

No.

In The Supreme Court of the United States

RONALD STUART LUBETSKY,

Applicant,

v.

UNITED STATES OF AMERICA,

Respondent.

To the Honorable Clarence Thomas,
Associate Justice of the Supreme Court of the United States
and Circuit Justice for the Eleventh Circuit

**EMERGENCY APPLICATION TO CONTINUE
BAIL PENDING SENTENCING,
AND FOR AN ADMINISTRATIVE STAY**

**TO PREVENT IRREPARABLE HARM A RULING IS
REQUESTED BEFORE SEPTEMBER 12, 2022 AT 12:00 P.M. EST**

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PARTIES TO THE PROCEEDING BELOW

Applicant was the defendant-appellant below. Applicant is Ronald Stuart Lubetsky.

Respondent was the plaintiff-appellee below. The Respondent is the United States of America.

INTRODUCTION

Pursuant to Rule 22 and Rule 23 of the Rules of this Court, the All Writs Act, 28 U.S.C. § 1651, the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb, *et seq*, Federal Rule of Criminal Procedure 46(c), and 18 U.S.C. § 3145(c), undersigned counsel, on behalf of Ronald Stuart Lubetsky (“Lubetsky”), respectfully applies for an order continuing Lubetsky on bail, pending sentencing. Section 3145(c) allows a defendant, otherwise subject to detention under 18 U.S.C. § 3143(a)(2) to be released on bail pending sentencing “if it is clearly shown that there are exceptional reasons why such person’s detention would not be appropriate.” 18 U.S.C. § 3145(c). Here, exceptional reasons are present because the Federal Bureau of Prisons acknowledged in the district court that it will delay or deny some of Lubetsky’s exercise of religion at the Federal Detention Center in Miami, Florida if Lubetsky surrenders, as ordered, on December 12, 2022, by noon.

The Government has not shown that it has a compelling interest in substantially burdening Lubetsky’s exercise of religion under RFRA. Furthermore, the Government has not shown that detention—which

will result in these substantial burdens—is the least restrictive means under RFRA.

The imminent RFRA violations Lubetsky faces, if he surrenders, constitute “exceptional reasons” under § 3145(c) to continue Lubetsky on bail.

Lubetsky also respectfully requests an immediate administrative stay to preserve the status quo and avoid irreparable harm to his rights under RFRA while the Court considers this application. *Ramirez v. Collier*, 142 S. Ct. 1264, 1282 (2022)(prison’s refusal to allow “religious touch” and audible prayer was irreparable harm under RLUIPA because the prisoner would be “unable to engage in protected religious exercise *in the final moments of his life*. Compensation paid to his estate would not remedy this harm, which is spiritual rather than pecuniary”)(emphasis added).

Because the Eleventh Circuit declined to treat any additional filings about this matter as an emergency (App. 2a), Lubetsky could not seek an administrative stay from the lower court so this Court could consider this application in the normal course.

BACKGROUND

1. Lubetsky is an Orthodox Jew. App.49a. Lubetsky has been practicing Orthodox Judaism since he was a child, and has attended numerous Orthodox synagogues throughout his life. Add. App.49-50a. According to Lubetsky, “Judaism is his life,” and “[t]he tenets of [his] faith are of paramount importance to [him].” App. 51-52a (alterations added).

2. Lubetsky sincerely believes that he is required to “strictly follow the tenets of the Jewish faith.” App. 49a ¶ 6. Some of those tenets include:

- Wearing a tallit katan, a religious undergarment, every day
- Praying with tefillin each day.
- Eating only kosher foods.
- Keeping the Jewish Sabbath, which begins at sundown every Friday until sundown on Saturdays.
- Participating in congregational worship during the Sabbath.
- Consuming a shared meal, after Sabbath prayers, that includes two loaves of challah bread.
- Hearing and participating in readings from a torah scroll.

App. 49-50a ¶ 7 a-f.

3. On October 7, 2021, Lubetsky was released on a personal recognizance bond. App. 9a.

4. On November 3, 2022, Lubetsky was found guilty on Counts 2, 5, 7-8, and 10-12 of the Indictment for prescribing outside the scope of professional practice. Lubetsky is scheduled to be sentenced on January 10, 2022.

5. The district court allowed Lubetsky to remain on bail after his conviction, directing instead that Lubetsky surrender to the U.S. Marshals Service by 12:00 noon on December 5, 2022. App. 8a.

6. Lubetsky, shortly before his December 5, 2022, surrender date, learned that the BOP at FDC Miami would delay or totally deny some of his sincerely held exercise of religion. App. 54-55a.

7. As a result, Lubetsky moved to continue the district court's surrender order until after Lubetsky was sentenced and designated by the BOP to an institution that would accommodate his faith. App.38-48a. Lubetsky's motion was supported by a declaration from himself and from Rabbi Menachem Katz of the Aleph Institute. App. 49a, 53a.

8. The district court agreed to continue its original surrender order in order to allow the Government time to respond to Lubetsky's filing. App.7a. The new surrender order directed Lubetsky to surrender to the U.S. Marshal's Service on December 12, 2022, by noon. App. 7a.

9. The Government responded to Lubetsky's motion on December 7, 2022. App. 58a. The Government, without substantively discussing RFRA, argued that Lubetsky's motion should be denied because the BOP was prepared to accommodate, some, but not all of Lubetsky's beliefs. App. 58-59a. The Government directly invited the district court to draw "distinctions [...] between the core elements of religious observance, and the personal preferences, practices, or customs of an individual or of the religious group in which he places himself" when deciding whether the BOP was prepared to comply with RFRA. App. 58a (alterations added).

10. The Government offered a declaration from K. Klett, an attorney at FDC Miami, in support of its response. App. 61-63a. The Klett declaration is based on discussion with FDC Miami's chaplain, Mr. Thomas Johnson. App. 61a ¶ 2.

11. According to Klett, the BOP is prepared to accommodate some of Lubetsky's exercise of religion. App. 61-63a. However, the Klett declaration makes clear that BOP will delay or deny some of Lubetsky's exercise of religion. For instance, on the provision of Kosher food, Klett explains that Lubetsky must be interviewed by the institution chaplain before he can receive a kosher diet. App. 62a ¶ 11. If approved, the chaplain is afforded 24 hours thereafter to enter the approval into the BOP's computer systems. App. 62a ¶ 11. *Within two days* after the chaplaincy approval is entered, "under normal operations," the inmate will be provided a kosher diet. App. 62a ¶ 11. In other words, it may take three days, possibly more, before Lubetsky receives kosher food if he is forced to surrender on Monday. This is consistent with similar delays Rabbi Katz wrote about in his declaration vis-à-vis his letter. App. 54a. ("Unfortunately, we have had recent instances where it took *up to a week* to get an inmate a Kosher meal at FDC Miami")(emphasis added).

12. The Klett declaration also makes clear that Lubetsky, if he surrenders, will not be able to (a) participate in congregate Sabbath services; or (b) receive required readings from a Torah scroll because

FDC Miami does not have a Torah scroll. App. 62-63a ¶¶ 14-16.

Further, the Klett declaration does not dispute that, while in transit from FDC Miami to his later designated BOP institution, Lubetsky will be unable to participate in congregative religious services or have his Kosher diet needs addressed while in transit. App. 63a ¶¶ 17. Finally, the Government acknowledged that it was unlikely the BOP would accommodate Lubetsky's exercise of religion involving a congregative Sabbath meal with two loaves of challah bread. App. 59a.

13. The Government, without mentioning the words “substantial burden” seemed to suggest that as long as Lubetsky could practice some aspects of his faith there can be no violation of RFRA. App. 59a. The Government also, without expressly using the phrase “compelling interest” pointed to 18 U.S.C. §§ 3142-3143 and the probable advisory Guidelines—which are anticipated to recommend a period of imprisonment—as bases for denying Lubetsky's motion.

14. The Government did not discuss in its response any less restrictive alternatives that would allow Lubetsky to continue practicing all his exercise of religion. App. 58-59a. Importantly, the Government did not argue that Lubetsky was dilatory or that he

purposefully delayed in presenting his motion to continue surrender.

Add. 58-59a.

15. The district court denied Lubetsky's motion to continue surrender on December 8, 2022. App. 5a. Lubetsky moved for a stay of the district court's order. App. 69a. The district court denied Lubetsky's request for a stay the same day. App.4a. According to the district court, Lubetsky was unlikely to succeed on the merits of his RFRA claims, stating that, "The Bureau of Prisons has indicated that it will accommodate Dr. Lubetsky's religious beliefs as it does other similarly situated inmates." App. 4a. The district court also, *sua sponte*, suggested that "the last minute request for relief does not merit a stay." App. 4a.

16. Lubetsky filed a timely notice of appeal. App.73a.

17. On December 9, 2022, Lubetsky moved the Eleventh Circuit to stay the district court's surrender order. App. 17a.

18. On December 10, 2022, the Eleventh Circuit, treating Lubetsky's stay motion as a motion for release pending sentencing denied relief. (App.2a). According to the Eleventh Circuit, Lubetsky "has not demonstrated that any of the exceptions to mandatory

detention apply.” (App.2a). Additionally, the Eleventh Circuit held that the ”Religious Freedom Restoration Act” does not provide a basis to release a prisoner from lawful confinement” (App.2a). The Eleventh Circuit cited 42 U.S.C. § 2000bb-1(b), suggesting that release is not “appropriate relief” under RFRA. The Eleventh Circuit also referenced 18 U.S.C. § 3626(a)(3), which forbids prisoner releases *in civil actions* generally. (“[i]n *any civil action* with respect to prison conditions”).

ARGUMENT

(a) Lubetsky Should Be Continued on Bail Pending Sentencing

The Eleventh Circuit erred in holding that Lubetsky should not be continued on bail. While detention is ordinarily required after conviction in cases such as Lubestky’s, 18 U.S.C. § 3143(a)(2), the district court allowed Lubetsky to remain on bail for 30 days after “mandatory” detention. App. 8a. Presumably, the district court did so consistent with its powers under 18 U.S.C. § 3145(c) because of “exceptional reasons.” 18 U.S.C. § 3145(c).

When Lubetsky learned that the district court’s new surrender order would result in violations of his rights under RFRA, Lubetsky

asked the district court to continue its surrender order again.

Ultimately, the district court declined.

Even though Lubetsky is not yet in detention, the Eleventh Circuit held that RFRA was inapplicable to bail matters referencing suggesting release is not “appropriate relief” under RFRA and that 18 U.S.C. § 3626(a)(3), which only applies to “civil actions” bars Lubestky’s arguments.

RFRA requires Lubetsky to show that his (i) sincere (ii) exercise of religion (iii) is being (or will be) “substantially burdened” by (iv) the “government.” *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 698 n.5 (2014) (RFRA uses the term “exercise of religion” instead of RLUIPA’s “religious exercise,” but both are defined the same); 42 U.S.C. §§ 2000bb–2(1), 2000cc-5(4). If Lubetsky satisfies this burden, then the burden shifts to the government to “demonstrate[] that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.” *Hobby Lobby*, 573 U.S. at 694-695. (alteration added).

The Government seemed to argue in the lower court, without specifically citing the substantial burden prong, that Lubetsky's exercise of religion was not being substantially burdened because he could practice other parts of his faith. App.58-59a. But this is not the law. *Holt v. Hobbs*, 574 U.S. 352, 361-62, 135 S. Ct. 853, 862 (2015) (“RLUIPA’s ‘substantial burden’ inquiry asks whether the government has substantially burdened religious exercise (here, the growing of a 1/2-inch beard), not whether the RLUIPA claimant is able to engage in other forms of religious exercise”).

It is undisputed that the BOP will delay the provision of kosher meals to Lubetsky if he surrenders on Monday. App. 62a. It is also undisputed that BOP will not allow Lubestky to participate in congregate prayer, a Sabbath meal with two loaves of challah, or allow him to receive readings from a Torah *scroll*. App.59a, 62-63a. Accordingly, the district court's surrender order will result in substantial burdens on Lubetsky's exercise of religion—burdens that would not exist if he remains on bail. Lubetsky has satisfied his *prima facie* case under RFRA.

The Government, at no point, has shown that it has a compelling interest in Lubestky's detention come Monday. The district court already allowed Lubetsky to remain on bail even though detention was mandatory but for "exceptional reasons." 18 U.S.C. §§ 3143(a); 3145(c). If the district court was willing to make an exception for detention for non-religious reasons, it is hard to understand—under the lens of RFRA's strict scrutiny—why an exception under RFRA is not an "exceptional reason" under § 3145(c).

Furthermore, the Government has not shown that detention, versus allowing Lubetsky to remain on bail, is the least restrictive means under RFRA.

Additionally, the Eleventh Circuit was wrong to conclude that RFRA cannot provide "appropriate relief" here. Section 3145(c) already allows for an "exceptional reasons" exception to mandatory detention. 18 U.S.C. § 3145(c). RFRA "applies to all Federal law, and the implementation of that law, whether statutory or otherwise." 42 U.S.C. § 2000bb-3(a). The statute expressly allows "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain

appropriate relief against a government .” 42 U.S.C. § 2000bb-1(c).

Invoking RFRA as an “exceptional reason” under § 3145(c) is a faithful application of the plain language of RFRA’s text.

Finally, the Eleventh Circuit was incorrect to hold that 18 U.S.C. § 3626(a)(3) bars Lubetsky’s reliance on RFRA. Section 3626(a)(3) does not apply here *because Lubetsky is not yet in detention*. Additionally, § 3626(a)(3) only applies to prisoner release orders in “civil actions.” 18 U.S.C. § 3626(a)(3)(“[i]n *any civil action* with respect to prison conditions”)(emphasis added). Lubetsky’s bail request is not raised in a “civil action.”

CONCLUSION

Lubetsky is scheduled to be sentenced on January 10, 2023. Lubetsky is not trying to avoid imprisonment all together. Instead, Lubetsky wishes to transition to service of his sentence in a way that does not violate his exercise of religion under RFRA. The Court should grant this application and continue Lubetsky on bail and issue an administrative stay.

Respectfully submitted,

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