not condemn those attempting to “return” to the commandments through *teshuvah*, but who err from time to time in the process:

³ Rabbi Steinsaltz is a “renowned Jerusalem scholar, philosopher, social critic, educator, [and] author... Hailed by Time Magazine as a ‘once-in-a-millennium scholar’ for his innovative commentary and translation of the Talmud into Hebrew and other languages, Steinsaltz received the Israel Prize, the country’s highest honor, in the field of Jewish studies, in 1988.” Simcha Prombaum, *Four Questions for Rabbi Adin Steinsaltz*, JEWISH DAILY FORWARD, April 9, 2008, <http://www.forward.com/articles/13114/>.

There are no tricks for ensuring that one will not trip and fall, no matter how righteous one has been or for how long. The Talmudic sages deal with this problem, but after lengthy analysis and numerous examples they fall back on the generalization that no one is safe from temptation; *consequently, no one is in a position to despise backsliders.*

Id. at 36 (emphasis added). Judaism rules out “holding a grudge” and using someone’s past lapses against them in the future – as the district court essentially did to Moussazadeh. “The rabbis urge that the sinner must be given every encouragement to repent. It is forbidden to say to a penitent: ‘Remember your former deeds.’” Steven T. Katz, *JEWISH IDEAS AND CONCEPTS* 126 (Schocken Books 1977).

If there is understanding in Judaism for backsliders, it may be particularly forthcoming where *kashruth* is concerned. Consistently adhering to Jewish dietary laws is especially daunting:

While *kashrut* may be a system for cultivating a holier approach to life, it is not always easy. It entails a certain amount of self-denial that will be far more difficult for meat-and-potatoes people than folks who prefer fish and salad for dinner. Choosing to keep kosher can be a difficult decision on many levels. For one thing, it is not easy to explain to others. Keeping kosher means embracing a basically non-Western system of self-discipline that runs counter to a culture of consumerism and instant gratification. It means making a very fundamental distinction between yourself and others – and that includes not only non-Jews but also Jews who do not keep kosher, and Jews who keep kosher differently than you do.

Besides, any major change in eating habits can be a deeply unsettling experience. Unlike animals, human beings do

not eat simply to sustain life. For people, eating, like sex, is not simply a physical act. Eating is arguably life's first sensual pleasure and the table is an important setting for social as well as physical sustenance. Furthermore, food places us within historic, ethnic and familial contexts, even as it expresses idiosyncrasies and individuality.

Anita Diamant, *LIVING A JEWISH LIFE: JEWISH TRADITIONS, CUSTOMS, AND VALUES FOR TODAY'S FAMILIES* 86-87 (HarperCollins 2007).

“Because *kashrut* is detailed and complex, it is easy to come close to complying with *kashrut* but still fall short.” Karen Ruth Lavy Lindsay, *Can Kosher Fraud Statutes Pass the Lemon Test?: The Constitutionality of Current and Proposed Statutes*, 23 U. DAYTON L. REV. 337, 337-38 (Winter 1998). And as Rabbi Heinemann avers, even observant Jews sometimes yield to temptation:

Many observant Jews, including those who are not in prison, have access to and strong relationships with qualified rabbis, and have control over their own diets, sometimes fail to adhere perfectly to the laws of *kashruth*. I am personally aware of some such cases involving very sincere people who genuinely believe in the Divinity of the Torah and Jewish Law who have succumbed – temporarily – to their base desires. Their errors do not mean that they are insincere. It means only that they erred and must perform teshuvah.

R. 1234. Rachel Freedenberg works at a Jewish newspaper in San Francisco and has written about her experience keeping kosher. See Rachel Freedenberg, *Why Do I Still Keep Kosher? It's Food for Thought*, JWEEKLY.COM, July 23, 2009, <http://www.jweekly.com/article/full/39309/>

why-do-i-still-keep-kosher-its-food-for-thought/. She has, “on the rarest of occasions, even eaten something totally nonkosher (and nonvegetarian), like whale,” and she admits she may someday try a crab cake from her native Maryland. *Id.* Judaism would not condemn Freedenberg or the people referred to by Rabbi Heinemann as insincere.

Nor would it likely censure Moussazadeh. His declaration indicates that he is on the path of *teshuvah*: “I will be the first to admit that am not perfect. I do not always obey all of the commands of my faith as perfectly as I would like, but I sincerely try to consume an exclusively kosher diet whenever possible... In the past, when I have occasionally slipped up and failed to keep kosher, I have always tried to reform my ways and continue keeping kosher.” R. 995.

Ironically, in finding Moussazadeh wanting, the district court overlooked what he *has* accomplished from a Jewish vantage point, even if incompletely. While he has yet to achieve perfect consistency, each isolated observance of *kashruth*, “each positive precept fulfilled, each transgression avoided, is in itself an achievement.” Steinsaltz, *supra*, at 25. For example, “[t]here are many American Jews who keep kosher at home but eat unkosher foods outside the home. Other Jews, both more and less observant, often ridicule such behavior as hypocritical. Yet, from the perspective of Jewish

law, it is clearly preferable to keep kosher at home than not to keep it at all.” Joseph Telushkin, *JEWISH LITERACY* 636-37 (William Morrow and Co. 1991). Moussazadeh, too, may have fallen short of “consum[ing] an exclusively kosher diet,” R. 995, but like Jews who only keep kosher at home, his efforts are still preferable to lesser observance. Most Jews would commend these efforts, especially given his circumstances – not hold them up as imperfect and therefore proof of his lack of sincerity to try to do even better.

Teshuvah is “so integral to the whole structure of Jewish theology that it runs in an unbroken line from the Bible to the most modern prayer in the synagogue... [T]he rabbis suggested that *t’shuvah* or penitence was created even before the world itself was formed.” Levi A. Olan, *The Nature of Man*, in *CONCEPTS THAT DISTINGUISH JUDAISM* 179 (Abraham Ezra Millgram, ed., B’nai B’rith Books 1985). Accounting for *teshuvah* inevitably leads to skepticism, from a Jewish viewpoint, of the district court’s finding of Moussazadeh’s insincerity. True, the court was charged with applying federal law, not Jewish law. But if Jewish tradition would not see Moussazadeh’s lapses as definitive proof of inauthenticity, why should the courts?

B. The District Court’s Decision Also Runs Afoul of Federal Law’s View of Sincerity and Backsliding

Just as Moussazadeh’s supposed inconsistency does not mark him as incontrovertibly insincere under Jewish law, it does not do so under federal law either.

In numerous decisions where courts are called upon to assess the sincerity of inmates’ religious practice, they acknowledge that inconsistencies and imperfections do not by themselves require findings of insincerity. Judge Posner may have penned the best statement of this in *Reed v. Faulkner*, where a Rastafarian inmate challenged prison limits on hair length. *See* 842 F.2d 960, 961-62 (7th Cir. 1988). The district court appeared to attach “conclusive weight to Reed’s ‘backsliding’ – his eating of meat, and his (inferred) shaving of his beard” – in finding his Rastafarianism insincere. *See id.* at 963. But the Seventh Circuit disagreed:

[T]he fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere. Some religions place unrealistic demands on their adherents; others cater especially to the weak of will. 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.

Id.; *see also Nasir v. I.N.S.*, 122 F.3d 484, 487 (7th Cir. 1997) (“we have previously noted the difficulty judges have in assessing one’s sincerity about

religious beliefs... apparent back-sliding on religious practices may be evidence of the insincerity of the religious beliefs, but saying that it is conclusive evidence of insincerity would be improper”).

As another court put it in rejecting arguments based on backsliding, while finding an inmate sincere in his desire to keep kosher: “Blount also makes a persuasive argument that his failure to follow all tenets of his religion at all times does not prove lack of sincerity in his belief in those tenets; it proves, at most, that he is an imperfect human being. In this failing, he is clearly not alone.” *Blount v. Johnson*, 2007 WL 1577521 at * 7 (W.D. Va. 2007). Many recent decisions have specifically declined to find inmates to be insincere in their adherence to *kashruth* or other religious dietary regimes simply because they lapsed now and then in their observance.⁴

While correctional officers and courts are sometimes called upon to examine the sincerity of a believer’s religious practice, they should do so with a light touch. Overly exacting tests of sincerity can lead, intentionally

⁴ See, e.g., *Isbell v. Ryan*, ___ F. Supp. 2d. ___, 2011 WL 6050337 at * 7 (D. Ariz., Dec. 6, 2011); *Bonnell v. Burnett*, 2009 WL 909572 at * 6 (E.D. Mich.), *adopted in relevant part*, 2009 WL 909575 (E.D. Mich. 2009); *Blount*, 2007 WL 1577521 at * 7; *Shaheed-Muhammad v. DiPaolo*, 393 F. Supp. 2d 80, 91-92 (D. Mass. 2005); *Shilling v. Crawford*, 2007 WL 2790623 at * 17 (D. Nev. 2007); *Caruso v. Zenon*, 2005 WL 5957978 at * 11 (D. Colo. 2005) (“He may have strayed from the teachings of his faith – even repeatedly – with regard to his purchase of *haram* foods. These purchases demonstrate carelessness at best, and spiritual weakness at worst, but they do not suggest that his intent to adhere to Islamic law or a *halal* diet is somehow insincere”).

or not, to immersion in ecclesiastical questions and what amounts to a grading of religious fidelity – judgments courts are hardly well equipped to make. *See, e.g., Merced v. Kasson*, 577 F.3d 578, 590 (5th Cir. 2009) (“The judiciary is ill-suited to opine on theological matters, and should avoid doing so”); *United Kosher Butchers Ass’n. v. Assoc. Synagogues of Greater Boston, Inc.*, 211 N.E.2d 332, 334 (Mass. 1965) (declining to decide claims by one kosher certifier against another that would require determining criteria for whether foods are kosher and passing on certifying procedures: “this court is not qualified to decide and therefore must refuse to consider an issue which is so exclusively one of religious practice and conscience”). Delving deeply into the quality and quantity of an inmate’s ritual practice to make sure it measures up to some perceived minimum of orthodoxy could easily under-protect legitimate observance and lead to the sort of “bizarre... religious polic[ing]” feared in *Reed*. *See* 842 F.2d at 963. As this Court recognized in a different context, “judicial shyness” is in order when it comes to wading into matters of faith and any one person’s “struggling” religious views. *Betenbaugh v. Needville Indep. School Dist.*, 611 F.3d 248, 261-62 (5th Cir. 2010).

The district court appears to have erred in this fashion and employed unduly rigorous scrutiny of Moussazadeh’s kosher practice, grading him

down for perceived inconsistency. If anything, courts should err on the side of finding sincerity or at least allowing the fact-finder to weigh the issue at trial. This approach best avoids chilling the free exercise of religion, even in institutional settings where claimants' rights are limited.

Moreover, the district court's decision is especially questionable because it granted summary judgment against Moussazadeh. "Whether religious beliefs are sincerely held is a question of fact." *Mosier v. Maynard*, 937 F.2d 1521, 1526 (10th Cir. 1991); *accord Patrick v. LeFevre*, 745 F.2d 153, 159 (2d Cir. 1984) ("If there were ever a clearer example of a question of fact, rather than law, I can think of none" (quotation omitted)). Moussazadeh questions whether the state's evidence purporting to rebut the sincerity of his views is even probative. *See* Moussazadeh Brf., Point II(B)(3). At a minimum, the evidence Moussazadeh offered indicating that he ate a kosher diet while housed at the Stringfellow Unit, that he has regularly attended Jewish religious services while incarcerated, and that he was born and raised and remains Jewish demonstrates his entitlement to a trial on the sincerity issue.

II. The Specific Factors Cited by the District Court Do Not Establish Moussazadeh's Insincerity

Turning to the specific examples of inconsistency and backsliding cited by the district court in this case, none negates Moussazadeh's religious sincerity as a matter of law.

Initially, the court emphasized Moussazadeh's occasional purchase of items from the commissary that lack a seal indicating inspection by a kosher certifying agency. R 1603. As Moussazadeh correctly points out, though, inspection by such an authority does not make food kosher. *See* Moussazadeh Brf. at 52-54. Food is kosher or not, but inspection and certification do not make it so, and many of the items Moussazadeh purchased may well have been kosher. R. 1234-35 (Heinemann Declaration); Lindsay, *supra*, at 341 (noting that many foods, such as grains, beverages, fruits and vegetables are "inherently kosher," though non-kosher preparation can change their status). Certification merely reassures the consumer that the producer has complied with the laws of *kashrut*. *See, e.g.*, http://www.ou.kosher.org/index.php/basics/about_ou (Orthodox Union website) ("Forbes magazine wrote, 'If you want to know your food is kosher, you can look for the Orthodox Union's OU symbol.' It immediately and universally enhances your product, raising the perception of its quality, and increasing its marketability").

Ironically though, even certification is no guaranty that every certified product is kosher. Occasional fraud in certification and doctrinal differences among Jewish authorities and certifying entities make certainty elusive.⁵ Nor are courts well placed to make judgments about whether certain foods are kosher, as the district court's apparent misunderstanding of the significance of certification illustrates. While the district court unhesitatingly pronounced certain commissary foods to be non-kosher, other courts have recognized state authorities' and their own institutional incapacity to decide what foods are kosher, as well as the entanglement problems such decisions inevitably raise.⁶ Despite the district court's assumption, there is no proof the snacks Moussazadeh ate were actually non-kosher, and any burden to prove the point should have fallen on Texas officials seeking to use the purchases to defeat Moussazadeh's claims.

⁵ See, e.g., Jonathan Cohen, *Kosher Slaughter, State Regulation of Religious Organizations, and the European Court of Human Rights*, 4 INTERCULTURAL HUM. RTS. L. REV. 355, 367-68 (2009) ("Another unresolved issue involving kosher food regards the credibility of its supervision. Allegations of fraud and findings of abuses continually undermine the credibility of those entrusted with supervision and certification"); Mark Popovsky, *The Constitutional Complexity of Kosher Food Laws*, 44 COLUM. J. L. & SOC. PROBS. 75, 79 (Fall 2010) ("There is no widely accepted authority that can determine definitively whether a food product or food preparation practice is kosher"); *Commack Self-Service Kosher Meats, Inc. v. Weiss*, 294 F.3d 415, 426 (2d Cir. 2002) ("We find it indisputable that there are differences of opinion within Judaism regarding the dietary requirements of *kashrut*), *cert. denied*, 537 U.S. 1187 (2003).

⁶ See, e.g., *Commack*, 294 F.3d at 427-28; *Ran-Dav's County Kosher*, 608 A.2d at 1362-64; *Korn v. Rabbinical Council of Cal.*, 195 Cal.Rptr. 910, 914 (Cal. Dist. Ct. App. 1983) (unpublished) ("Thus, we conclude that the determination of whether food is kosher is an ecclesiastical question unsuitable for adjudication in civil courts"); *United Kosher Butchers Ass'n.*, 211 N.E.2d at 334-35.

Because certification does not determine whether food is kosher, Moussazadeh's occasional past willingness to buy items lacking a certification symbol does not inevitably reflect non-practice of *kashruth*. To be sure, he acknowledges "occasionally slipp[ing] up and fail[ing] to keep kosher." R. 995. Yet Moussazadeh may also genuinely believe at least certain uncertified items with no obvious non-kosher ingredient like pork are actually kosher, or he may have calculated that the risk of eating them is acceptably low:

There is a great deal of variance within the Jewish population with regard to knowledge of the laws of *kashrus*...

Kashrus standards vary by individual, as well as the amount of risk a consumer is willing to assume. Even with the supervising and certifying industry, no one can be one hundred percent certain that food is kosher, but this does not seem to deter most consumers. Though they would not identify it as such, most Jewish consumers appear to have adopted a negligence standard of observance: it is forbidden to eat food that one knows to be or should know to be not kosher.

Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 FLA. ST. U. L. REV. 509, 549 (Spring 2004).

Moussazadeh may be mistaken in judging what foods are kosher, or he may be too lenient in setting his own personal "negligence standard" by which to calibrate the risk of actually eating something non-kosher. *Id.* But

“[s]incerity of belief does not turn on an inmate’s objective knowledge of his religion.” *Isbell*, 2011 WL 6050337 at *6. Nor is Moussazadeh required to practice the most orthodox version of *kashruth*. Sincerity does not require sainthood. In any event, Moussazadeh’s precise views and intentions in this regard should at least have been explored at trial.

The district court also cited Moussazadeh’s failure to buy prepackaged kosher meals from the commissary. R. 1603. Moussazadeh has given testimony that at least raises a factual question as to whether he can routinely afford to do so, however. R. 995-96; *see also* Moussazadeh Brf. at 56. The district court stated that Moussazadeh “does not indicate that he attempted to purchase kosher food and was denied the same by the alleged spending limitation pursuant to TDCJ-CID policy.” R. 1603. Yet he essentially testified to just that, declaring that the spending limit has made it “impossible for [him] to keep kosher by purchasing kosher meals at the commissary.” R. 996. He also averred that, “even if [he] were not restricted to spending \$25.00 every two weeks, [he is] not financially able to afford paying for kosher meals for the length of [his] sentence.” *Id.* Again, there is at least a factual dispute on the subject. Other courts have held that states may not require inmates to make a co-payment for kosher food as an alternative means of providing a kosher diet. *See, e.g., Beerheide v. Suthers*,

286 F.3d 1179, 1186-89 (10th Cir. 2002) (noting “Hobson’s choice” inmates would face if forced to choose between following religious tenets and spending funds on other essentials); *Thompson v. Vilsack*, 328 F. Supp. 2d 974, 978-80 (S.D. Iowa 2004).

It is also worth noting that, if Moussazadeh’s practice of *kashruth* has been undermined by limited resources, he is not alone. Kosher food is generally more expensive than nonkosher food, and some who try and largely succeed in observing *kashruth* nonetheless have their practice curtailed to some degree by insufficient means:

In most U.S. grocery stores, the kosher section is small, providing basic staples and additional foods needed for Jewish holidays. But these items are often too pricey for many Diaspora Jews [Jews who do not live in Israel], who, like many other Americans, are struggling during these difficult economic times...

Is there justification for soaring kosher food prices? How is it ethical to charge so much for kosher products, that many Jews simply cannot afford to keep the dietary laws?

Yael Miller, *The Cost of Keeping Kosher*, HAARETZ Oct. 10, 2011, <http://www.haaretz.com/jewish-world/the-cost-of-keeping-kosher-1.389171>.

Jews forced to limit their practice of *kashruth* based on cost are not *per se* disingenuous about keeping kosher, and Moussazadeh may not be either.

Finally, the district court cited Moussazadeh’s failure to obtain a transfer to the Stringfellow Unit, where there is a kosher kitchen, because he

did not request such a move or was ineligible for housing there due to disciplinary infractions. R. 1603. Moussazadeh has indicated that he faced harassment at Stringfellow, and that during most of the time period at issue prison regulations barred his being housed there. *See* Moussazadeh Brf. at 56-57. Moussazadeh is also correct that courts have held that disciplinary violations do not definitively negate sincerity or permit restricting an inmate's religious exercise. *See id.* at 57-58 (and authority cited therein); *see also, e.g., Horacek v. Burnett*, 2008 WL 4427825 at * 6 (E.D. Mich.) (rejecting state's argument that inmate was insincere about Judaism because he committed crimes while on parole), *adopted in relevant part*, 2008 WL 4427792 (E.D. Mich. 2008); *Blount*, 2007 WL 1577521 at * 7.

In sum, the specific reasons given by the district court for finding Moussazadeh insincere as a matter of law either misapprehend Jewish law and practice, fail to demonstrate the absence of a factual dispute, or both. Moreover, the court's comment that Moussazadeh's only real goal is to harass prison officials suggests that it may have let a dim personal view of a particular litigant in a long-running case color its assessment of the issues. R. 1605. AJC respectfully believes Moussazadeh has done enough to at least receive a trial on his claim to freer access to kosher food while in prison.

CONCLUSION

This Court should reverse the judgment below.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. Civ. P. 29 and 28.1(e)(2) because this brief contains 5,055 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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