UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

SHAVON BOYD,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 3:13-cv-185 RLY-WGH
	)	
COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION, in his official capacity, DIRECTOR, RELIGIOUS AND VOLUNTEER SERVICES, INDIANA DEPARTMENT OF CORRECTION, in his official capacity,	)	
	)	
Defendants.	)	

Memorandum in Support of Motion for Preliminary Injunction

Introduction

Shavon Boyd is an observant Jew and as such believes that he is religiously obligated to eat a kosher diet. The defendants ("DOC" for Indiana Department of Correction) recognize that Mr. Boyd is Jewish and, in fact, transferred him to his current institutional location so that he could have more access to services that supported his Jewish religious beliefs. Although the DOC does make kosher diets available to some prisoners, it has denied Mr. Boyd's request for one. This violates Mr. Boyd's rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a). All the requirements for the grant of a preliminary injunction are met and one should issue here.

Facts

It is believed that the following facts will be presented in support of the preliminary

injunction request.[1]

Shavon Boyd is an adult resident of the State of Indiana who is currently a prisoner confined to the Indiana Department of Correction. (Declaration of Shavon Boyd, Attached to this Memorandum as Exhibit 1 ["Boyd"], ¶¶ 1-2). He is currently placed at the Indiana State Prison in Michigan City, Indiana. (*Id.* ¶ 2). Mr. Boyd's mother was Jewish and his father was an adherent of the African Hebrew Israelite religion, which Mr. Boyd views as a form of Judaism.[2] (*Id.* ¶ 4). Although Mr. Boyd was born in Montreal, his family moved to Israel when he was a young child and he lived there for six years and was raised Jewish. (*Id.* ¶¶ 3, 5-6). His family followed the Jewish dietary laws known as kosher and kashrut and near his 13th birthday he had a bar mitzvah, as is traditional for Jewish males. (*Id.* ¶¶ 7-8).

As an adult Mr. Boyd continues to consider himself an observant Jew. (*Id.* ¶¶ 9, 12). As an observant Jew he has attempted to follow what he believes are the requirements of Judaism. (*Id.* ¶ 12). These include the laws of kashrut that he believes are commanded by God and are explicitly set forth in the test of the Torah (the first five books of the Bible) in both Leviticus and Deuteronomy. (*Id.* ¶ 14). Among other things, kosher laws proscribe that:

a. Certain foods may not be eaten at all. For example, only land animals which have a cloven foot and chew their cud may be eaten. (Leviticus 11:3-8). Thus pork may not be eaten, because pigs do not chew their cud. (Leviticus 11:7). Fish may be eaten, but not sea food that has neither fins nor scales. (Leviticus 11:9-12). Certain birds, including birds of prey, may not be eaten, although chicken and turkey may be eaten. (Leviticus 11:13-19).

b. In order to be kosher, animals must be killed in accordance with Jewish law. (Deuteronomy 12: 20-24).

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[1] Inasmuch as no discovery has yet been conducted in this case, the plaintiff reserves the right to supplement the following facts as additional information becomes known.

[2] Judge Posner has noted that African Hebrew Israelites believe "that the original Jews – the Jews of the Old Testament – were black and that black people today are the descendents of those Jews" and that "African Hebrew Israelites of Jerusalem venerate the Old Testament." *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012).

c. Meat and dairy products may not be eaten together. This law derives from the Torah's prescription that "You shall not boil a kid in its mother's milk." (Deuteronomy 14:21).

d. Utensils and cooking services that have been used to prepare or eat meat may not be used to prepare or eat milk dishes, and vice-versa. But, the status of a dish or utensil can be transferred from food and vice-versa, only in the presence of heat.

e. The separation between foods demanded by the laws of kashrut apply also to the dishwashers and sinks in which the plates, pots, pans and utensils are cleaned.

f. Although vegetables and fruit are kosher, they may not come into contact with non-kosher food, utensils or dishes

(*Id.* ¶ 15).

As the word of God, Mr. Boyd must comply with the laws of kosher and keeping kosher is a central and essential tenet of his religious faith. (*Id.*¶¶ 16-17). Mr. Boyd sincerely desires a kosher diet to satisfy the religious requirements of the Jewish faith. (*Id.* ¶ 23)

The DOC recognizes that Mr. Boyd is Jewish and he is so listed on the DOC's Offender Information System. (*Id.* ¶ 10). In fact, during a prior incarceration in the DOC, in 2011, he was allowed a kosher diet. (*Id.* ¶ 18). When he returned to the DOC on his current incarceration he was placed at the DOC's Branchville Correctional Facility where there are no Jewish services. (*Id.* ¶¶ 19-20). He was therefore moved by the DOC in January of 2014 to the Indiana State Prison for the purpose of placing him where he would have more access to supportive services for his Judaism. (*Id.* ¶ 20). Unfortunately, although there is a Jewish community at the Indiana State Prison, Mr. Boyd, because of his relatively low security level, has been placed in the facility's Minimum Unit where he is the only Jewish prisoner and where he has no access to Jewish services. (*Id.* ¶ 21).

During the most recent Passover, the Jewish celebration where no leavening is to be eaten, the DOC did provide him with matzo, unleavened bread. (*Id.*). However, despite

conceding that he is Jewish, the DOC has denied Mr. Boyd a kosher diet, despite his repeated requests for one. (*Id.* ¶ 22; Answer of Defendants ¶ 40, ECF No. 33). The DOC denies that Mr. Boyd is sincere in his religious practices. (Answer of Defendants ¶ 41).

Inasmuch as Mr. Boyd cannot have a kosher diet, the only diets he has access to are either the regular or vegan diet. (Boyd ¶ 25). Neither are kosher. (*Id.*; Answer of Defendants ¶ 43, ECF No. 33). Mr. Boyd's response, because he does not want to eat non-kosher food, is to eat only kosher food that he can purchase off of the commissary that is available to prisoners. (Boyd ¶ 27). These are food items such as oatmeal, certain cookies, sardines, crackers, rice, and pickles, etc. (*Id.*).

Commissary food is designed to, at best, supplement the DOC diet and does not provide a healthy and balanced diet. (*Id.* ¶ 28). Moreover, Mr. Boyd cannot afford to feed himself entirely off of commissary. (*Id.*). He receives no money from the State of Indiana and has no money in his prisoner account. (*Id.* ¶ 29). He is able to receive commissary only because he has a friend outside of the prison who orders commissary items directly for him. (*Id.*). But, Mr. Boyd is uncertain how long his friend will be able to do this for him and, as indicated, commissary food is not a substitute for actual meals. (*Id.*). As a result Mr. Boyd has lost weight. (*Id.*).

The DOC receives federal financial assistance and is headed by defendant Commissioner. (Answer of Defendants ¶¶ 7, 51, ECF No. 22). Defendant Director, Religious and Volunteer Services for the DOC is the DOC employee who is in charge, and ultimately responsible for the provision of religious services to prisoners, including religious diets. (Answer of Defendants ¶¶ 8, 48, ECF No. 22).

Given that Mr. Boyd is commanded by his religion to eat only a kosher diet, the refusal of the defendants to allow him a kosher diet is unwarranted and imposes a substantial burden on

the exercise of his religion. (Boyd ¶ 30).

Preliminary injunction standard

In order to obtain a preliminary injunction, Mr. Boyd must demonstrate that absent the injunction he will suffer irreparable harm for which there is no adequate remedy at law and that he has "some likelihood of succeeding on the merits." *Girls Scouts of Manitou Council, Inc. v. Girl Scouts of U.S. of America, Inc.*, 549 F.3d 1079, 1086 (7th Cir. 2008). Once this is shown, he must further demonstrate that the balance of harms favors the grant of a preliminary injunction. In assessing this showing, "the court employs a sliding scale approach: '[t]he more likely the plaintiff is to win, the less heavily need the balance of harms weigh in his favor.'" *Id.* (quoting *Roland Machinery Co. v. Dresser Industries, Inc.*, 749 F.2d 380, 387 (7th Cir. 1984)). Finally, the court must consider the public interest. *Id.* A consideration of all these factors demonstrates that a preliminary injunction should be granted here.

Argument

I. Mr. Boyd will prevail on his claim that the denial of his kosher diet violates the Religious Land Use and Institutionalized Persons Act

A. RLUIPA prevents the DOC from imposing a substantial burden on Mr. Boyd's sincere religious belief absent the DOC demonstrating that the burden is the least restrictive means to satisfy a compelling governmental interest

RLUIPA was "enacted . . . in part, to protect inmates and other institutionalized persons from substantial burdens in freely practicing their religions." *Charles v. Verhagen*, 348 F.3d 601, 606 (7th Cir. 2003). It applies to, among other things, any facility owned or operated by a State, including prisons, provided that the prison system receives federal funding. 42 U.S.C. §§ 2000cc-1, 1997(1). As indicated, the DOC concedes it has received such funding. (Answer of Defendants ¶ 51, ECF No. 22)

RLUIPA prevents the DOC from imposing "a substantial burden on the religious exercise" of the prisoners, "unless the government demonstrates that imposition of the burden . . . (1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). The plaintiff bears the burden of persuasion on the issue of whether the challenged practices substantially burden the exercise of his religion. 42 U.S.C. § 2000cc-2(b). Once he or she establishes "this prima facie case, the defendants 'bear the burden of persuasion on any [other] element of the claim,' . . . namely whether their practice 'is the least restrictive means of furthering a compelling governmental interest.'" *Koger v. Bryan*, 523 F.3d 789, 796 (7th Cir. 2008) (internal citations omitted), 42 U.S.C. § 2000cc-2(b).

B. Inasmuch as Mr. Boyd is a class member in the adjudicated case of *Willis v. Commissioner* the DOC is limited to arguing that Mr. Boyd is not sincere

On December 8, 2010, this Court, by Judge Magnus-Stinson, entered its Final Judgment and Injunction in the case of *Willis v. Commissioner, Indiana Department of Correction* (No. 1:09-cv-815 JMS-DML, ECF No. 114 (S.D. Ind. 2010) (Attached to this Memorandum as Exhibit 2).[3] It held, in pertinent part, that RLUIPA required that:

> The Commissioner of the Indiana Department of Correction ("Commissioner") must supply a kosher meal option for all meals served within any facility within the Department of Correction. The kosher meals must be certified as kosher by appropriate religious authorities selected by the Indiana Department of Correction, which may be accomplished by purchasing pre-packaged meals certified as kosher. If the meal option is not utilized, the kosher meals must be recertified as kosher at the frequency specified by religious authorities.
>
> The Commissioner must provide certified kosher meals to all inmates who, for sincerely held religious reasons, request them in writing.

[3] "The 'court may take judicial notice [of] its own court documents and records.'" *Fletcher v. Stine*, 1:10-CV-1204-WTL-MJD, 2011 WL 13546, *1 n.1 (S.D. Ind. Jan. 4, 2011) (quoting *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364 (7th Cir.1983)).

(*Id.*).[4] *Willis* was a class action brought pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure with the class defined to include:

> All prisoners confined within the Indiana Department of Correction, including the New Castle Correctional Facility, who have identified, or who will identify, themselves to the Indiana Department of Correction as requiring a kosher diet in order to properly exercise their religious beliefs and who have requested such a diet, or would request it if such a diet was available.

(No. 1:09-cv-815 JMS-DML, ECF No. 47 at 8) (Attached to this Memorandum as Exhibit 3). Mr. Boyd is a member of the class as he clearly asserts that he requires a kosher diet to properly exercise his religious beliefs. (Boyd ¶¶ 13, 17, 23, 30).

Under principles of both claim preclusion (res judicata) and issue preclusion (collateral estoppel) a class action is "conclusive on the issues actually and necessarily litigated and decided." 7AA Wright and Miller, Fed. Prac. & Proc. Civ. § 1789 (3d ed.). *See also Laskey v. International Union, United Auto., Aerospace and Agr. Implement Workers of America (UAW)*, 638 F.2d 954, 956 (6th Cir. 1981) ("A judgment in a court of competent jurisdiction binds the parties to the suit in any subsequent litigation dealing with the same cause of action on every matter that was or could have been litigated . . . A judgment in a class action binds the class."); *Matrix IV, Inc. v. American Nat. Bank and Trust Co. of Chicago*, 649 F.3d 539, 547 (7th Cir. 2011) (noting that res judicata is claim preclusion, barring issues actually decided between the same parties as well as issues that could have been brought whereas collateral estoppel is issue preclusion, barring issues necessarily litigated). In the *Willis* Judgment, quoted above, the Court actually decided that class members must be provided kosher food so long as they request it in writing for sincerely held religious reasons. This matter has been adjudicated and cannot be challenged by the DOC in this action by a class member. Mr. Boyd must be provided a kosher

[4] Although an appeal was perfected in the *Willis* case, is was dismissed. *See Willis v. Buss*, No. 11-1071 at Dkt. 26 (7th Cir. May 9, 2011).

diet provided he has a sincere religious reason for the diet. The only issue to be resolved is whether or not he is sincere in his request for the diet.[5]

C. Mr. Boyd is sincere in his desire and need for a kosher diet

The Supreme Court has stressed that "[a]lthough RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion . . . the Act does not preclude an inquiry into the sincerity of a prisoner's professed religiosity." *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005). This, of course, is consistent with free exercise jurisprudence[6], which allows analysis "to determine an adherent's good faith in the expression of his religious belief . . . The test provides a rational means of differentiating between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984). On the other hand, the sincerity inquiry must be a limited one as "[m]en may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others." *United States v. Ballard*, 322 U.S. 78, 86 (1944).

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[5] The same conclusion is reached if the matter is viewed through the lens of issue preclusion or collateral estoppel. In *Willis* the DOC and the plaintiff class litigated, and it was determined that: 1) denial of a kosher diet imposes a substantial burden on prisoners for whom keeping kosher is a religious obligation; 2) denial of the diet to these prisoners is not narrowly tailored to support any compelling governmental interest. *See Willis v. Commissioner,* 753 F. Supp. 2d 768, 777, 780 (S.D. Ind. 2010). Mr. Boyd, of course, has articulated a religious need for the kosher diet. Therefore, issue preclusion also prevents the DOC from arguing that under RLUIPA it may deny a kosher diet to Mr. Boyd, provided that he has a sincere religious reason for the diet.

[6] Congress enacted RLUIPA, "in part, to protect inmates and other institutionalized pesons from substantial burdens in freely practicing their religions." RLUIPA was proceeded by the similar Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb, which was passed because of Congress' concerns that the Supreme Court decisions in *Employment Division v. Smith*, 494 U.S. 872 (1990), and *O'Lone v. Shabazz*, 482 U.S. 342 (1987), had weakened traditional First Amendment protections. S. Rep. 103-11, 1993 U.S.C.C.A.N 1892, 1895-1901. RFRA was declared unconstitutional as applied to state and local government in *Boerne v. Flores*, 521 U.S. 507 (1997). Congress responded by enacting RLUIPA. RFRA and RLUIPA are "substantively identical with respect to prisoners' entitlements." *Whitfield v. Illinois Dept. of Corrections*, 237 Fed. Appx. 93, *1 (7th Cir. 2007).

Similarly, under RLUIPA although sincerity can be assessed, the sincerity inquiry "must be handled with a light touch, or 'judicial shyness.'" *Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2012), as corrected (Feb. 20, 2013) (quoting *A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 262 (7th Cir. 2010)). "We limit ourselves to 'almost exclusively a credibility assessment' when determining sincerity . . . To examine religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread." *Id.* (quoting *Kay v. Bemis*, 500 F.3d 1214, 1219 (10th Cir. 2007)).

One other point is clear about the sincerity assessment. A person can be sincere and still, on occasion, not follow the precepts of his or her religious belief. As the Seventh Circuit has noted, in the context of a First Amendment free exercise claim, "a sincere religious observer 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 v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012). The same is true under RLUIPA. *See, e.g.*, *Moussazadeh*, 703 F.3d at 791 ("A finding of sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time.").

However, there is no evidence that Mr. Boyd has "strayed." Indeed, he has taken the extraordinary, unsustainable, and unhealthy course of eating only kosher food available from commissary purchases – not eating the regular meals at all. He is attempting to keep kosher in the prison environment, but he cannot live solely off of commissary purchases.

Moreover, any argument that the DOC might make concerning sincerity is undercut by the fact that the DOC has recognized Mr. Boyd as Jewish, provided him a kosher diet during a

prior incarceration, and even going so far as moving him to his current facility so he could obtain better access to Jewish supportive services. It is true that not all Jews keep kosher. *See, e.g., Turner-Bey v. Maynard*, CIV.A. JFM-10-2816, 2012 WL 4327282, *3 (D. Md. Sept. 18, 2012) ("The degree by which Jews follow a kosher diet varies."); Kent Greenawalt, *Religious Law and Civil Law: Using Secular Law to Assure Observance of Practices with Religious Significance*, 71 S. Cal. L. Rev. 781, 786 (1998) ("The three main branches of American Judaism, Orthodox, Conservative, and Reform, have different attitudes toward kashrut. Orthodox and a minority of Conservatives are observant, though the Orthodox practice is stricter in some respects. Some Reform Jews observe aspects of kashrut, but they do not consider the rules binding."). On the other hand, as the Court noted in *Willis*, the "DOC acknowledges, 'The laws of [kosher] require Jews to keep kosher in their diet.'" *Willis*, 753 F. Supp. 2d at 773. Therefore when someone who the DOC acknowledges is Jewish asserts a desire and religious need to receive a kosher diet, there simply is no reason or basis for questioning the prisoner's sincerity. This is particularly true with Mr. Boyd given the fact that the DOC, despite denying him a kosher diet at the current time, saw fit to provide him a kosher diet during a prior incarceration and to provide him with matzo, unleavened bread, that observant Jews eating during the Passover holiday. The DOC, in essence, has acknowledged Mr. Boyd's sincere desire and need to have the food mandated by his religious belief. The sincerity determination can go no further than that. As the Court noted in *Love v. Reed*, 216 F.3d 682, 688 (8th Cir. 2000), "[w]e would not deny that a Jew's desire to keep Kosher is rooted in religion even if he were not a Rabbinical scholar capable of explaining the more subtle spiritual aspects of Judaism." Mr. Boyd is sincere and there is simply no cause or justification to deny him a kosher diet. He will therefore prevail on the merits of his claim.

II. The other requirements for the grant of a preliminary injunction are met here as well

A. Mr. Boyd is being cause irreparable harm for which there is no adequate remedy at law

In *Christian Legal Soc'y v. Walker*, 453 F.3d 853 (7th Cir. 2006), the court noted that "violations of First Amendment rights are presumed to constitute irreparable injuries. *Id.* at 867. (citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The court noted further that "[t]he loss of First Amendment freedoms is presumed to constitute an irreparable injury for which money damages are not adequate." *Id.* at 859. Here, the violation is of RLUIPA, not the First Amendment. However, as courts have noted, "although the plaintiff's free exercise claim is statutory rather than constitutional, the denial of the plaintiff's right to the free exercise of religious beliefs is a harm that cannot be adequately compensated monetarily." *Jolly v. Coughlin*, 76 F.3d 469, 482 (2d Cir. 1996) (referring to RFRA). *See also Kikumura v. Hurley*, 242 F.3d 950, 963 (10th Cir. 2001) (same, citing *Jolly*). And, "[c]ourts have persuasively found that irreparable harm accompanies a substantial burden on an individual's rights to the free exercise of religion under RFRA." *Jolly*, 76 F.3d at 482 (citations omitted). Therefore, Mr. Boyd is being caused irreparable harm for which there is no adequate remedy at law.

B. The balance of harms favors the issuance of a preliminary injunction

Without a preliminary injunction Mr. Boyd will not be able to eat the religious diet mandated by Judaism, in violation of federal law. In *Christian Legal Soc'y* the Seventh Circuit noted that "injunctions protecting First Amendment freedoms are always in the public interest." 453 F.3d at 859. The same is true of the injunction here that will protect and preserve the religious rights secured by RLUIPA.

Because Mr. Boyd has demonstrated a substantial likelihood of success on the merits of

his claim, "no substantial harm to others can be said to inhere in its enjoinment." *Déjà vu of Nashville, Inc., v. Metro Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001) (referring to a demonstration that a law violates the First Amendment). Instead, an injunction will only force the DOC to conform its conduct to legal norms and the requirements of RLUIPA. In *Christian Legal Soc'y*, the Court stressed that a governmental entity cannot claim that requiring it to comply with the First Amendment to the United States Constitution is harmful or burdensome. *See Christian Legal Soc'y*, 453 F.3d at 867 (7th Cir. 2006) (holding that if a governmental entity "is applying [a] policy in a manner that violates [the plaintiff's] First Amendment rights . . . then [the] claimed harm is no harm at all"). The same is true here in discussing compliance with RLUIPA, the statute that Congress passed to preserve what it perceived as a weakening of First Amendment rights by Supreme Court decisions. *See* n.1, *supra.* The balance of harms favors the issuance of the preliminary injunction.

C. The public interest favors the grant of the preliminary injunction

The Seventh Circuit has stated that "injunctions protecting First Amendment freedoms are always in the public interest." *Christian Legal Soc'y*, 453 F.3d at 859. As the Sixth Circuit has similarly held, it is "always in the public interest to prevent violation of a party's constitutional rights." *Déjà vu of Nashville*, 274 F.3d at 400 (quoting *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1079 (6th Cir. 1994)). Given that RLUIPA is analogous to the First Amendment, in that both secure the free exercise of religion, the public interest would be similarly served by the grant of a preliminary injunction here.

D. The injunction should issue without bond

The issuance of a preliminary injunction will not impose any monetary injuries on the defendants. In the absence of such injuries, no bond should be required. *E.g., Doctor's Assocs.,*

Inc. v. Stuart, 85 F.3d 975, 985 (2d Cir. 1996). Moreover, Mr. Boyd is a prisoner with meager financial resources and this also justifies waiver of any bond. *See, e.g., Johnson v. Board of Police Com'rs*, 351 F. Supp. 2d 929, 952 (E.D. Mo. 2004) (noting that the bonding requirement of Fed. R. Civ. P. 65(c) "has long been interpreted to meant that a district court has discretion to grant injunctive relief without requiring bond or other security, especially when doing so would function to bar poor people from obtaining judicial redress" [citing cases]).

Conclusion

For the foregoing reasons the DOC must be enjoined to immediately provide Mr. Boyd with a kosher diet.

/s/ Kenneth J. Falk
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Certificate of Service

I hereby certify that on this 28th day of July, 2014, a copy of the foregoing was filed electronically with the Clerk of this Court. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system and the parties may access this filing through the Court's system.

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s/ *Kenneth J. Falk*
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
EVANSVILLE DIVISION

SHAVON BOYD, Plaintiff, v. COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION, in his official capacity, DIRECTOR, RELIGIOUS AND VOLUNTEER SERVICES, INDIANA DEPARTMENT OF CORRECTION, in his official capacity, Defendants.	)	No. 3:13-cv-185 RLY-WGH

Declaration of Shavon Boyd

Shavon Boyd, being duly sworn upon his oath, says that:

1. I am an adult resident of the State of Indiana.

2. I am currently a prisoner committed to the Indiana Department of Correction ("DOC") and confined at the Indiana State Prison in Michigan City, Indiana.

3. I was born in Montreal, Canada.

4. My mother was Jewish and my father was an adherent of the African Hebrew Israelite religion, which I view as a form of Judaism.

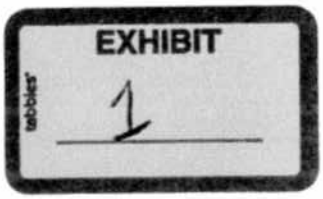
5. My family moved to Israel when I was a young child and I lived there for 6 years.

6. I was raised as Jewish.

7. My family followed the Jewish dietary laws known as kosher or kashrut.

8. Near my 13th birthday I had a bar mitzvah, as is traditional for Jewish males.

9. As an adult I have kept kosher I continue to consider myself to be Jewish.



10. The DOC recognizes I am Jewish and lists me as such on its Offender Information System that, among other things, registers a prisoner's religion.

11. I have been incarcerated in the DOC since June of 2013.

12. I consider myself to be an observant Jew and I attempt to follow what I believe to be the requirements of Judaism.

13. Like many observant Jews I believe that I am commanded to follow the laws of kashrut.

14. Like many observant Jews I believe that the laws of kashrut are commanded by God and are explicitly set out in the text of the Torah (the first five books of the Bible) in both Leviticus and Deuteronomy.

15. Among other things, kosher laws proscribe that:

a. Certain foods may not be eaten at all. For example, only land animals which have a cloven foot and chew their cud may be eaten. (Leviticus 11:3-8). Thus pork may not be eaten, because pigs do not chew their cud. (Leviticus 11:7). Fish may be eaten, but not sea food that has neither fins nor scales. (Leviticus 11:9-12). Certain birds, including birds of prey, may not be eaten, although chicken and turkey may be eaten. (Leviticus 11:13-19).

b. In order to be kosher, animals must be killed in accordance with Jewish law. (Deuteronomy 12: 20-24).

c. Meat and dairy products may not be eaten together. This law derives from the Torah's prescription that "You shall not boil a kid in its mother's milk." (Deuteronomy 14:21).

d. Utensils and cooking services that have been used to prepare or eat meat may not be used to prepare or eat milk dishes, and vice-versa. But, the status of a dish or utensil can be transferred from food and vice-versa, only in the presence of heat.

e. The separation between foods demanded by the laws of kashrut apply also to the dishwashers and sinks in which the plates, pots, pans and utensils are cleaned.

f. Although vegetables and fruit are kosher, they may not come into contact with non-kosher food, utensils or dishes

16. I believe that the Torah is the word of God and I am therefore compelled to follow the laws of kashrut.

17. Keeping kosher is therefore a central and essential tenet of my religious faith.

18. In 2011, during a previous incarceration in the DOC, I was allowed a kosher diet by the DOC.

19. Upon my reentry into the DOC, after initial screening at the DOC's Reception and Diagnostic Center, I was placed at the DOC's Branchville Correctional Facility.

20. However, there were no Jewish services at Branchville, and therefore the DOC transferred me to the Indiana State Prison in January of 2014, supposedly so I could have more access to supportive services for my Judaism.

21. There is a Jewish community at the Indiana State Prison. However, because of my relatively low security level, I have been placed in the Indiana State Prison's Minimum Unit, where I am the only Jewish prisoner and where I have no access to Jewish services.

22. I have repeatedly requested that I again be provided a kosher diet, but I have been denied one, although the DOC has continually acknowledged that I am Jewish. Not only was I transferred to my current placement because the DOC was attempting to accommodate the fact that I am Jewish, but the DOC provided me matzo, unleavened bread, during the most recent Passover holiday. During Passover Jews are not supposed to eat anything with leavening in it so they eat matzo instead of regular bread.

23. I am sincere in my desire and need for a kosher diet to satisfy the requirements of his religious faith.

24. I have fully grieved the denial of my diet request and I attached proof of my grievances to my amended complaint in this case.

25. Inasmuch as I have been denied a kosher diet, the only diet I potentially have access to is the regular diet and the vegan diet. Neither are kosher.

26. I am refusing to eat the non-kosher diets, which are the only diets that the DOC is willing to serve me

27. Instead, I am only eating kosher food that I can purchase from the commissary that is available to prisoners. These are food items such as oatmeal, certain cookies, sardines, crackers, rice and pickles, etc.

28. The commissary food is designed to, at best, supplement the DOC diet and does not provide a healthy and balanced diet. Moreover, I cannot afford to feed myself entirely off commissary.

29. I receive no money from the State of Indiana and I have no money in my inmate account. My commissary is provided by an outside friend who is able to order items directly for me. However, I am uncertain how long my friend will be able to do this and the food is not a substitute for actual meals. I have lost weight.

30. I am commanded by my religion to eat only a kosher diet and the refusal of the defendants in this case to allow me to receive a kosher diet imposes a substantial burden on the exercise of my religion and is not justifiable.

Verification

I verify, under penalty for perjury, that the foregoing representations are true.

Executed on: 7-11-14
(DATE)

SHAVON BOYD

Prepared by:

Kenneth J. Falk
No. 6777-49
ACLU of Indiana
1031 E. Washington St.
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MATSON WILLIS, et al., *Plaintiffs*,	)	
vs.	)	1:09-cv-00815-JMS-TAB
COMMISSIONER, INDIANA DEPARTMENT OF CORRECTION, et al., *Defendants.*	)	

FINAL JUDGMENT AND INJUNCTION

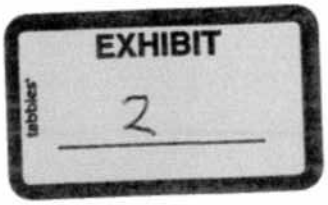
Pursuant to the Court's Order on Cross-Motions for Summary Judgment, [dkt. 103], and its Entry Corresponding with Final Judgment and Injunction, simultaneously entered on this day, the Court hereby enters final judgment as follows:

With respect to Count I, the Court enters final judgment in favor of the Plaintiff Class against DOC.

With respect to Count II, the Court enters final judgment in favor of Maston Willis as against DOC. Further, the Court enters final judgment in favor of Mr. Willis as against Chaplain Merle Hodges; accordingly, the Court awards Mr. Willis nominal damages in the amount of $60.00. Finally, the Court enters final judgment in favor of Dr. Steven Hall as against Mr. Willis.

With respect to Count I, the Court now enters the following **permanent injunction**, pursuant to 18 U.S.C. § 3626(a)(1)(A), by **ORDERING** as follows:

The Commissioner of the Indiana Department of Correction ("Commissioner") must supply a kosher meal option for all meals served within any facility within the Department of Correction. The kosher meals must be certified as kosher by appropriate religious authorities selected by the Indiana Department of Correction, which may be accomplished by purchasing



pre-packaged meals certified as kosher. If the meal option is not utilized, the kosher meals must be recertified as kosher at the frequency specified by the religious authorities.

The Commissioner must provide certified kosher meals to all inmates who, for sincerely held religious reasons, request them in writing. The request shall be directed to their facility's chaplain, or to another person designated by the superintendent.

The Commissioner must comply with this injunction **within 45 days** of today's date.

IT IS SO ORDERED.

12/08/2010

Hon. Jane Magnus-Stinson, Judge
United States District Court
Southern District of Indiana

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MASTON WILLIS, *Plaintiff,*	)	
vs.	)	1:09-cv-00815-JMS-LJM
COMMISSIONER INDIANA DEPARTMENT OF CORRECTION, *et al.*, *Defendants.*	)	

ORDER

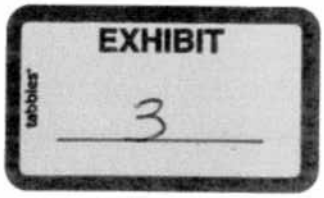
Presently before the Court is Plaintiff Maston Willis' Motion for Class Certification. [Dkt. 19.][1] Through it, he seeks class certification on Count I of his Second Amended Complaint.

BACKGROUND

Mr. Willis is an Orthodox Jewish prisoner in the custody of the Indiana Department of Correction ("IDOC") whose faith requires him to "keep kosher." [Dkt. 17 ¶¶1, 7.] As is relevant here, he alleges that the IDOC recently stopped offering prisoners kosher meals. [*Id.* ¶1.] Mr. Willis contends that IDOC did so in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, which (among other things) generally requires states to avoid imposing a "substantial burden" on the religious liberties of prisoners, absent a "compelling governmental interest" and, even then, so long as the state uses "the least restrictive means [available] of furthering that compelling interest." 42 U.S.C. § 2000-cc-1(a).

Mr. Willis seeks to certify a class of similarly situated individuals for his RLUIPA claims. He has proposed the following class definition:

[1] By written consent of the parties, this case has been referred to the magistrate judge for all proceedings, including for the entry of judgment, as permitted under 28 U.S.C. § 636(c) and Fed. R. Civ. P. 73. [Dkt. 22.]



> [A]ll prisoners confined within the Indiana Department of Correction, including the New Castle Correctional Facility, who have identified, or who will identify, themselves to the Indiana Department of Correction as requiring a kosher diet in order to properly exercise their religious beliefs and who have requested such a diet, or would request it if such a diet was available.

[Dkt. 19 ¶2.] Based on the discovery that he has conducted thus far, Mr. Willis estimates that the putative class, if certified, would contain at least 139 members. [Dkt. 39 at 2.] And because the class also seeks to include future prisoners who may also require kosher diets as a tenet of their religion, Mr. Willis notes that the number may expand (it's also possible that it could contract) given inevitable changes in the IDOC prison population and their religious beliefs. [*See id.*]

DISCUSSION

In deciding whether to certify a class, the Court may not blithely accept as true even the well-pleaded allegations of the complaint but must instead "make whatever factual and legal inquiries are necessary under Rule 23" to resolve contested issues. *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). Specifically, the Court must find that the putative class satisfies the four "prerequisites" set forth in Federal Rule of Civil Procedure 23(a). If the putative class does, the Court must additionally find that it satisfies the requirements set forth in Federal Rule of Civil Procedure 23(b), which vary depending upon which of three different types of classes is proposed. The Court will address the two sets of requirements in turn.

A. Federal Rule of Civil Procedure 23(a)

The four class-action prerequisites in Federal Rule of Civil Procedure 23(a) are commonly termed "numerosity, commonality, typicality, and adequacy." *In re Ready-Mixed Concrete Antitrust Litig.*, 2009 U.S. Dist. LEXIS 82043, *46 (S.D. Ind. 2009).

1. Numerosity

The Court can only certify a class that "is so numerous that joinder of all members is impracticable." Fed. R. Civ. Pro. 23(a). Implicit in this requirement is that the members of the class be ascertainable; otherwise the Court could not count them. *See Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977).

Insofar as Defendants object that the future putative class members are, as of yet, currently unknown, Mr. Willis correctly notes that the very open-endedness supports certification where, as here, injunctive relief is sought. *See Rosario v. Cook County*, 101 F.R.D. 659, 661 (N.D. Ill. 1983) ("Plaintiffs request a declaration that defendants' promotion procedures violate Title VII, and an injunction against continued use of the performance evaluations and written examination. A decision will necessarily affect the interests of future Hispanic applicants for sergeant. Regardless of their number, the joinder of future alleged discriminatees is inherently impracticable."). Because their identity as class members will be ascertainable by objective criteria—*i.e.* whether or not they identify themselves to IDOC as requiring a kosher meal for religious reasons—the Court likewise rejects Defendants' claim that the class cannot be shown to exist as to future class members. *See Rochford*, 565 F.2d at 976.[2]

As for the number of identifiable individuals currently in the putative class, Defendants claim there are only 122 members [dkt. 40 at 2], not the 139 members that Mr. Willis claims [dkt. 39 at 2]. But no matter which party's math is correct, the class satisfies the numerosity

[2] There, the Seventh Circuit affirmed a class defined in part as "all residents of the City of Chicago, and all other persons who are physically present within the City of Chicago for regular or irregular periods of time, who engage or have engaged in lawful political, religious, educational or social activities and who, as a result of these activities...hereafter may be[] subjected to or threatened by alleged infiltration, physical or verbal coercion, photographic, electronic, or physical surveillance, summary punishment, harassment, or dossier collection, maintenance, and dissemination by defendants or their agents." *Id.*

requirement. "Although there is no 'bright line' test for numerosity, a class of forty is generally sufficient to satisfy Rule 23(a)(1)." *McCabe v. Crawford & Co.*, 210 F.R.D. 631, 644 (N.D. Ill. 2002) (collecting cases). Even under Defendants' calculations, the proposed class exceeds forty. Furthermore, given that the putative class members are incarcerated in facilities across the State of Indiana, logistical and security concerns associated with transporting multiple prisoners to and from this Court—as would be required if they had to participate personally—also weigh in favor of finding joinder impracticable. *Cf. Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992) (finding numerosity and noting geographic dispersion and "already overtaxed judicial resources").

Accordingly, the Court finds that Mr. Willis has satisfied the numerosity requirement.

2. Commonality

A class action also requires "questions of law or fact common to the class." Fed. R. Civ. Pro. 23(a)(2). That commonality requirement is a "low hurdle." *S. States Police Benev. Ass'n, Inc. v. First Choice Armor & Equipment, Inc.*, 241 F.R.D. 85, 87 (D. Mass. 2007). "A certifiable class claim must arise out of the same legal or remedial theory," *Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980), which in this Circuit is usually satisfied if the class members' claims share "[a] common nucleus of operative fact," that is, some "common question...at the heart of the case," *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992) (citation omitted).

The common question at the heart of this case, for all members of the proposed class, is the same: Does the IDOC provide prisoners kosher meals when those prisoners request them for religious reasons? Based on his affidavit (recounting an admission of a party-opponent) and on an affidavit from a prisoner in another facility, Mr. Willis believes that IDOC has adopted an

across-the-board policy against providing any more kosher meals, despite the religious views of prisoners. [*See* dkt. 34-1 ¶ 49, -2 ¶6.] In contrast, while IDOC denies that any such policy exists and claims that each facility prepares its food in a different manner, Defendants have offered absolutely no evidence on either count [*see* dkt. 39 at 3], even though the facts necessary to substantiate those contentions are readily within their control. In the Court's "preliminary inquiry into the merits" for class certification purposes, *Szabo*, 249 F.3d at 676, the Court charges that failure of evidence to Defendants, *cf. Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 719 F.2d 1335, 1353 (7th Cir. 1983) ("According to the 'missing witness' rule, when a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, but chooses not to call them, an inference arises that the testimony, if produced, would be unfavorable." (citation and quotation omitted)).

Mr. Willis has satisfied the commonality requirement.

3. Typicality

The third prerequisite for a class action is that the "claims...of the representative parties [be] typical of the claims...of the class." Fed. R. Civ. Pro. 23(a)(3). A proposed class representative can satisfy this prerequisite if his or her "claim...arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory. The typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (quotation and citation omitted).

In opposing typicality, Defendants stress the individualized nature of "least restrictive" balancing test and question whether Judaism even requires adherents to keep kosher at all. As to

the first point, however, Mr. Willis rightly notes that courts can, and do, certify RLUIPA classes, *see, e.g., Miller v. Wilkinson*, 2009 WL 862169 (S.D. Ohio 2009), and Defendants have presented no argument why this case is somehow more difficult than the others where classes have been certified.[3] As to the second, whether or not keep kosher is a central requirement of Judaism is not the issue presented in this case. Indeed, as Defendants themselves note in their brief, RLUIPA expressly covers religious exercise "whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). Thus, the issue presented is whether prisoners who believe their religious obligations require them to eat kosher meals can do so while in the custody of the IDOC. Mr. Willis' claim—that he can't get kosher meals even though he believes that he needs them for religious reasons—is a prime example of the claims that other class members would assert.

The Court finds that the typicality requirement is satisfied here.

4. Adequacy

To satisfy the fourth, and final, class-action prerequisite, the Court must find that "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Pro. 23(a)(4). This is a two-pronged inquiry, "one relates to the adequacy of the named plaintiffs' representation of the class and requires that there be no conflict between the interests of the representative and those of the class in general; the other relates to the adequacy of class counsel's representation." *In re Ready-Mixed Concrete Antitrust Litig.*, 2009 U.S. Dist. LEXIS 82043, *53 (S.D. Ind. 2009) (citation omitted).

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[3] If it later turns out that weighing the burdens imposed on an IDOC-wide class becomes unwieldy (which the Court doubts at present), the current class can be split into sub-classes, defined, for example, on an institution-by-institution basis. *See* Fed. R. Civ. Pro. 23(c)(1)(C) ("An order that grants...class certification may be altered or amended before final judgment"), 23(c)(5) ("When appropriate, a class may be divided into subclasses that are each treated as a class under this rule.").

Defendants argue that Mr. Willis has a conflict with the other class members because, by maintaining this action as a class action, he seeks to "force[]" his religious beliefs on others. [Dkt. 40 at 5.] Defendants present no evidence to support such claim, and the Court finds otherwise. The proposed class definition itself requires self-identification, so there is no merit to a claim of imposed religious beliefs. Mr. Willis seeks to expand the religious freedoms available to IDOC prisoners, so that those who believe their religion requires them to eat kosher meals—no matter their religious denomination—may do so. Thus, there is no conflict; Mr. Willis is an adequate class representative.

Because Defendants do not contest the adequacy of Mr. Willis' counsel and because the Court's own experiences with his counsel (in this case and in others) confirm counsel's legal abilities, the Court finds that the representation here is also adequate.

B. Federal Rule of Civil Procedure 26(b)

Where, as here, a proposed class satisfies all the prerequisites listed in Federal Rule of Civil Procedure 23(a), the Court can only certify the class if it fits within one of the categories described in 23(b). The category that Mr. Willis claims applies is 23(b)(2), which authorizes a class action when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. Pro. 23(b)(2).

In this case, Mr. Willis claims that the IDOC has violated his, and his fellow prisoners', civil rights, and he seeks injunctive relief against any future such violations. That is the "prime example" of a proper class under Rule 23(b)(2). *Amchem Prods. v. Windsor*, 521 U.S. 591, 614 (1997) (citation omitted); *see also Doe v. Guardian Life Ins. Co.*, 145 F.R.D. 466, 477 (N.D. Ill.

1992) ("[T]he primary limitation on the use of Rule 23(b)(2) is the requirement that injunctive or declaratory relief be the predominant remedy requested for the class members.").

Mr. Willis has alleged a common injury to the class: He claims that the IDOC replaced a policy that enabled religious prisoners to obtain kosher meals with one that precludes kosher meals for prisoners. If proven, injunctive relief against that new policy would be appropriate. Given that Mr. Willis seeks exactly that type of relief, the Court finds that Rule 23(b)(2) is satisfied here.

CONCLUSION

Based on the evidentiary material submitted, the Court finds that Mr. Willis has satisfied all of the prerequisites under Federal Rule of Civil Procedure 23(a) and has additionally satisfied Federal Rule of Civil Procedure 23(b)(2). Accordingly, the Court now **CERTIFIES** the following class with respect to Count I of Mr. Willis' Second Amended Complaint:

> All prisoners confined within the Indiana Department of Correction, including the New Castle Correctional Facility, who have identified, or who will identify, themselves to the Indiana Department of Correction as requiring a kosher diet in order to properly exercise their religious beliefs and who have requested such a diet, or would request it if such a diet was available.

The Court hereby **DESIGNATES** Mr. Willis as the representative plaintiff for that certified class and, pursuant to Federal Rule of Civil Procedure 23(g), **DESIGNATES** Mr. Falk as lead class counsel.

The Court now **ORDERS** the parties to meet and confer with one another and, within **fourteen days**, to submit a joint report in this matter setting forth a proposed plan (or, if necessary, competing plans) for providing appropriate notice to the class pursuant to Federal Rule of Civil Procedure 23(c)(2). A status conference for this matter will be set by separate entry.

12/07/2009

Jane Magnus-Stinson
United States Magistrate Judge
Southern District of Indiana

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