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
for the Southern District of Texas, Galveston Division
No. 3:07-CV-00574, Hon. Melinda Harmon

SUPPLEMENTAL REPLY BRIEF OF PLAINTIFF-APPELLANT MAX MOUSSAZADEH

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

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

April 16, 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, Andrew J. Robinson);
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 (Arthur C. D'Andrea, Celamaine Cunniff);
8. James Mossbarger, Warden of Stringfellow Unit.

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

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INTRODUCTION

In response to this lawsuit, TDCJ has established a kosher kitchen and has provided a kosher diet to most of its Jewish inmates without any problems of cost or security. The only question is whether it will spend an extra $1,000 to $3,000 per year to provide a kosher diet to Moussazadeh, who has been transferred away from the kosher kitchen and is now forced to violate his religious beliefs. TDCJ has now fought this issue through seven years of litigation, with three issues remaining on appeal: exhaustion, sincerity, and the merits.

On the issue of exhaustion, TDCJ fails to confront the rule in this Circuit that "prisoners need not continue to file grievances about the same issue." *Johnson v. Johnson*, 385 F.3d 503, 521 (5th Cir. 2004). The "issue" today is the same one described in Moussazadeh's original administrative grievance: TDCJ's failure to provide Moussazadeh with access to kosher meals in the dining hall. Not liking its chances under *Johnson*, TDCJ attempts to make up its own rule, ostensibly derived from the "policies" underlying the Prison Litigation Reform Act

("PLRA"). TDCJ Br. 19-20.[1] But even those policy considerations militate *against* re-exhaustion.

TDCJ fares even worse on the issue of Moussazadeh's sincerity, where it invites this Court to make an impermissible credibility determination on summary judgment. This Court's leading case on sincerity is *A.A. ex rel. Betenbaugh v. Needville Independent School District*, where this Court refused to second-guess a student's "shifting explanations" of his religious beliefs out of a "longstanding judicial shyness with line drawing" in this area. 611 F.3d 248, 261-62 (5th Cir. 2010). Yet TDCJ does not even attempt to distinguish *Needville*. TDCJ Br. 43. TDCJ also ignores substantial record evidence demonstrating Moussazadeh's sincerity, including the fact that TDCJ's Jewish chaplains have repeatedly deemed Moussazadeh sincere. TDCJ instead criticizes Moussazadeh's supposedly "non-kosher" commissary purchases, without ever establishing that any of the items Moussazadeh purchased were, in

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[1] References to "TDCJ Br." are to Appellees' Supplemental Brief, filed on March 19, 2012, while references to "Moussazadeh Br." are to Appellant's Supplemental Brief, filed January 6, 2012. Citations to the record conform to the convention followed in Appellant's Supplemental Brief.

fact, non-kosher. This evidence does not even create a material factual dispute over Moussazadeh's sincerity.

Unable to defend the district court's rulings on exhaustion or sincerity, TDCJ asks this court to affirm on an alternate ground—that the denial of a kosher diet satisfies strict scrutiny under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). But TDCJ's attempt to justify its denial of a kosher diet fall flat. Requiring inmates to pay for their religious meals, when all other inmates receive their meals for free, is a quintessential "substantial burden" under *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004). TDCJ asserts that it has "compelling" interests in controlling costs and prison security, but it ignores the fact that the cost of providing a kosher diet is *de minimis*, and hopes the Court will overlook that TDCJ long ago abandoned any claimed interest in "security." Moreover, TDCJ has failed to explain why it did not consider or implement several less restrictive means of furthering its alleged interests. Indeed, TDCJ's approach to the issue in its brief is emblematic of its approach over the past seven years—pretending that its options for providing a kosher diet to Moussazadeh are impossibly nar-

row, even while ignoring options that would easily meet Moussazadeh's religious needs.

This Court should not allow TDCJ to avoid providing Moussazadeh a kosher diet any longer. It should reject TDCJ's smokescreen arguments on exhaustion and sincerity, and grant Moussazadeh summary judgment on the merits.

ARGUMENT

I. Moussazadeh Exhausted His Administrative Remedies

TDCJ does not dispute that Moussazadeh fully exhausted his administrative remedies before filing suit. Instead, it argues that Moussazadeh must *re-exhaust* those remedies because TDCJ "changed" its dietary policy and transferred him to a new unit. TDCJ Br. 20. But this argument is directly contrary to the text of the PLRA, the policies underlying exhaustion, and this Court's precedent.

A. The Exhaustion Analysis Is Controlled by *Johnson*

Despite its roundabout arguments on exhaustion, TDCJ cannot escape the fact that *Johnson* controls this case. Under *Johnson*, a grievance need only provide "fair notice" of a prisoner's claim and "a fair opportunity to address the problem that will later form the basis of the lawsuit." 385 F.3d at 516-17. Moussazadeh's grievance did just that—

it notified TDCJ of the lack of kosher food and requested "access to kosher meals in the prison dining hall." Supp. USCA5 511; Moussazadeh Br. 30-31. Moussazadeh seeks precisely the same relief today.

Nevertheless, TDCJ claims that a new dietary policy, which makes kosher meals available "for purchase in the commissary," requires re-exhaustion. TDCJ Br. 20. But forcing Moussazadeh to pay for kosher meals at the commissary does nothing to address his request for "access to kosher meals in the prison dining hall." And it certainly does not require re-exhaustion under *Johnson*.

Johnson squarely held that "prisoners need not continue to file grievances about the same issue." *Johnson*, 385 F.3d at 521. There, the inmate filed grievances alleging that TDCJ failed to protect him from repeated sexual assaults. TDCJ argued that he needed to file new grievances to exhaust *additional* claims of sexual assault that arose *after* the initial grievances. But this Court rejected TDCJ's argument, concluding that the prisoner "could not have been expected to file a new grievance … each time he was assaulted." *Id.* Here, too, Moussazadeh is complaining about "the same continuing failure" to provide him ac-

cess to kosher meals in the prison dining hall. *Id.* Thus, it is no surprise that TDCJ does not even attempt to distinguish *Johnson*.

TDCJ's argument also flies in the face of precedent from other courts, including *Howard v. Waide*, 534 F.3d 1227 (10th Cir. 2008), *Abney v. McGinnis*, 380 F.3d 663 (2d Cir. 2004), and *Sulton v. Wright*, 265 F. Supp. 2d 292 (S.D.N.Y. 2003). Moussazadeh Br. 34; *see also Parzyck v. Prison Health Servs., Inc.*, 627 F.3d 1215, 1219 (11th Cir. 2010) (holding that a prisoner "was not required to initiate another round of the administrative grievance process on the exact same issue each time another request for an orthopedic consultation was denied"). Tellingly, TDCJ does not even attempt to distinguish these cases.

In fact, TDCJ fails to cite *even a single case* that required *re-exhaustion* of the same claims after an inmate had already exhausted his administrative remedies. That is because, as the *amicus* brief of the ACLU points out (at 12-23), re-exhaustion is contrary to the text of the PLRA. The PLRA provides that "*[n]o action shall be brought … until* such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). While this means that exhaustion is a necessary precursor to filing suit, it also means that exhaustion is a

one-time event. Once a prisoner has exhausted his administrative remedies, his action can be "brought"; there is no continuing obligation to keep re-exhausting administrative remedies merely to maintain the same legal action. *See DeHart v. Horn*, 390 F.3d 262, 273 (3d Cir. 2004) ("[W]e have never held that a prisoner must exhaust his claims more than once."); ACLU Br. 12-23 (citing additional cases in support).

B. Re-exhaustion in This Context Would Frustrate, Not Promote, the Purposes of the PLRA

Unable to square its argument with *Johnson* or the PLRA's text, TDCJ attempts to turn the exhaustion requirement into a standardless policy inquiry, relying on general statements of policy from *Woodford v. Ngo*, 548 U.S. 81 (2006). But even those general policy statements contradict TDCJ's arguments.

Woodford offers three policy reasons for exhaustion: (1) It gives the prison "'an opportunity to correct its own mistakes'" before facing suit; (2) it "promotes efficiency" by allowing claims to be "settled at the administrative level"; and (3) it "'produce[s] a useful record for subsequent judicial consideration.'" 548 U.S. at 89. None of these goals would be furthered by re-exhaustion.

First, TDCJ claims that it has not had "'an opportunity to correct its own mistakes,'" because Moussazadeh has not filed a new grievance. TDCJ Br. 21-22 (citation omitted). This argument is nonsensical. Moussazadeh has been requesting the same relief for seven years of litigation: access to kosher meals in the prison dining hall. The parties have had extensive settlement negotiations, and TDCJ has staunchly refused to grant Moussazadeh a kosher diet when he is transferred away from Stringfellow. *See* Orig. USCA5 349, 368. Everyone knows what will happen if Moussazadeh files a new grievance: It will be denied. TDCJ is not seeking "an opportunity to correct its own mistakes," but a trap to escape RLUIPA liability.

TDCJ's "efficiency" argument is even worse. The notion that seven years of litigation should be put on hold, merely so Moussazadeh can go on the fool's errand of filing another grievance, is the height of inefficiency. TDCJ blithely asserts that the administrative exhaustion process "does not take long." TDCJ Br. 25. But even if that were true, Moussazadeh would have to re-file his case after seven years of litigation. That is not efficient.

Third, re-exhaustion would do nothing to improve the factual record. *Cf. id.* at 22-23. Over the last seven years of litigation, the parties have developed a voluminous record. Indeed, this Court remanded the case to the district court *precisely* to "allow the parties and the district court to further develop the record" on the transfer to Stiles—which the parties have now done via extensive discovery. *Moussazadeh v. Tex. Dep't of Crim. Justice*, 364 F. App'x 110, 110 (5th Cir. 2010) (unpublished). A new administrative grievance would add nothing to the existing record.[2]

Finally, as noted in Moussazadeh's opening supplemental brief, TDCJ's position on re-exhaustion would create perverse incentives for prison officials, who could halt litigation merely by making minor policy changes or transferring an inmate elsewhere. Moussazadeh Br. 38; *accord* ACLU Br. 24-26. TDCJ claims that it "do[es] not understand [this] argument about incentives," because it can game the system only if it "transfers the inmate to give him *exactly what he is asking for*." TDCJ Br. 26. But TDCJ has *not* given Moussazadeh "exactly what he is ask-

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[2] Notably, at the time of the remand, TDCJ agreed that "additional fact-finding" in the district court—not a new grievance—was the proper venue for developing the record. *See* TDCJ 28(j) Letter at 1-2 (filed Jan. 6, 2010). TDCJ should be estopped from arguing differently here.

ing for"; yet it still asserts that the case should be dismissed for lack of re-exhaustion. This sort of gamesmanship "would allow prison officials to indefinitely delay an inmate's suit … by transferring him to a new facility when he has exhausted his prison appeals." *Tillis v. Lamarque*, No. C 04-3763 SI, 2006 WL 644876, at *6 (N.D. Cal. Mar. 9, 2006). Such a result cannot be squared with the text of the PLRA, the purposes of exhaustion, or this Court's precedent.

II. Moussazadeh Sincerely Believes in Keeping Kosher

TDCJ's sincerity arguments are equally unpersuasive. Not surprisingly, TDCJ buries those arguments deep in its brief, rarely defending the district court's reasoning, but still inviting this Court to make the same mistake—*i.e.*, to make a credibility determination on summary judgment. Doing so would disregard settled law and abundant summary judgment evidence establishing Moussazadeh's sincerity.

A. Sincerity Is a Credibility Assessment

The overwhelming weight of authority treats sincerity as a credibility assessment that can only rarely be resolved against an inmate on summary judgment. Moussazadeh Br. 39-43. In its leading case on sincerity, this Court refused to second-guess a student's "shifting explanations" of his religious beliefs when seeking to wear long hair in

school. *Needville*, 611 F.3d at 261. As the Court explained, there is a "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." *Id.* (internal quotation marks omitted). TDCJ does not distinguish *Needville*; indeed, the only time it cites *Needville*, it wrongly characterizes it as a prisoner case. TDCJ Br. 43.

Because the issue of sincerity is "almost exclusively a credibility assessment," courts have held that "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." *Kay v. Bemis*, 500 F.3d 1214, 1219-20 (10th Cir. 2007) (internal quotation marks and citations omitted). Contrary to TDCJ's suggestion, courts have not merely "flirted" with this principle (TDCJ Br. 43); they have embraced it emphatically. *See, e.g.*, *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."); *see also EEOC v. Union Independiente de la Autrodad de Acueductos y Alcantarillados de Puerto Rico*, 279 F.3d 49, 56 (1st Cir. 2002); *Van Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009), *cert. de-*

nied, 131 S. Ct. 2149 (2011); *Mosier v. Maynard*, 937 F.2d 1521, 1527 (10th Cir. 1991). This includes numerous cases specifically involving religious dietary requests. *See* AJC Br. 12-15 & n.4 (collecting cases).

In response, TDCJ cites only *one case*—an unpublished opinion, which it claims offers "the better approach." TDCJ Br. 43. But in *Gardner v. Riska*, the inmate failed to offer *any* specific facts demonstrating his sincerity; even his own affidavit failed to "state[] that he sincerely believed that a kosher diet is important to the free exercise of his religion." 444 F. App'x 353, 355 (11th Cir. 2011). Thus, *Gardner* is fully consistent with the other cases, standing only for the unremarkable proposition that summary judgment is appropriate where the inmate offers *no evidence* of sincerity.

Here, by contrast, Moussazadeh has submitted abundant evidence of his sincerity, including affidavits explaining his religious belief, evidence that he was raised in a kosher household, and evidence that TDCJ's own chaplains repeatedly deemed him to be sincere. In light of this evidence, there is no basis for granting summary judgment against Moussazadeh.

B. Abundant Evidence Supports Moussazadeh's Sincerity

TDCJ's brief also ignores substantial evidence of Moussazadeh's sincerity. According to TDCJ, Moussazadeh's "principal evidence" of sincerity is a "self-serving affidavit." TDCJ Br. 37-39. But this characterization of the record is inaccurate.

Moussazadeh's evidence of sincerity is extensive: In addition to two declarations affirming Moussazadeh's Jewish upbringing and describing the importance that he and his family place on keeping kosher (Orig. USCA5 1070-72 (RE 25); Supp. USCA5 994-96 (Supp. RE 6)), Moussazadeh has introduced evidence of the hardships he has suffered for pursuing a kosher diet (Orig. USCA5 429-30, 1014, 1072), information about his attendance at religious services (Supp. USCA5 995 (Supp. RE 6)), and evidence that he purchases Passover meals at his own expense (Supp. USCA5 996 (Supp. RE 6)).

Perhaps most importantly, TDCJ's own Jewish chaplain, its own prison officials, and its own outside Jewish authority have all deemed Moussazadeh to be sincere on multiple occasions. Moussazadeh Br. 46-49. Incredibly, although Moussazadeh devoted an entire subsection of his brief to this point, *id.*, TDCJ never even mentions it.

Specifically, with every transfer to a Basic Jewish Designated Unit or an Enhanced Jewish Designated Unit, TDCJ's rules require that an inmate's sincerity be verified by its Jewish chaplain and by outside Jewish authorities. *See* Supp. USCA5 999, 1000, 1002 (Supp. RE 15). Thus, TDCJ was required to confirm Moussazadeh's sincerity when transferring him to Stringfellow in 2007 and to Stiles in 2009, as well as when it deemed him eligible for possible transfer back to Stringfellow in 2010. *Id.* TDCJ has introduced no evidence to show that it ignored these rules; to the contrary, the record shows that TDCJ officials "never questioned" his sincerity. Supp. USCA5 1228 (Supp. RE 13). Indeed, TDCJ's own lawyers never questioned Moussazadeh's sincerity for the first five years of this litigation; the issue appeared for the first time in TDCJ's final summary judgment brief, only after it became clear that TDCJ could not successfully defend its policy under strict scrutiny.

We are aware of no case—and TDCJ cites none—where a court found an inmate insincere after the prison chaplain and prison officials deemed him sincere. Indeed, courts often find an inmate to be sincere *even when religious officials deem him insincere. See, e.g., Koger v. Bry-*

an, 523 F.3d 789, 799 (7th Cir. 2008) ("[C]lergy opinion has generally been deemed insufficient to override a prisoner's sincerely held religious belief."); *Jackson v. Mann*, 196 F.3d 316, 320-21 (2d Cir. 1999) (rejecting rabbi's determination that an inmate was not Jewish); *Monts v. Arpaio*, No. 10-0532-PHX-FJM (ECV), 2012 U.S. Dist. LEXIS 5842, at *5-9 (D. Ariz. Jan. 18, 2012) (same). If an inmate can be sincere even when clergy denies it, surely Moussazadeh is sincere when clergy and prison officials have repeatedly affirmed it.

Lacking any good response, TDCJ tries to artificially raise the bar, arguing that Moussazadeh must not only prove sincerity, but also "that he is an *orthodox* believer." TDCJ Br. 38. That is not the law. As this Court has explained, RLUIPA merely requires the inmate to demonstrate "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), *aff'd*, 131 S. Ct. 1651 (2011); *see also Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012) ("Religious belief must be sincere to be protected …, but it does not have to be orthodox.").

C. TDCJ Has Offered No Competent Evidence Rebutting Moussazadeh's Sincerity

TDCJ has also failed to offer any competent evidence of insincerity. The centerpiece of its argument is Moussazadeh's purchase of allegedly "non-kosher" food at unit commissaries. TDCJ Br. 39-41. But TDCJ has offered no competent evidence to establish that even one purchase was, in fact, "non-kosher."

At bottom, TDCJ's argument is based on a misunderstanding of Jewish law—namely, that food lacking a kosher certification is not kosher. That assumption is simply false; many foods that lack kosher certification are still kosher. Supp. USCA5 1234-35 (Supp. RE 14); Moussazadeh Br. 53-54; AJC Brief 16-18.[3] TDCJ has offered no competent

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[3] TDCJ's brief is littered with mistakes about keeping kosher. For example, TDCJ claims that kosher dinnerware can "never ha[ve] contact with non-kosher food"; that kosher cookware can never "come into contact with non-kosher" cookware; that cookware and dinnerware for kosher meat can never have "contact with dairy products." TDCJ Br. 8-9. Each assertion is an "overstatement." Supp. USCA5 1235-36 (Supp. RE 14). Similarly, TDCJ claims that "a kosher kitchen" is needed to heat prepackaged meals, TDCJ Br. 12, which is false, Supp. USCA5 1235-36 (Supp. RE 14). It also faults Moussazadeh for purchasing "Diet Dr. Pepper," TDCJ Br. 40, 42, which is kosher. *See Diet Dr. Pepper FAQ*, http://www.drpepper.com/text/products/dietdrpepper/faq/. These mistakes are not surprising; TDCJ admitted that its understanding of kosher was "taken liberally" from the Internet—not an expert. Supp. USCA5 385, 1237.

evidence establishing that Moussazadeh's commissary purchases were non-kosher. Indeed, the only evidence regarding those purchases is the affidavit of Rabbi Moshe Heinemann (improperly struck by the district court), which shows that those purchases may have been kosher. *See id*.

In any case, "backsliding" cannot establish insincerity as a matter of law. *See* Moussazadeh Br. 50-52 (collecting cases). As Judge Posner explained, "a sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?" *Grayson*, 666 F.3d at 454. This is especially true under Jewish law, which expressly contemplates that "observant Jews will sometimes fail" and will need to perform *teshuvah*, or repentance. AJC Br. 5-11. Accordingly, Moussazadeh's alleged failure to consume an exclusively kosher diet "does not mean that his belief is insincere." Supp. USCA5 1234 (Supp. RE 14). Rather, it means that "[m]ost Jews would commend [his] efforts, especially given his circumstances," and would encourage him "to try to do even better." AJC Br. 11.

Even TDCJ did not consider Moussazadeh's commissary purchases to demonstrate insincerity. Under its Chaplaincy Policy, the purchase of non-kosher food "may result in disciplinary proceedings and [the inmate's] subsequent removal from the Kosher Diet Program." Supp. USCA5 434. But despite Moussazadeh's commissary purchases, TDCJ never once initiated "disciplinary proceedings" or threatened his "removal from the Kosher Diet Program." *See* Moussazadeh Br. 52. Again, on this point, TDCJ offers no response.

Once TDCJ's false assumptions about commissary purchases are swept aside, there is nothing left of its sincerity argument. TDCJ faults Moussazadeh for not filing a new grievance at Stiles and for not "ask[ing] TDCJ to transfer him back to the Stringfellow Unit." TDCJ Br. 41-42. But this is not "probative evidence" of insincerity. *Cf. id.* at 41. As discussed above, Moussazadeh was not required to file another grievance at Stiles, *see supra* at 4-7, and TDCJ's rules prohibited him from filing repetitive grievances, *see Johnson*, 385 F.3d at 515-16. Also, contrary to TDCJ's suggestion, Moussazadeh never "refus[ed]" a transfer back to Stringfellow, and TDCJ cites no record evidence indicating otherwise. TDCJ Br. 42 & n.8. The very notion that an inmate *could*

refuse such a transfer is absurd; TDCJ—not Moussazadeh—decides where he is housed. Although Moussazadeh has expressed legitimate concerns about Stringfellow, given documented instances of retaliation, *see* Orig. USCA5 429-30; Moussazadeh Br. 45, he would welcome the opportunity to receive a kosher diet anywhere, including at Stringfellow.

Lacking any probative evidence of insincerity, TDCJ argues that it should win on summary judgment simply because a trial is too "expensive." TDCJ Br. 44. But courts "do not make credibility determinations at the summary judgment stage"—even when trials are expensive. *Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 380 n.25 (5th Cir. 2010). And TDCJ brought the expense on itself by challenging sincerity after the close of discovery and after the Jewish authorities repeatedly deemed Moussazadeh to be sincere. Civil rights do not get compromised for TDCJ's "cost saving[s]." TDCJ Br. 44.

TDCJ also cries wolf about a flood of sincerity trials. *Id.* Where an inmate fails to come forward with competent evidence of his sincerity (as in *Gardner*, 444 F. App'x at 355) or repeatedly changes his religious preference to harass prison officials, or where the prison has carried its

heavy burden on strict scrutiny, summary judgment is appropriate. Courts have long applied standard summary judgment rules without producing a flood of sincerity trials.

III. TDCJ's Conduct Violates RLUIPA

Moussazadeh is also entitled to summary judgment on the merits. The denial of a kosher diet substantially burdens Moussazadeh's religious exercise, and TDCJ cannot satisfy strict scrutiny.

A. A Financial Penalty on Keeping Kosher Is a Substantial Burden

On the merits, TDCJ's primary argument is that RLUIPA creates a sharp distinction between "*obstructing* a religious activity and *refusing to underwrite* it." TDCJ Br. 27. Thus, according to TDCJ, prison systems are never required to incur expenses to provide a religious accommodation, and forcing Jewish inmates to pay for religious meals "does not substantially burden their ability to keep kosher." *Id.*

This argument fails for several reasons. First, it is contrary to RLUIPA's text. RLUIPA specifically provides that it "may require a government *to incur expenses in its own operations* to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3(c) (emphasis added). That is precisely what Moussazadeh is requesting

here—that TDCJ "incur expenses in its own [food] operations" to provide a kosher diet. If TDCJ were correct, and prisons could always require inmates to pay the full cost of any religious accommodation, this statutory provision would be a nullity. *Willis v. Comm'r, Ind. Dep't of Corr.*, 753 F. Supp. 2d 768, 778 (S.D. Ind. 2010).

Second, TDCJ's claim that RLUIPA never requires prisons to expend funds on religious accommodations is simply false. Numerous cases have required prison systems to provide a religious diet at the prison's expense—both under RLUIPA and under the more prison-friendly standard of the First Amendment.[4]

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[4] *See, e.g.*:

(1) *Koger v. Bryan*, 523 F.3d 789, 801 (7th Cir. 2008) (non-meat);
(2) *Beerheide v. Suthers*, 286 F.3d 1179, 1192 (10th Cir. 2002) (kosher under First Amendment);
(3) *Ashelman v. Wawrzaszek*, 111 F.3d 674, 678 (9th Cir. 1997) (kosher under First Amendment);
(4) *Kahane v. Carlson*, 527 F.2d 492, 495 (2d Cir. 1975) (kosher under First Amendment);
(5) *Willis*, 753 F. Supp. 2d at 778 (S.D. Ind. 2010) (kosher);
(6) *Hudson v. Dennehy*, 538 F. Supp. 2d 400, 411 (D. Mass. 2008) (halal);
(7) *Thompson v. Vilsack*, 328 F. Supp. 2d 974, 980 (S.D. Iowa 2004) (kosher);
(8) *Prushinowski v. Hambrick*, 570 F. Supp. 863, 868-69 (E.D.N.C. 1983) (kosher under First Amendment).

Third, TDCJ's argument contradicts Supreme Court precedent. As this Court has recognized, the "substantial burden" standard comes from two key Supreme Court cases: *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Thomas v. Review Board of the Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). *See Adkins v. Kaspar*, 393 F.3d 559, 569 (5th Cir. 2004) (discussing *Sherbert* and *Thomas*); *Longoria v. Dretke*, 507 F.3d 898, 902-03 (5th Cir. 2007) (same). ***Both cases involved financial burdens on religious exercise***.

In *Sherbert*, the plaintiff was denied state unemployment benefits (*i.e.*, money) because she refused to accept employment that would require her to work on the Sabbath. 374 U.S. at 401. And in *Thomas*, the plaintiff was denied state unemployment benefits (*i.e.*, money) because he quit his job based on a religious refusal to engage in the production of weapons. 450 U.S. at 712. Neither plaintiff claimed to be indigent; yet in both cases, the Supreme Court held that the denial of a financial benefit constituted a substantial burden on their religious exercise. As *Sherbert* explained, forcing the plaintiff "to choose between following the precepts of her religion" on the one hand, or else "forfeiting benefits" on the other, "puts the same kind of burden upon the free exercise of re-

ligion as would a fine imposed against [plaintiff] for her Saturday worship." 374 U.S. at 404.

The same is true here. TDCJ forces Moussazadeh "to choose between following the precepts of [his] religion" or paying thousands of dollars to keep kosher. Indeed, this case is more like a "fine" than either *Sherbert* or *Thomas*, because TDCJ is not just denying Moussazadeh a benefit, but is forcing him to pay out-of-pocket to exercise his religious beliefs. That is a quintessential substantial burden.

This analysis fits perfectly with this Court's definition of "substantial burden" in *Adkins*. Tellingly, TDCJ quotes only a small portion of that definition, TDCJ Br. 27, omitting the crucial parts:

> [A] government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious belief. And, in line with the … teachings of the Supreme Court [in *Sherbert* and *Thomas*], the effect of a government action or regulation is significant when it either (1) *influences the adherent to act in a way that violates his religious beliefs*, or (2) *forces the adherent to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his religious beliefs*.

393 F.3d at 570 (emphasis added).

TDCJ runs away from this definition because both elements are easily satisfied here. First, forcing Moussazadeh to pay for a kosher diet undoubtedly tends to "influence" or "pressure" him to abandon keeping kosher. At the Stiles commissary, TDCJ charges $4.50 per kosher meal. TDCJ Br. 30-31. Thus, to keep kosher at Stiles, Moussazadeh must pay an annual penalty of $4,927.50[5]—more than *double* his typical account balance, and more than *double* what he spent at the commissary for nearly *two years*. *See* TDCJ Br. 35 (citing Orig. USCA5 825-58; Supp. USCA5 540-53, 553). This is almost as much as TDCJ spent to establish the entire Stringfellow kitchen ($8,066), and it is four times as much as the Tenth Circuit struck down in *Beerheide v. Suthers*, 286 F.3d 1179, 1188 (10th Cir. 2002) ("$90 dollars a month," or $1,080 annually). And, in fact, Moussazadeh *cannot* afford this expense, and it *has* caused Moussazadeh to abandon keeping kosher at Stiles.

Second, requiring Moussazadeh to pay for a kosher diet plainly "forces [him] to choose between, on the one hand, enjoying some generally available, non-trivial benefit, and, on the other hand, following his

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[5] ($4.50/meal)*(3 meals/day)*(365 days/year) = $4,927.50/year. As Moussazadeh has explained, TDCJ could use a mix of prepackaged meals and items from the Kosher cannery to feed him for far less. *See* Moussazadeh Br. 65-66.

religious beliefs." *Adkins*, 393 F.3d at 570. Here, the "generally available benefit" is a free, nutritionally sufficient diet. All inmates receive this benefit. In fact, many inmates receive specialized medical diets for free, regardless of their cost, including a gluten-restricted diet, a renal diet, a dental diet, a "[d]iet for health," and individualized diets for specific medical conditions. Supp. USCA5 874-76, 880, 1080-84. But Moussazadeh is forced to pay for his. This is effectively a tax on being a Jew.

Rather than address *Adkins*, *Sherbert*, or *Thomas*, TDCJ relies on the Eighth Circuit's ruling in *Patel v. United States Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008). But *Patel* is easily distinguishable. First, the Eight Circuit applies a significantly different "substantial burden" standard, which provides that the regulation:

> "must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion."

Patel, 515 F.3d at 813 (citation omitted). This is a distinctly higher standard than *Adkins*, which holds that a burden is substantial when it merely "influences" an adherent to change his conduct or denies him a

"generally available, non-trivial benefit." 393 F.3d at 569-70. *Patel*'s facts are also distinguishable. There, the inmate conceded that 16 out of 21 meals per week satisfied his religious needs and rejected all attempts to accommodate his beliefs on the remaining five meals without an adequate explanation. 515 F.3d at 811 & n.4, 814-15. *Patel* is not a case where the prison system forced an inmate to pay thousands of dollars per year to finance his own religious diet.

Finally, seeking to distinguish *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010) and *Beerheide*, TDCJ argues that even if having to pay for kosher meals substantially burdens "some inmates," it does not burden Moussazadeh unless he proves indigence. TDCJ Br. 32-34. But neither *Abdulhaseeb* nor *Beerheide* rested on proof of indigence. To the contrary, *Beerheide* noted that the inmates "sometimes receive money from family, friends, and other outside sources," and "are fortunate to have more than the minimal income prisoners earn from their work." 286 F.3d at 1188. Nevertheless, it held that a small co-pay of $90 per month—less than a quarter of what Moussazadeh faces—was still a substantial burden, because it would force the inmates to choose

between paying for their religious exercise and paying for other necessities. *Id.* at 1188-89. The same is true here.[6]

B. TDCJ Fails to Demonstrate a Compelling Government Interest

Because TDCJ has imposed a substantial burden on Moussazadeh, it must satisfy strict scrutiny. This is the "'most demanding test known to constitutional law,'" *Needville*, 611 F.3d at 267 (citation omitted), and TDCJ cannot begin to satisfy it.

1. Baranowski *is easily distinguishable*

As an initial matter, TDCJ relies heavily on *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007). But *Baranowski* is easily distinguishable. There, TDCJ offered "uncontroverted summary judgment evidence" that it could not provide a kosher diet due to concerns about "good order" and "controlling costs." *Id.* at 125. Here, TDCJ has been providing a kosher diet for several years, and there is "uncontroverted summary judgment evidence" that TDCJ's budget *can* cover the cost and there have been *no* security problems. Moussazadeh Br. 63-66. Because

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[6] In any event, a factual dispute remains as to whether TDCJ's policy would allow Moussazadeh to purchase more than five or six meals every two weeks, thereby making indigence beside the point. Moussazadeh Br. 56.

strict scrutiny must be assessed on a case-by-case basis, *see Adkins*, 393 F.3d at 571, *Baranowski* is not controlling.

2. ***TDCJ has abandoned its supposed interest in security***

Next, TDCJ attempts to resurrect an interest in "prison security," TDCJ Br. 53-54, littering its brief with references to the "most dangerous inmates" and potential "resentment and envy" among other inmates. *See*, *e.g.*, *id.* at 11, 15, 17, 27, 52, 54. But TDCJ abandoned its alleged interest in security long ago by failing to raise it in any of its three summary judgment briefs. *See* Moussazadeh Br. 63. As this Court has explained, "arguments not raised before the district court are waived and cannot be raised for the first time on appeal." *Mid-Continent Cas. Co. v. Bay Rock Operating Co.*, 614 F.3d 105, 113 (5th Cir. 2010) (internal quotation marks and citation omitted).

Even if it had not abandoned its alleged interest in security, there is *no record evidence* to support it. TDCJ Br. 53-54. The only available evidence shows that providing a kosher diet has not created any security problems. *See, e.g.*, Supp. USCA5 1024 (Supp. RE 9) (stating that there have been no issues relating to contraband from either the provi-

sion of prepackaged kosher foods in the commissary or the operation of the kosher kitchen).

3. *The cost at issue is* de minimis

Unable to rely on security, TDCJ claims a compelling interest in "controlling costs." TDCJ Br. 44. But outside the prison context, the Supreme Court has repeatedly rejected the argument that cost, by itself, is a compelling government interest. *See Mem'l Hosp. v. Maricopa Cnty.*, 415 U.S. 250, 263 (1974); *Graham v. Richardson*, 403 U.S. 365, 374-75 (1971); *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by Edelman v. Jordan*, 415 U.S. 651, 671 (1974). And in another prisoner case involving a religious diet, this Court stated that "'inadequate resources can never be an adequate justification for depriving any person of his constitutional rights.'" *Udey v. Kastner*, 805 F.2d 1218, 1220 (5th Cir. 1986) (quoting *Smith v. Sullivan*, 553 F.2d 373, 378 (5th Cir. 1977)).

Even assuming that cost alone can be a compelling interest, it is certainly not "compelling" in this case. The undisputed evidence demonstrates that the cost of providing kosher food is *de minimis*. As TDCJ admits, the increased cost of operating the *entire* kosher food pro-

gram at Stringfellow has ranged from $28,324 to $42,475 per year—which represents only two-hundredths of one percent (0.02%) of TDCJ's $183.5 million annual food budget. TDCJ Br. 49; Moussazadeh Br. 64. By contrast, the cost of kosher food program in *Beerheide* was eight times higher (".158 percent"), and yet the Tenth Circuit held that this sum did not even amount to a "valid penological interest[]"—let alone a compelling interest. 286 F.3d at 1191-92.

But the issue in this case is not the cost of the *entire* kosher dietary program; it is the cost of providing a kosher diet to *Moussazadeh* while he is housed at Stiles. That cost is even smaller. At the summary judgment stage, TDCJ estimated that the typical prepackaged meal "would cost approximately $2.99," Supp. USCA5 389, and that it would need only one prepackaged meal per day to provide a kosher diet, Orig. USCA5 1140-42 (Orig. RE 29). Thus, TDCJ could purchase a year's worth of pre-packaged kosher meals for Moussazadeh for just $1,091. It could even purchase three prepackaged meals per day for $3,274. As a percentage of TDCJ's annual food budget, these figures do not even reg-

ister when rounded to the nearest one-hundredth of one percent (0.00%).[7] Moussazadeh Br. 65-66.

TDCJ does not dispute these figures. TDCJ Br. 49. Instead, it offers three distractions. First, it cites extra-record materials on "the State's financial woes." TDCJ Br. 46-47. But many states face similar budget constraints, and now 35 states and the federal government continue to provide a kosher diet to their Jewish inmates (as does TDCJ at Stringfellow). Moreover, RLUIPA is merely "Spending Clause legislation." *Id.* at 5. So "if [Texas] finds compliance with RLUIPA impractical, [Texas] can refuse federal funds." *Benning v. Georgia*, 391 F.3d 1299, 1312 (11th Cir. 2004).

Second, TDCJ offers a lengthy argument on why it cannot create additional kosher kitchens. TDCJ Br. 47-51. But that is not the main proposal on the table. Like the vast majority of states, TDCJ can easily supply a kosher diet to Moussazadeh at Stiles via prepackaged kosher meals. Moussazadeh Br. 13.

Third, TDCJ claims that providing kosher meals to Moussazadeh will lead to a "slippery-slope problem" of "opportunistic conversions."

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[7] $3,274 / $183,519,541 annual food service cost in 2009 = approximately 0.002%.

TDCJ Br. 52-53. But courts have routinely rejected the notion that a prison can justify its denial of a religious accommodation based on the risk that others might request it. *See Love v. Reed*, 216 F.3d 682, 691 (8th Cir. 2000); *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436-37 (2006); Moussazadeh Br. 67-68. And in any event, the factual record refutes this argument. The *only* record evidence on this issue demonstrates that the number of inmates identifying themselves as Jewish has *decreased* since TDCJ instituted the program. *Compare* Pierce Affidavit, Supp. USCA5 468 (noting that there were 839 Jewish offenders in the system in August 2010), *with* Defs.' Third Supp. Resps. to Pl.'s First Set of Interrogs., Supp. USCA5 244 (claiming approximately 900 inmates who "classify themselves as Jewish" in September 2008).

At the end of the day, TDCJ cannot escape a simple, undisputed fact: It can provide a kosher diet to Moussazadeh for no more than $3,274 per year, which is not even one one-hundredth of a percent of its annual food budget. That cannot, as a matter of law, be a compelling governmental interest. *Beerheide*, 286 F.3d at 1191-92.

C. TDCJ Has Not Shown That Its Adopted Plan Is the Least Restrictive Means of Furthering Any Compelling Interest

Even if preventing such a *de minimis* cost were a compelling governmental interest, TDCJ has not shown that its policy is the least restrictive means of furthering that interest. Under RLUIPA, the failure to consider even one less restrictive alternative prevents TDCJ from satisfying strict scrutiny. *Merced v. Kasson*, 577 F.3d 578, 595 (5th Cir. 2009); *Sossamon*, 560 F.3d at 334-35. Here, Moussazadeh has offered four less restrictive alternatives: (1) supplementing the regular diet with prepackaged kosher meals; (2) establishing another kosher kitchen; (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.

TDCJ completely ignores the third and fourth alternatives—distributing kosher meals from Stringfellow to other units (as Wyoming does), or offering the existing commissary meals for free. *See* Moussazadeh Br. 71. Either of these alternatives would be less restrictive than the current policy, and TDCJ has never even considered them. *Id.*

That alone dooms its strict scrutiny defense. *Sossamon*, 560 F.3d at 334-35; *Merced*, 577 F.3d at 595.

TDCJ spends most of its energy on the second alternative—establishing another kosher kitchen. It argues that "the Stringfellow kitchen is particularly inexpensive to operate," and that building "a free-standing kosher kitchen at Stiles" would be prohibitively expensive. TDCJ Br. 50-51. But it remains fixated on Stringfellow and Stiles, without ever explaining why it failed to consider the possibility of a kosher kitchen at another Jewish unit, such as Darrington or Wynne. Moussazadeh Br. 70 (citing Supp. USCA5 888).

On the first option—prepackaged kosher meals—TDCJ's only response appears to be that (a) prepackaged meals have "insufficient nutritional value"; and (b) "a kosher kitchen still would have been required to heat the meals." TDCJ Br. 12. But if this were true, then how can Moussazadeh keep kosher by purchasing "pre-packaged kosher meals in the commissary at Stiles"? *Id.* at 30.

Fortunately, TDCJ is wrong on both counts. The vast majority of states provide a kosher diet via prepackaged meals; thus, they have been able to find nutritionally sufficient meals. Moussazadeh Opening

Br. 47-48; Orig. USCA5 1116 (RE Tab 28). And "[i]f a pre-packaged kosher meal is properly packaged (as most meals from commercial kosher vendors are) it can be heated in any clean microwave, kosher or not." Supp. USCA5 1235 (Supp. RE 14). Otherwise, observant Jews would be unable to consume the prepackaged kosher meals available from airlines, restaurants, or hotels.

Finally, TDCJ fails to distinguish the kosher dietary programs of the 35 states and federal government, all of which provide a kosher diet to their Jewish inmates. As several courts have held, a prison system cannot satisfy strict scrutiny under RLUIPA if it fails "to explain why another institution with the same compelling interests was able to accommodate the same religious practices." *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005); *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007) (same). Here, rather than pointing to relevant differences, TDCJ suggests that the policies in these prison systems are irrelevant because two of them (California and Michigan) are overcrowded. TDCJ Br. 54-55. That is a non sequitur. If states as disparate as California, Michigan, New York, Arkansas, Maryland, and Colorado can provide a kosher diet to all of their Jewish inmates—despite overcrowd-

ing and budgetary constraints—surely Texas can. Indeed, just last month, Nevada has joined the list of states granting kosher meals to inmates. Stipulation, *Ackerman v. Nev. Dep't of Corr.*, No. 11-0883 (D. Nev. Mar. 23, 2012), ECF No. 107. Because TDCJ cannot distinguish itself from these prison systems, it cannot satisfy strict scrutiny.

CONCLUSION

The district court's ruling should be reversed, and this Court should render judgment on the merits in Moussazadeh's favor.

Respectfully submitted,

s/ Anne W. Robinson

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

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

April 16, 2012

Attorneys for Max Moussazadeh

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on this the 16th day of April, 2012, I electronically filed the foregoing Supplemental Reply 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:

Arthur C. D'Andrea
Office of the Attorney General for the State of Texas
P.O. Box 12548 (MC 059)
Austin, TX 78701-2548
arthur.dandrea@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

Daniel Mach
American Civil Liberties Union
Program on Freedom of Religion & Belief
915 15th Street, N.W.
Washington, DC 20005-0000
dmach@aclu.org

Kelly Anne Laudenslager
Wheeler, Trigg & O'Donnell, L.L.P.
Suite 3600
1801 California Street
Denver, CO 80202-0000
laudenslager@wtotrial.com

Attorneys for Amicus Curiae American Civil Liberties Union

Joshua D. Hawley
Hogan Lovells US, L.L.P.
555 13th Street, N.W.
Columbia Square
Washington, DC 20004

Attorney for Amici Curiae Aleph Institute, Jewish Prisoner Services International, and National Prison Project of the ACLU

Lisa S. Graybill
American Civil Liberties Union
Foundation of Texas
611 S. Congress Avenue, Suite 320
Austin, TX 78704-0000
lgraybill@aclutx.org

Attorney for Amicus Curiae American Civil Liberties Union of Texas

Michael Alex Sink
Perkins Coie, L.L.P.
Suite 1400
1900 16th Street
Denver, CO 80202-0000
msink@perkinscoie.com

Attorney for Amici Curiae American Islamic Congress, American Jewish Congress, Sikh American Legal Defense and Education Fund and United Sikhs

Martin Jonathan Siegel
Law Office of Martin J. Siegel. P.C.
700 Louisiana Street
Bank of America Center
Houston, TX 77002
martin@siegelfirm.com

Attorney for Amici Curiae American Jewish Committee and American Jewish Congress

Marc D. Stern
American Jewish Congress
Suite 1800
825 3rd Avenue
New York, NY 10022-0000
mstern@ajcongress.org
(via Fedex Delivery)

Attorney for Amicus Curiae American Jewish Congress

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 6,996 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 2010 using 14-point Century Schoolbook font in the text and footnotes.

Executed April 16, 2012.

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