

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

APPENDIX

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APPENDIX A

**December 10, 2022
Eleventh Circuit Order**

2a

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-14087-A

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD STUART LUBETSKY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

Before: ROSENBAUM, BRANCH, and BRASHER, Circuit Judges.

BY THE COURT:

Before this Court is Appellant’s motion for release pending sentencing. *See* Fed. R. App. P. 9(a); 11th Cir. R. 9-1. Appellant has been found guilty of an offense for which a maximum term of imprisonment of ten years or more is prescribed under the Controlled Substances Act and he has not demonstrated that any of the exceptions to mandatory detention apply. *See* 18 U.S.C. § 3143(a)(2). The Religious Freedom Restoration Act does not provide a basis to release a prisoner from lawful confinement. *See* 42 U.S.C. § 2000bb-1(b)(allowing only “appropriate relief”); 18 U.S.C. § 3626(a)(3)(forbidding courts from ordering the release of prisoners except in specific circumstances). Accordingly, the motion is DENIED.

The Clerk’s Office is DIRECTED to close the file on this case and to treat any motion for reconsideration of this order as a non-emergency matter.

3a

APPENDIX B

District Court's Orders

4a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-20485-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA

v.

RONALD STUART LUBETSKY,

Defendant.

ORDER ON MOTION TO STAY

Ronald Stuart Lubetsky has filed an Opposed Emergency Motion for Stay Pending Appeal (D.E. 76). Dr. Lubetsky has not shown a likelihood of success on the merits or that he will irreparably be harmed absent a stay. The Bureau of Prisons has indicated that it will accommodate Dr. Lubetsky's religious beliefs as it does other similarly situated inmates. Moreover, the last minute request for relief does not merit a stay. See Dunn v. Ray, 193 S.Ct. 661 (2019). Stay lifted by Dunn v. Ray 139 S.Ct. 661 (Feb. 7, 2019). Therefore, it is

ORDERED AND ADJUDGED that Defendant's Opposed Emergency Motion for Stay Pending Appeal (D.E. 76) is hereby **DENIED**.

DONE AND ORDERED in Chambers, in West Palm Beach, Florida, this 8th day of December, 2022.



Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record
U.S. Marshals/Bureau of Prisons

5a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-20485-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA

v.

RONALD STUART LUBETSKY,

Defendant.

_____ /

ORDER DENYING MOTION TO EXTEND SURRENDER DATE

On the Friday before voluntary surrender ordered to occur on Monday, December 5, 2022, the Defendant filed a motion to continue surrender (D.E. 68) arguing that delay is necessary to ensure that the Defendant – an Orthodox Jew – remains able to fully practice the tenets of his faith. In order to give the Government an opportunity to respond to the Defendant’s motion, I extended his surrender date to December 12, 2022.

On November 3, 2022, when the Defendant was convicted at trial, the Government initially asked for remand based upon the drug amounts involved in the case. At the request of the defense, I agreed to voluntary surrender on December 5, 2022. No issues of religious freedom were identified.

Attached to the Defendant’s motion is his affidavit expressing his desire to practice the tenets of his faith. Also attached is a letter from Rabbi Menachem M. Katz, who, while applauding the Federal Bureau of Prisons’ “effort to ensure that it has all the necessary policies and strives to meet the religious requirements of ultra-orthodox Jewish inmates...” expresses concern about the immediate implementation of these policies to Dr. Lubetsky. He also indicates that the Defendant wishes to continue attending services at the Chai Center and continue to participate in a weekly Zoom class geared towards religious law on business ethics.

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The Government opposes further extension of his surrender date pointing out that Title 18 United States Code, Sections 3142 and 3143 call for detention upon conviction of a person convicted of a controlled substance offense and the sentencing guidelines applicable to the Defendant's offenses call for a lengthy sentence. The Government also attaches a declaration concerning the religious accommodations available at FDC Miami.

Upon consideration of Defendant's motion to extend voluntary surrender, the Government's response (D.E. 73) and Defendant's reply (D.E. 74) it is,

ORDERED AND ADJUDGED that Defendant's Motion to Continue Surrender (D.E. 68) is hereby **DENIED**. The Defendant shall self-surrender as previously ordered to the United States Marshals in Miami, Florida on Monday, December 12, 2022 by 12:00 Noon.

DONE AND ORDERED in Chambers, in West Palm Beach, Florida, this 8th day of December, 2022.



Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record
U.S. Marshals/Bureau of Prisons

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-20485-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA

v.

RONALD STUART LUBETSKY,

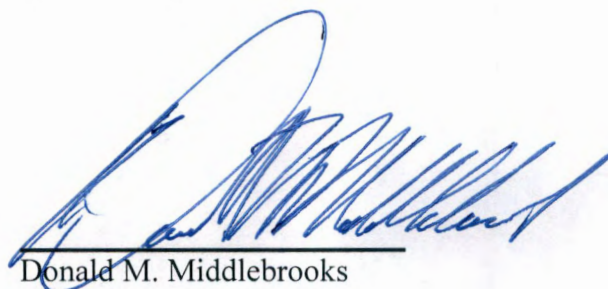
Defendant.

ORDER EXTENDING SURRENDER DATE

THIS MATTER comes before the Court pursuant to Defendant's Unopposed Motion to Stay Surrender (D.E. 69) until the Court can rule on the Defendant's Motion to Continue Surrender (D.E. 68). After reviewing the motion, it is

ORDERED AND ADJUDGED that Defendant's Unopposed Motion to Stay Surrender Date is GRANTED in part. In order to allow the Court to consider the motion and the Government's response, the self-surrender date is extended until **Monday, December 12, 2022 by 12:00 Noon.**

DONE AND ORDERED in Chambers, in West Palm Beach, Florida, this 2nd day of December, 2022.



Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record
U.S. Marshals/Bureau of Prisons

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-20485-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA

v.

RONALD STUART LUBETSKY,

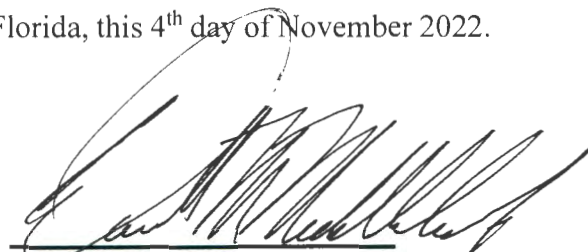
Defendant.

ORDER SETTING SURRENDER DATE

On November 3, 2022, Defendant, Ronald Stuart Lubetsky was found guilty by a jury on Counts 2, 5, 7-8 and 10-12. Defendant is currently out on bond and sentencing is scheduled for January 10, 2023 at 11:00 am in Miami. It is

ORDERED AND ADJUDGED that the Defendant shall Self-Surrender to the United States Marshals in Miami, Florida on Monday, December 5, 2022 by 12 Noon.

DONE AND ORDERED in Chambers, in Miami, Florida, this 4th day of November 2022.



Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record
United States Marshals

(Revised 03/2020)

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

APPEARANCE BOND: _____

CASE NO.: 1-21-CR 20485-MGC

UNITED STATES OF AMERICA:

Plaintiff,

v.

Ronald Lubetsky
Defendant,

USM #: 67786-509

I, the undersigned defendant and I or we, the undersigned sureties, jointly and severally acknowledge that we and our personal representatives, jointly and severally, are bound to pay the United States of America, the sum of \$ 250,000 10% jma

STANDARD CONDITIONS OF BOND

The conditions of this bond are that the defendant:

1. Shall appear before this Court and at such other places as the defendant may be required to appear, in accordance with any and all orders and directions relating to the defendant's appearance in this case, including appearance for violation of a condition of the defendant's release as may be ordered or notified by this Court or any other United States District Court to which the defendant may be held to answer or the cause transferred. The defendant is required to ascertain from the Clerk of Court or defense counsel the time and place of all scheduled proceedings on the case. In no event may a defendant assume that his or her case has been dismissed unless the Court has entered an order of dismissal. The defendant is to abide by any judgment entered in such matter by surrendering to serve any sentence imposed and obeying any order or direction in connection with such judgment. This is a continuing bond, including any proceeding on appeal or review, which shall remain in full force and effect until such time as the Court shall order otherwise.
2. May not travel outside the Southern District of Florida unless otherwise approved by the Court prior to any such travel. The Southern District of Florida consists of the following counties: Broward, Highlands, Indian River, Martin, Miami-Dade, Monroe, Okeechobee, Palm Beach and St. Lucie.
3. May not change his/her present address without prior notification and approval from the U.S. Probation Officer or the Court.
4. Must cooperate with law enforcement officers in the collection of a DNA sample if the collection is required by 42 U.S.C. Section 14135a.
5. Must not violate any federal, state or local law while on release in this case. Should the defendant come in contact with law enforcement he/she shall notify the U.S. Probation Officer within 72 hours.

10a DEFENDANT: *Ronald Stuart Lubetsky*
CASE NUMBER: *21-20485-CR-KING*
PAGE TWO

SPECIAL CONDITIONS OF BOND

In addition to compliance with the previously stated conditions of bond, the defendant must comply with the special conditions checked below:

- a. Surrender all passports and travel documents, if any, to Pretrial Services and not obtain any travel documents during the pendency of the case;
- b. Report to Pretrial Services as follows: () as directed or ___ time(s) a week in person and ___ time(s) a week by telephone;
- c. Submit to substance abuse testing and/or treatment, contribute to the cost of services rendered based on ability to pay, as determined by the U.S. Probation Officer;
- d. Refrain from ___ excessive OR ___ abstain from alcohol use or any use of a narcotic drug or other controlled substance, as defined in section 102 of the Controlled Substances Act (21 U.S.C. §802), without a prescription by a licensed medical practitioner;
- e. Participate in a mental health assessment and/or treatment and contribute to the costs of services rendered based on ability to pay, as determined by the U.S. Probation Officer;
- f. Employment restriction(s): *not to be employed in the dispensing of controlled substances*
- g. Maintain or actively seek full-time employment;
- h. Maintain or begin an educational program;
- i. Avoid all contact with victims or witnesses to the crimes charged, except through counsel. The AUSA shall provide defense counsel and pretrial services with the names of all victims or witnesses. The prohibition against contact does not take effect until defense counsel receives the list. The prohibition against contact applies only to those persons on the list, but the prosecutor may expand the list by sending written notice to defense counsel and pretrial services.;
- j. Avoid all contact with co-defendants and defendants in related cases, except through counsel;
- k. Refrain from possessing a firearm, destructive device or other dangerous weapons and shall surrender (if any), their concealed weapons permit to the U.S. Probation Office;
- l. None of the signatories may sell, pledge, mortgage, hypothecate, encumber, etc., any real property they own, until the bond is discharged, or otherwise modified by the Court; *including residence*
- m. May not visit commercial transportation establishment: airports, seaport/marinas, commercial bus terminals, train stations, etc.;
- n. Defendant shall consent to the U.S. Probation Officer conducting periodic unannounced examinations of the defendant's computer equipment at his/her place of employment or on the computer at his/her residence which may include retrieval and copying of all data from the computer(s) and any internal or external peripherals to ensure compliance with this condition and/or removal of such equipment for the purpose of conducting a more thorough inspection; and consent at the direction of the U.S. Probation Officer to have installed on the defendant's computer(s), at the defendant's expense, any hardware or software systems to monitor the defendant's computer use;

11a DEFENDANT: Ronald Stuart Lubetsky
CASE NUMBER: 21-20485-CR-KMG
PAGE THREE

o. **LOCATION MONITORING PROGRAM:** The defendant shall be monitored by the form of location monitoring and shall abide by all technology requirements as noted below, as well as contribute to the costs of services rendered based on () ability to pay as determined by the U.S. Probation Officer – or – () paid by U.S. Probation;

__ Location monitoring technology at the discretion of the officer

__ Radio Frequency (RF) monitoring (Electronic Monitoring)

__ Active GPS Monitoring

__ Voice Recognition

__ Curfew: You are restricted to your residence every day from _____ to _____, or as directed by the supervising officer.

OR

__ Home Detention: You are restricted to your residence at all times except for:

() medical

() substance abuse or mental health treatment

() court appearances

() attorney visits or court ordered obligations

() religious services

() employment

() other activities as pre-approved by the supervising officer

p. **RESIDENTIAL RE-ENTRY CENTER:** The defendant shall reside at a residential re-entry center or halfway house and abide by all the rules and regulations of the program. The cost to be paid by () Pretrial Services or () based on the defendant's ability to pay. You are restricted to the residential re-entry center/halfway house at all times except for:

() employment

() education

() religious services

() medical, substance abuse, or mental health treatment

() attorney visits

() court appearances

() court ordered obligations

() reporting to Pretrial Services

() other _____

q. Third-Party Custody: _____ will serve as a third party custodian and will report any violations of the release conditions to the U.S. Probation Officer. Failure to comply with these requirements, the third party custodian can be subject to the provisions of 18 U.S.C. § 401, Contempt of Court.

r. The defendant shall submit his person, property, residence, vehicle, papers, computers, (as defined in 18 U.S.C. 1030(e)(1)), other electronic communication or data storage devices or media, or office, to a search conducted by a United States Probation Officer. The defendant must warn any other occupants that the premises may be subject to searches pursuant to this condition. Any search must be conducted at a reasonable time and in a reasonable manner.

12a DEFENDANT: Ronald Stuart Lubetsky
CASE NUMBER: 21-20485-CR-16706
PAGE FOUR

s. **Mandatory Adam Walsh Conditions:** Defendant shall abide by specified restrictions on personal associations, place of abode, or travel, to avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the offense; report on a regular basis to a designated law enforcement agency, pretrial services agency or other agency; comply with a specified curfew (with electronic monitoring) and refrain from possessing a firearm, destructive device or other dangerous weapons.

t. Additional Sex Offense Conditions For Defendants Charged or Convicted of a Sexual Offense:

1. () Defendant may not have contact with victim(s), or any child under the age of 18, unless approved by the Court or allowed by the U.S. Probation Officer.
2. () The defendant shall not possess or use any data encryption technique or program and shall provide passwords and administrative rights to the U.S. Probation Officer.
3. () Defendant shall participate in specialized sex offender evaluation and treatment, if necessary, and to contribute to the costs of services rendered based on ability to pay, as determined by the U.S. Probation Office.
4. () Defendant shall not possess, procure, purchase or otherwise obtain any internet capable device and/or computer. Additionally, the defendant is prohibited from using another individual's computer or device that has internet capability.
5. () Defendant is prohibited from establishing or maintaining any email account or social media account. Additionally, the defendant is prohibited from using another individual's email account or social media account. Must provide monthly or upon request, personal phone and credit card billings to Pretrial Services to confirm there are no services with any internet services provider.
6. () Defendant is not permitted to enter places where children congregate including, but not limited to any play areas, playgrounds, libraries, children-themed restaurants, daycares, schools, amusement parks, carnivals/fairs, unless approved by the U.S. Probation Officer.
7. () The defendant shall not be involved in any children's or youth organizations.
8. () Defendant is prohibited from viewing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services.
9. () The defendant shall participate in a maintenance polygraph examination to periodically investigate the defendant's compliance. The polygraph examination shall specifically address only defendant's compliance or non-compliance with the special conditions of release and shall not inquire into the facts of the pending criminal case against defendant. The defendant will contribute to the costs of services rendered (co-payment) based on ability to pay or availability of third party payment.

u. May travel to and from: _____, and must notify Pretrial Services of travel plans before leaving and upon return.

v. Comply with the following additional conditions of bond:
no drugs, alcohol, controlled substance
pay 10% of \$25,000 to the clerk

13a DEFENDANT: Ronald Stuart Lubetsky
CASE NUMBER: 21-20485-CR-KING
PAGE FIVE

PENALTIES AND SANCTIONS APPLICABLE TO DEFENDANT

Violation of any of the foregoing conditions of release may result in the immediate issuance of a warrant for the defendant's arrest, a revocation of release, and order of detention, as provided in 18 U.S.C. §3148, forfeiture of any bail posted, and a prosecution for contempt as provided in 18 U.S.C. §401, which could result in a possible term of imprisonment or a fine.

The commission of any offense while on pretrial release may result in an additional sentence upon conviction for such offense to a term of imprisonment of not more than ten years, if the offense is a felony; or a term of imprisonment of not more than one year, if the offense is a misdemeanor. This sentence shall be consecutive to any other sentence and must be imposed in addition to the sentence received for the offense itself.

Title 18 U.S.C. §1503 makes it a felony criminal offense punishable by imprisonment and a \$250,000 fine to intimidate or attempt to intimidate a witness, juror or officer of the court; 18 U.S.C. §1510 makes it a felony criminal offense punishable by imprisonment and a \$250,000 fine to obstruct a criminal investigation; 18 U.S.C. §1512 makes it a felony criminal offense punishable by imprisonment and a \$250,000 fine to tamper with a witness, victim or informant; and 18 U.S.C. §1513 makes it a felony criminal offense punishable by imprisonment and a \$250,000 fine to retaliate against a witness, victim or informant, or threaten to do so.

It is a criminal offense under 18 U.S.C. §3146, if after having been released, the defendant knowingly fails to appear as required by the conditions of release, or to surrender for the service of sentence pursuant to a court order. If the defendant was released in connection with a charge of, or while awaiting sentence, surrender for the service of a sentence, or appeal or certiorari after conviction for:

- (1) an offense punishable by death, life imprisonment, or imprisonment for a term of fifteen years or more the defendant shall be fined not more than \$250,000 or imprisoned for not more than ten years, or both;
- (2) an offense punishable by imprisonment for a term of five years or more, but less than fifteen years, the defendant shall be fined not more than \$250,000 or imprisoned for not more than five years, or both;
- (3) any other felony, the defendant shall be fined not more than \$250,000 or imprisoned not more than two years, or both;
- (4) a misdemeanor, the defendant shall be fined not more than \$100,000 or imprisoned not more than one year, or both.

A term of imprisonment imposed for failure to appear or surrender shall be consecutive to the sentence of imprisonment for any other offense. In addition, a failure to appear may result in the forfeiture of any bail posted, which means that the defendant will be obligated to pay the full amount of the bond, which may be enforced by all applicable laws of the United States.

14a DEFENDANT: Ronald Stuart Lubetsky
CASE NUMBER: 21-20485-CR-KING
PAGE SIX

PENALTIES AND SANCTIONS APPLICABLE TO SURETIES

Violation by the defendant of any of the foregoing conditions of release will result in an immediate obligation by the surety or sureties to pay the full amount of the bond. Forfeiture of the bond for any breach of one or more conditions may be declared by a judicial officer of any United States District Court having cognizance of the above entitled matter at the time of such breach, and if the bond is forfeited and the forfeiture is not set aside or remitted, judgment may be entered upon motion in such United States District Court against each surety jointly and severally for the amount of the bond, together with interest and costs, and execution may be issued and payment secured as provided by the Federal Rules of Criminal Procedure and other laws of the United States.

SIGNATURES

I have carefully read and I understand this entire appearance bond consisting of seven pages, or it has been read to me, and, if necessary, translated into my native language, and I know that I am obligated by law to comply with all of the terms of this bond. I promise to obey all conditions of this bond, to appear in court as required, and to surrender for service of any sentence imposed. I am aware of the penalties and sanctions outlined in this bond for violations of the terms of the bond.

If I am an agent acting for or on behalf of a corporate surety, I further represent that I am a duly authorized agent for the corporate surety and have full power to execute this bond in the amount stated.

Signed this 6 day of October, 2021 at Miami, Florida
Signed and acknowledged before me: DEFENDANT: (Signature) Ronald Lubetsky
WITNESS: [Signature] Miami FL
Miami Florida
City State City State

CORPORATE SURETY

Signed this _____ day of _____, 20____ at _____, Florida
SURETY: _____ AGENT: (Signature) _____

City State PRINT NAME: _____

INDIVIDUAL SURETIES

Signed this 6 day of October, 2021 at Miami, Florida Signed this 6th day of October, 2021 at Miami, Florida
SURETY: (Signature) Natalie Scetinkina SURETY: (Signature) Ronald Lubetsky
PRINT NAME: Natalie Scetinkina PRINT NAME: Ronald Lubetsky
RELATIONSHIP TO DEFENDANT: Spouse RELATIONSHIP TO DEFENDANT: self
Miami FL Miami FL
City State City State

Signed this ___ day of _____, 20__ at _____, Florida Signed this ___ day of _____, 20__ at _____, Florida
SURETY: (Signature) _____ SURETY: (Signature) _____
PRINT NAME: _____ PRINT NAME: _____
RELATIONSHIP TO DEFENDANT: _____ RELATIONSHIP TO DEFENDANT: _____

City State City State

APPROVAL BY THE COURT

Date: 10/6/21

[Signature]
LISETTE M. REID
UNITED STATES MAGISTRATE JUDGE

The issuance of a "Declaration of Loss" under oath statement will be required before this check will be replaced or refunded in the event it is lost, misplaced, or stolen.

City National Bank
Bci FINANCIAL GROUP

121050075
63-436/660

15a

DATE 10/05/2021

REMITTER: RONALD LUBETSKY

PAY TO THE U.S. COURTS
ORDER OF

\$ 25,000.00

**** Twenty Five Thousand and 00/100****

MEMO:

CASHIER'S CHECK

25,000.00
DOLLAR TWO FIVE THOUSAND ZERO ZERO PERIOD ZERO ZERO

2910

⑈ 121050075 ⑆ 066004367 ⑆ 500000050 ⑈

Court Name: SOUTHERN DISTRICT OF FLORIDA
Division: 1
Receipt Number: FLS100237826
Cashier ID: vthomas
Transaction Date: 10/06/2021
Payer Name: RONALD LUBETSKY

TREASURY REGISTRY
For: RONALD STUART LUBETSKY
Case/Party: D-FLS-1-21-CR-020405-001
Amount: \$25,000.00

PAPER CHECK CONVERSION
Check/Money Order Num: 121050075
Amt Tendered: \$25,000.00

Total Due: \$25,000.00
Total Tendered: \$25,000.00
Change Amt: \$0.00

21-CR-20405-MGC-1
USA VS. RONALD STUART LUBETSKY

REMITTER: RONALD LUBETSKY

RUW
Returned check fee \$53

Checks and drafts are accepted subject to collection and full credit will only be given when the check or draft has been accepted by the financial institution on which it was drawn.

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APPENDIX C

Applicant's Filing in Eleventh Circuit

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No. 22-14087A

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

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RONALD STUART LUBETSKY,

Defendant - Appellant.

On Appeal From The United States District Court
For The Southern District of Florida

**APPELLANT'S CORRECTED EMERGENCY MOTION FOR
STAY OF SURRENDER ORDER**

**TO PREVENT IRREPARABLE HARM A RULING IS
REQUESTED BY SEPTEMBER 12, 2022 AT 9:00 A.M.**

Brandon Sample
Brandon Sample PLC
1701 Pennsylvania Ave., #200
Washington, D.C. 20006-4357
Tel: 202-990-2500
Fax: 202-990-2600
Vermont Bar # 5573
E-mail: brandon@brandonsample.com

Attorney for Ronald Stuart Lubetsky

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Ronald Stuart Lubetsky, by and through the undersigned counsel,
respectfully submits this Certificate of Interested Persons and
Corporate Disclosure Statement:¹

Marx Calderon, Counsel for Appellee in District Court

Bernard M. Cassidy, Counsel for Appellant in District Court

Marcia G. Cooke, U.S. District Judge

Lisa Hirsch, Counsel for Appellee

Mitchell Evan Hyman, Counsel for Appellee in District Court

Thomas Johnson, BOP Chaplain

K. Klett, BOP Attorney

Ronald Stuart Lubetsky, Appellant

Jonathan Scott Meltz, Counsel for Appellant in District Court

Donald M. Middlebrooks, U.S. District Judge

Lisette M. Reid, U.S. Magistrate Judge

¹ Undersigned counsel, to the best of his ability, has identified the listed persons as interested persons to this appeal. Given the urgent nature of this appeal, counsel will amend or supplement this certificate of interested persons in the future should other persons be identified that should be listed.

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Lisa Tobin Rubio, Counsel for Appellee

Brandon Sample, Counsel for Appellant in District Court & this appeal

Mark Steven Solomon, Counsel for Appellant in District Court

Emily Rose Stone, Counsel for Appellee in District Court

Frank Tamen, Counsel for Appellee in District Court

This 9th day of December, 2022.

Signed: /s/ Brandon Sample

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INTRODUCTION

Ronald Stuart Lubetsky (“Lubetsky”) respectfully asks this Court to stay the district court’s order directing him to surrender to the U.S. Marshal’s Service on Monday, December 12, 2022, by 12:00 noon. Lubetsky also asks the Court to issue an administrative stay pending its consideration of this motion. A decision on this motion is requested on or before December 12, 2022, at 9:00 a.m. EST. This emergency motion is filed within one-day of the district court’s underlying order.

A stay is needed because the district court’s surrender order will work a violation of Lubetsky’s rights under the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. § 2000bb, *et seq.* This is because the Federal Bureau of Prisons (“BOP”) at the Federal Detention Center in Miami will, *as admitted by the BOP*, delay or totally deny accommodation of some of Lubetsky’s sincerely held religious beliefs after he surrenders.

Any amount of delay or denial of Lubetsky’s exercise of religion under RFRA constitutes irreparable harm. *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

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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).

The Government has not demonstrated that it has a compelling interest in substantially burdening Lubetsky’s exercise of religion, nor has it shown that surrendering on Monday is the least restrictive means under RFRA. Lubestky has been on bail throughout the proceedings in the district court. Allowing Lubetsky to remain on bail until he is sentenced and designated by the BOP to serve his sentence at a BOP institution that will accommodate his exercise of religion is the least restrictive means under RFRA.

(a) Lubetsky’s Religious Beliefs

Lubetsky is an Orthodox Jew. Add. 27.² Lubetsky has been practicing Orthodox Judaism since he was a child, and has attended numerous Orthodox synagogues throughout his life. Add. 27-28.

² Lubetsky has prepared and attached to this motion an Addendum of the most salient district court filings. References to the Addendum use the abbreviation Add. followed by the page number of the document in the addendum. References to the district court’s record use the preferred citation method for this Circuit.

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According to Lubetsky, “Judaism is his life,” and “[t]he tenets of [his] faith are of paramount importance to [him].” Add. 30 (alterations added).

Lubetsky sincerely believes that he is required to “strictly follow the tenets of the Jewish faith.” Add. 28 ¶ 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.

Add. 28-29 ¶ 7 a-f.

(b) The Underlying Proceedings in the District Court

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

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professional practice. Doc 3, 55. Lubetsky is scheduled to be sentenced on January 10, 2022. Doc 57. 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. Doc 58.

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. Add. 33-34. 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. Add. 16-26. Lubetsky's motion was supported by a declaration from himself and from Rabbi Menachem Katz of the Aleph Institute. Add. 27, 31.

The district court agreed to continue its original surrender order in order to allow the Government time to respond to Lubetsky's filing. Add. 36. The new surrender order directed Lubetsky to surrender to the U.S. Marshal's Service on December 12, 2022, by noon. Add. 36.

The Government responded to Lubetsky's motion on December 7, 2022. Add. 37-39. The Government, without substantively discussing

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RFRA, argued that Lubetsky's motion should be denied because the BOP was prepared to accommodate, some, but not all of Lubetsky's beliefs. Add. 37-38. 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. Add. 37 (alterations added).

The Government, in support of its response, offered a declaration from K. Klett, an attorney at FDC Miami. Add. 40-42. The Klett declaration is based on discussion with FDC Miami's chaplain, Mr. Thomas Johnson. Add. 40 ¶ 2.

According to Klett, the BOP is prepared to accommodate some of Lubetsky's exercise of religion. Add. 40-42. 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. Add. 41 ¶ 11. If approved, the chaplain is afforded 24 hours thereafter to enter the approval into the

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BOP's computer systems. Add. 41 ¶ 11. *Within two days* after the chaplaincy approval is entered, "under normal operations," the inmate will be provided a kosher diet. Add. 41 ¶ 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. Add. 32. ("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).

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. Add. 41-42 ¶¶ 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 congregate religious services or have his Kosher diet needs addressed while in transit. Add. 42 ¶¶ 17. Finally, the Government acknowledged that it was unlikely the BOP would accommodate Lubetsky's exercise of religion involving a congregate Sabbath meal with two loaves of challah bread. Add. 38.

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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. Add. 38. 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.

The Government did not discuss in its response any less restrictive alternatives that would allow Lubetsky to continue practicing all his exercise of religion. Add. 37-38. Importantly, the Government did not argue that Lubetsky was dilatory or that he purposefully delayed in presenting his motion to continue surrender. Add. 37-38.

The district court denied Lubetsky’s motion to continue surrender on December 8, 2022. Add. 14-15. Lubetsky moved for a stay of the district court’s order. Add. 48-49. The district court denied Lubetsky’s request for a stay the same day. Add. 52. 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

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accommodate Dr. Lubetsky’s religious beliefs as it does other similarly situated inmates.” Add. 52. The district court also, *sua sponte*, suggested that “the last minute request for relief does not merit a stay.” Add. 52.

Lubetsky filed a timely notice of appeal. Add.12.

ARGUMENT

(A) Lubetsky Is Likely To Succeed On His RFRA Claims

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).

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The only RFRA prong of Lubetsky's *prima facie* case that appears in dispute is whether surrendering will result in a "substantial burden" on his exercise of religion. The Government, without specifically discussing what constitutes a "substantial burden" seemed to argue that RFRA is not violated if some, or his so-called "principle religious requirements" are accommodated. App. 38. The district court seemed to have adopted this rationale by stating "[t]he Bureau of Prisons has indicated that it will accommodate Dr. Lubetsky's religious beliefs as it does other similarly situated inmates." Add. 52. But this is not the law.

In fact, this Court—and the Supreme Court—have repeatedly emphasized that a "substantial burden" on the exercise of religion may exist *regardless* of whether a person can practice other aspects of their faith. *Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015); *Dorman v. Chaplains Office BSO*, 36 F.4th 1306, 1314 (11th Cir. 2022). In *Dorman* this Court specifically said that "[t]he substantial burden inquiry under the RLUIPA asks whether the government has substantially burdened religious exercise . . ., *not whether the RLUIPA claimant is able to engage in other forms of religious exercise.*" *Dorman* 36 F.4th at 1314 (internal citations omitted, emphasis added). The proper focus of the

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substantial burden analysis is whether Lubetsky is being “pressure[d], force[d], or coerce[d] [...] to abandon, forego, conform, or delay any of [his] religious beliefs or practices.” *Dorman*, 36 F.4th at 1314 (alterations added).

Here, it is undisputed that if Lubetsky surrenders on Monday his access to a Kosher diet will be delayed. Add. 41 ¶ 11. Additionally, if Lubetsky is forced to surrender on Monday he will be denied congregational Sabbath religious services, denied a congregational Sabbath meal that includes two loaves of challah bread, and denied the ability hear Torah *scroll* readings per his exercise of religion. Add. 38, 41-42 ¶¶ 14-17. Finally, Lubetsky will be denied or delayed kosher meals and congregational Sabbath prayer while in transit from FDC Miami to his designated BOP institution after sentencing. Add. 42 ¶¶ 17. All of these are substantial burdens because it is only by virtue of the surrender order that Lubetsky is being “pressure[d], force[d], or coerce[d] [...] to abandon, forego, conform, or delay any of [his] religious beliefs or practices.” *Dorman*, 36 F.4th at 1314 (alterations added).

With Lubetsky having satisfied his *prima facie* RFRA case, it was on the Government to *demonstrate* a “compelling interest,” as applied to

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Lubetsky, to subject him to these substantial burdens. *Holt*, 574 U.S. at 362-363. This is a “focused inquiry” that does not support reliance on “broadly formulated interest[s]” like general deterrence or ensuring compliance with the nation’s drug laws. *Id.*

The Government failed to show a compelling interest. The fact that 18 U.S.C. §§ 3142-3143 generally require detention in cases like Lubetsky’s is of no consequence. This is because “RFRA operates by mandating consideration, under the compelling interest test, of exceptions to “rule[s] of general applicability.” *Id.* (alterations in original). *Gonzales v. O’Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006). Lubetsky has been on bail throughout his case. And notwithstanding the dictates of §§ 3142-3143, the district court allowed Lubetsky to remain on bail after his conviction. Under the specific circumstances of this case, the government has no compelling interest—whatsoever—to obtain Lubetsky’s surrender on Monday when doing so would work substantial burdens on his exercise of religion under RFRA.

Furthermore, even assuming *arguendo*, the Government had shown a compelling interest in Lubetsky’s surrender, it has not shown

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that substantially burdening his religious exercise is the least restrictive means under RFRA. “[I]t is the government's burden to establish that there are no less restrictive means to adequately address its important interest.” *Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 701 (11th Cir. 2019). And if the Government claims “there are no less restrictive means, [...] the government must show [the Court] *how and why that is so.*” *Id.* (emphasis and alterations added). The Government has not done any of this.

The least restrictive means under RFRA is to allow Lubetsky to remain on bail and surrender for service of his sentence after BOP has designated him to an institution to serve his sentence where Lubetsky's exercise of religion will not be substantially burdened. Lubetsky is *not* trying to avoid incarceration. Lubetsky merely wishes to transition into his period of imprisonment in a way that does not substantially burden his exercise of religion. Lubetsky is set to be sentenced on January 10, 2022, a little more than 30 days away. The desire for RFRA accommodation under these unique circumstances is more than reasonable.

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(B) Lubetsky Will Suffer Irreparable Harm Without A Stay, The Government Will Not Be Harmed, And A Stay Is In The Public Interest

The Supreme Court in *Ramirez* held that a violation of RLUIPA which would deny a prisoner “protected religious exercise in the final moments of his life” is irreparable harm. *Ramirez* 142 S. Ct. at 1282 (2022). Here, Lubetsky is facing delays and outright denial of his protected religious exercise. This too is irreparable harm. Moreover, the remaining balance of equities tip in Lubetsky’s favor. Lubetsky is not trying to generally avoid imprisonment. His sentencing is a little more than 30 days away. The BOP will surely designate him to an institution for service of his sentence shortly after sentencing. Lubetsky just wants to transition to incarceration in a way that does not violate his exercise of religion. This is eminently reasonable. Furthermore, the public has an interest in ensuring RFRA is adhered to.

(C) Lubetsky Has Not Engaged In Inequitable Conduct

The Government never argued in the district court that Lubetsky was dilatory in presenting his request for a continuance of the surrender order. Any such contention now is waived. Furthermore, as already argued by Lubetsky in the district court, a continuance of the

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detention order was sought quickly after Lubetsky learned that BOP would not be able to fully accommodate his exercise of religion. Add.49-50.

CONCLUSION

Based on the foregoing, the Court should stay the district court's surrender order.

Respectfully submitted,

/s/Brandon Sample

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

- I. This motion complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the motion contains 3,103 words.
- II. This motion complies with the typeface requirements 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 using Microsoft Word in 14-point Century Schoolbook.

December 9, 2022

/s/Brandon Sample
Brandon Sample

CERTIFICATE OF SERVICE

I certify that on December 9, 2022, the foregoing was filed and served using CM/ECF on all counsel of record.

/s/Brandon Sample

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APPENDIX D

Filings in the District Court

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 1:21cr20485

RONALD STUART LUBETSKY,

Defendant.

_____ /

MOTION TO CONTINUE SURRENDER

Ronald Stuart Lubetsky, by and through the undersigned counsel, respectfully moves to continue his surrender date until after Lubetsky has been sentenced and designated by the Federal Bureau of Prisons. Continuance of the surrender date, as argued herein, is necessary to ensure that Lubetsky—an Orthodox Jew—remains able to fully practice the tenets of his faith consistent with the Religious Freedom Restoration Act (“RFRA”), 42 U.S.C. §§ 2000bb, *et seq.*

I. BACKGROUND

On November 3, 2022, Lubetsky was found guilty on Counts 2, 5, 7-8, and 10-12 of the Indictment (ECF 3) for prescribing outside the scope of professional practice. (ECF 55). The Court has scheduled the matter for sentencing on January 10, 2022. (ECF 57). The Court separately ordered Lubetsky to surrender to the U.S. Marshals Service by 12:00 noon on December 5, 2022. (ECF 58). Lubetsky has been on bond throughout the proceedings to date. (ECF 8).

Lubetsky is an Orthodox Jew. Lubetsky Decl. ¶ 2. Lubetsky has been practicing Orthodox Judaism since he was a child, and has attended numerous Orthodox synagogues

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throughout his life. Lubetsky Decl. ¶¶ 3-5. According to Lubetsky, “Judaism is his life,” and “[t]he tenets of [his] faith are of paramount importance to [him].” Lubetsky Decl. ¶ 7.g. (alterations added).

Lubetsky sincerely believes that he is required to “strictly follow the tenets of the Jewish faith.” Lubetsky Decl. ¶ 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.

Lubetsky Decl. ¶ 7 a-f.

Unfortunately, if Lubetsky is forced to surrender before sentencing, he will be unable to practice all the tenets of his faith. *See* Katz Declaration. According to Rabbi Menachem Katz from the Aleph Institute, the Bureau of Prisons in Miami is not able to scrupulously accommodate the religious practice of Orthodox Jews. *See*, Katz Declaration. Katz, who has over 28 years of experience dealing with the Bureau of Prisons, indicates that:

- It can take up to a week for inmates to receive a kosher meal at FDC Miami.
- It often takes days for inmates to receive daily prayer materials.

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- There is no torah scroll at FDC Miami.
- Congregate worship among prisoners is not currently permitted.

See, Katz Letter attached to Katz Declaration.

Additionally, Lubetsky's religious practices would not be accommodated while Lubetsky is in transit from FDC Miami (if forced to surrender now) to his designated institution:

Due to his religious observance, when Ronald self-surrenders to FDC Miami, he would have to be transferred by the BOP or the US Marshals to go to FPC Otisville, NY, or another BOP facility that would be able to accommodate his religious observances. During these transfers, there is little chance that his daily religious requirements could be accommodated, and he would be in daily violation of Jewish law.

See, Katz Letter attached to Katz Declaration. Katz' assertion that Lubetsky could not practice his faith while in transit is corroborated by information about the Justice Prisoner and Alien Transportation System (JPATS), which transports inmates around the United States. According to the U.S. Marshals website on JPATS, prisoners are not allowed *any* personal property while in transit. ¹



Without any access to personal property combined with detention in a variety of different facilities without clear policies on accommodating Orthodox Jewish practices consistent with RFRA, prisoner transport—for Lubetsky—through JPATS would be unlawful.²

¹ <https://www.usmarshals.gov/what-we-do/prisoners/transportation>

² Lubetsky, consistent with Fed. R. Evid. 201(c)(2) asks the Court to take judicial notice that “prisoners being transported through JPATS are not allowed to travel with money or other personal property.”

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II. RFRA STANDARDS

In 1993, Congress enacted RFRA in response to the Supreme Court’s decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*. See, *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014). *Smith* significantly altered decades of First Amendment free-exercise clause jurisprudence by permitting the government to substantially burden the free exercise of religion without demonstrating a compelling governmental interest provided the burden is the result of a “neutral, generally applicable law[.]” *City of Boerne v. Flores*, 521 U.S. 507, 514 (1997). Through RFRA, Congress sought “to restore the compelling interest test” discarded by *Smith*. 42 U.S.C. § 2000bb(b)(1).

RFRA, while now limited to the federal government, continues to sweep broadly into all aspects of federal law and regulation. *Hobby Lobby*, 134 S.Ct. at 2761; *Kikumura v. Hurley*, 242 F.3d 950, 959–60 (10th Cir.2001); *In re Young*, 141 F.3d 854, 863 (8th Cir.1998); *Mockaitis v. Harclerod*, 104 F.3d 1522, 1530 (9th Cir.1997); *Sasnett v. Sullivan*, 91 F.3d 1018, 1022 (7th Cir.1996), *vacated on other grounds*, 521 U.S. 1114 (1997); *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 470 (D.C.Cir.1996); *Flores v. City of Boerne*, 73 F.3d 1352, 1364 (5th Cir.1996), *rev'd on other grounds*, 521 U.S. 507 (1997). As the Court in *Flores* noted, RFRA “ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter.” *Flores*, 521 U.S. at 532. And RLUIPA, RFRA’s interpretive counterpart, provides prisoners with “expansive protection for religious liberty.” *Holt v. Hobbs*, 135 S.Ct. 853, 860 (2015).

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To make out a successful RFRA claim, Lubetsky must show that his (i) sincere (ii) religious exercise (iii) is being (or will be) “substantially burdened” by (iv) the “government.” *Hobby Lobby*, 134 S.Ct. at 2762 n.5 (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*, 134 S.Ct. 2751 at 2759 (alteration added).

(i) “Sincerity”

An individual seeking protection under RFRA must first show that their beliefs are sincerely held. *Holt*, 135 S.Ct. at 862. As the Court noted in *Cutter*, the Government “may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic.” *Cutter*, 544 U.S. at 725 n.13. But sincerity of belief is flexible. A person, for instance, could be sincere about certain aspects of his or her faith, but not others. *Lovelace v. Lee*, 472 F.3d 174, 188 (4th Cir. 2006).

(ii) “Exercise of Religion”

Both RFRA and RLUIPA “capaciously” define “exercise of religion” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” *Holt*, 135 S.Ct. at 860; 42 U.S.C. § 2000cc-5(7)(A). Further, as the Court in *Holt* noted, “this concept shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted.” *Holt*, 135 S.Ct. at 860 (internal quotations omitted).

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(iii) “Substantial Burden”

According to the Eleventh Circuit, “[t]he substantial burden inquiry under the RLUIPA “asks whether the government has substantially burdened religious exercise . . . , not whether the RLUIPA claimant is able to engage in other forms of religious exercise.” *Dorman v. Chaplains Office BSO*, 36 F.4th 1306, 1314 (11th Cir. 2022) (internal citations omitted). A substantial burden is “more than an inconvenience” and is “akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly[.]” *Id.* A substantial burden can “tend[] to force adherents to forego religious precepts” or “mandate[] religious conduct,” however; “these formulations are only examples—and not prerequisites—of a substantial burden.” *Id.*

(iv) “Government”

RFRA defines government as “a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity.” 42 U.S.C. § 2000bb-2(1). RFRA clearly applies to the Court’s orders, the U.S. Marshals Service, and the Federal Bureau of Prisons.

(vi) “Compelling Governmental Interest”

Once a person has shown that his or her sincere religious exercise is (or will be) substantially burdened, the burden then shifts to the government to “demonstrate” that application of the burden “to the person” is supported by a compelling governmental interest. *Holt*, 135 S.Ct. at 863 (alterations added). This is a “focused inquiry” that does not support reliance on “broadly formulated interest[s]” like general deterrence or ensuring compliance with the nation’s drug laws. *Id.* To the extent the Government might argue “if we do this for Lubetsky, we will have to do it for others,” the Supreme Court has made

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clear that this “classic rejoinder of bureaucrats throughout history” does not serve as a compelling interest under RFRA. *Gonzales v. O'Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006). As the Court made clear: “RFRA operates by mandating consideration, under the compelling interest test, of exceptions to “rule[s] of general applicability.” *Id.* (alterations in original).

(vii) “Least Restrictive Means”

Even if the Government could show that it has a compelling governmental interest it must demonstrate that it is applying the least restrictive means in furtherance of whatever “compelling governmental interest” it may advance. *Holt*, 135 S.Ct. at 865. This is an onerous burden. *Id.* As the *Holt* Court wrote, “RLUIPA ... demands that ... courts must hold [government] to their statutory burden, and they must not ‘assume a plausible, less restrictive alternative would be ineffective.’” *Id.* (alterations added).

III. ARGUMENT

(a) The Court’s Surrender Order Would Work a Violation of RFRA

a. Lubetsky Can Satisfy His *Prima Face* Case Under RFRA

Lubetstky’s *prima facie* case under RFRA requires that he show that the Government is (or imminently will be) substantially burdening his sincere exercise of religion. 42 U.S.C. §§ 2000bb-1(b). As discussed, the Court, its orders, the U.S. Marshals Service, and the BOP are covered by RFRA’s definition of Government. 42 U.S.C. § 2000bb-2(1). Moreover, RFRA “applies to *all* Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.” 42 U.S.C. §§ 2000bb-3(a) (emphasis added).

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Lubetsky's Orthodox Jewish beliefs plainly constitute the "exercise of religion," 42 U.S. Code § 2000bb-2(4), and there can be no reasonable question as to the sincerity of his beliefs. Thus, Lubetsky need only show that his "exercise of religion" is or will be substantially burdened to complete his *prima facie* case. Lubetsky can.

The Eleventh Circuit has held that a substantial burden exists when governmental action "tend[s] to force adherents to forego religious precepts." *Dorman*, 36 F.4th at 1314. Lubetsky recounts in his declaration how he is required to keep kosher, wear a tallit katan, don tefillin each day, honor the Sabbath, participate in communal Sabbath worship, eat a communal Sabbath meal with two loaves of challah, and participate and listen to Torah readings. Lubetsky Decl. ¶ 7. But as Rabbi Katz recounts, Lubetsky will not have his religious beliefs accommodated while at FDC Miami. Katz Decl. (generally). Additionally, post-sentencing, Lubetsky will be transported for service of his sentence through a process that does not allow him to retain any personal property, nor is it designed to accommodate the religious practices of Orthodox Jews like Lubetsky. Accordingly, a substantial burden exists.

b. The Government Does Not Have a Compelling Interest in Detention and Detention is Not the Least Restrictive Means Under RFRA

Lubetsky has been on bail since the inception of this case. There is no compelling governmental interest that requires that he be detained before sentencing. Indeed, given the significant RFRA interests present the Government has a compelling interest that he *not* be detained right now.

Lubetsky is scheduled to be sentenced on January 10, 2022. Lubetsky is not trying to get out of serving the sentence the Court imposes. He merely wishes to do so in a way that respects his religious beliefs consistent with RFRA. The BOP has the ability to

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accommodate Lubestky's religious practice at its facility in Otisville, New York. Allowing Lubetsky to surrender for service of his sentence there, or some other facility BOP designates that can accommodate his religious practice, post-sentencing, would be appropriate.

Finally, even assuming *arguendo* the Government could show a compelling interest in detention, it cannot demonstrate that detention, right now, is the least restrictive means under RFRA. There are ready, plausible less restrictive alternatives to immediate detention such as allowing Lubetsky to remain on bond until he surrenders for service of his sentence at the institution BOP ultimately designates him to.

IV. CONCLUSION

Based on the foregoing, the Court should continue its surrender order. Lubetsky should remain on bail and be required to surrender, post-sentencing, to the institution BOP designates Lubestky to for service of his sentence.

Date: December 1, 2022.

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Respectfully submitted,

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Pro Hac Vice Counsel for Ronald Lubetsky

CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that on November 30, 2022, I conferred with AUSA Frank Tamen about this motion. Mr. Tamen did not offer a position on the substantive motion at that time.

/s/Brandon Sample

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Unopposed Emergency Motion to Stay Surrender Order was duly filed and served upon counsel of record, via the Court's CM/ECF system, this 1st day of December, 2022.

By: /s/ Jonathan Meltz

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 1:21cr20485

RONALD STUART LUBETSKY,

Defendant.

DECLARATION OF RONALD STUART LUBETSKY

I, Ronald Stuart Lubetsky, declare under penalty of perjury that the following is true and correct:

1. I am over 63 years of age and make this declaration knowingly and voluntarily.
2. I am an Orthodox Jew.
3. I have been practicing Orthodox Judaism since I was a child.
4. I graduated from the Hillel Academy of Pittsburgh, an Orthodox Jewish day school, in 1976.
5. I have attended the following synagogues throughout my life:
 - a. Congregation Torath Chaim of Pittsburgh (Orthodox) 1971-1980
 - b. Chabad House of Ann Arbor, MI (Orthodox), 1980-1981
 - c. Harvard Hillel, Cambridge, MA (Orthodox minyan), 1981-1984
 - d. Chabad House of Westwood, Los Angeles, CA (Orthodox) 1984-1985
 - e. USF Chabad, Tampa, FL (Orthodox), 1985-1987
 - f. Albert Einstein Synagogue, Bronx, NY (Orthodox), 1987-1991
 - g. Riverdale Jewish Center, Bronx, NY (Orthodox), 1991-1992

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- h. Congregation Ohab Zedek, New York, NY (Orthodox), 1992-1995
 - i. East Denver Orthodox Synagogue (EDOS), Denver, CO (Orthodox), 1995-1997
 - j. Zichron Avraham at the Carriage House, Miami Beach, FL (Orthodox), 1997-2001
 - k. Aventura Chabad, Aventura, FL (Orthodox), 2001-2006
 - l. Young Israel of Aventura at the Waterways, Aventura, FL (Orthodox), 2006-2014
 - m. The Aventura Shul at Aventura Lakes, Aventura, FL (Orthodox), 2014-2019
 - n. Chabad of West Parkland, Parkland, FL (Orthodox), 2019-2021
 - o. Chai Center Chabad, Coral Springs, FL (Orthodox), 2021 to present
6. As an Orthodox Jew, I sincerely believe that I am required to strictly follow the tenets of the Jewish faith.

7. Those tenets include, but are not limited to:

- a. Wearing a tallit katan each day. A tallit katan is an undergarment that contains tzitzis. The Torah says in Numbers 15:38-39, "Speak to the children of Israel and say to them: They shall make for themselves fringes on the corners of their garments... And this shall be tzitzis for you, and when you see it, you will remember all the commandments of G-d, and perform them."



Figure 1 - Example of Tallit Katan

- b. Praying with tefillin each day. According to the Torah in Deuteronomy 6:5-9, "Love the Lord your G-d with all your heart, all your being, and all your might. These words that I am commanding you today must always be on your minds.

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Recite them to your children. Talk about them when you are sitting around your house and when you are out and about, when you are lying down and when you are getting up. *Tie them on your hand as a sign. They should be on your forehead as a symbol. Write them on your house's doorframes and on your city's gates.*"



Figure 2 - Photo of Tefillin



Figure 3 - Example Photo of Man Wearing Tefillin and a prayer shawl.

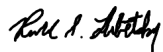
- c. Eating only kosher foods. Consuming non-kosher foods is inconsistent with kashrut and violates Jewish law.
- d. Participating in congregative worship each week as part of Shabbos, the Jewish sabbath, which begins at sundown every Friday and concludes at sundown on Saturday.
- e. Consuming a shared meal, after Shabbos prayer, that includes two loaves of challah bread. As the Torah in Exodus 16:22 states, "And it happened on the sixth day, they collected double the bread, two portions for each one."
- f. Hearing and participating in readings from a Torah scroll. The Torah contains the five books of Moses. The Torah is central to all of Judaism. Torah scroll readings typically take place four or more times per week, including on Shabbos.

RSL

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g. Judaism is my life. The tenets of my faith are of paramount importance to me.

Signed this 30th day of November, 2022.



Ronald Stuart Lubetsky

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 1:21cr20485

RONALD STUART LUBETSKY,

Defendant.

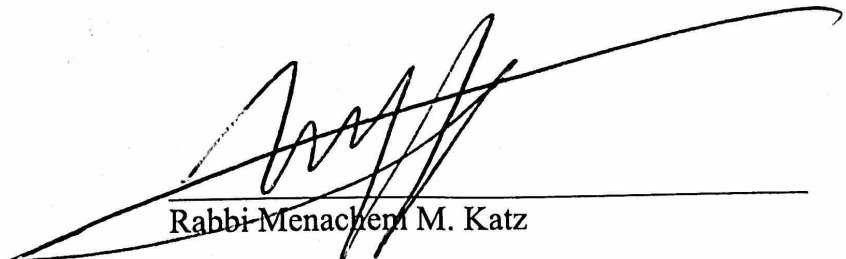
_____ /

DECLARATION OF RABBI MENACHEM M. KATZ

I, Rabbi Menachem M. Katz, declare under penalty of perjury that the following is true and correct:

1. I am over 18 years of age and make this declaration knowingly and voluntarily.
2. The November 29, 2022, letter attached to this declaration was authored by me and is a true and correct copy of same.
3. The statements contained in my November 29, 2022, letter are true and correct to the best of my knowledge, information and belief.

Signed this 30th day of November, 2022.



Rabbi Menachem M. Katz

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November 29, 2022

Rabbi Menachem M. Katz
Director of Outreach Programs

Joseph and Sterna Gutnick
NATIONAL HEADQUARTERS

To whom it may concern,

Chairman / Founder
Rabbi Sholom D. Lipskar

President
Lloyd S. Rubin

Executive Director
Rabbi Aaron Lipskar

Vice President
Ryan Shapiro

Secretary
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Director of Family Programs
Rabbi Shua Brook

Director of Military Programs
Rabbi Sanford L. Dresin

Director of Outreach Programs
Rabbi Menachem M. Katz

Chief Financial Officer
Yosie Lipskar

RE: BOP accommodating the practice and observances of Ronald Lubetsky, an Ultra-Orthodox Jewish defendant.

The Aleph Institute has been working with the Federal BOP for over 41 years. I have volunteered with the BOP for over 28 years, and through the years, I have personally experienced what happens within the system.

I applaud the BOP's effort to ensure that it has all the necessary policies and strives to meet the religious requirements of ultra-orthodox Jewish inmates. I am writing today as I am concerned about the immediate implementation of these policies in the case of Ronald Lubetsky.

Unfortunately, we have had recent instances where it took up to a week to get an inmate a Kosher meal at FDC Miami. There were many times when, sadly, it took days to get inmates their daily prayer materials (prayer shawl and Phylacteries). As I understand, there is no Torah Scroll at FDC Miami, Ronald's designation, and the Jewish inmates there do not meet as a group for weekly Shabbat Services.

Due to his religious observance, when Ronald self-surrenders to FDC Miami, he would have to be transferred by the BOP or the US Marshals to go to FPC Otisville, NY, or another BOP facility that would be able to accommodate his religious observances. During these transfers, there is little chance that his daily religious requirements could be accommodated, and he would be in daily violation of Jewish law. If Ronald were allowed to self-surrender to FPC Otisville after his sentencing, his religious needs would be accommodated from day one.

Ronald has taken steps to make the most of his time before his sentencing. He agreed to begin attending a weekly Zoom class entitled "Crime and Consequences," on business ethics from a religious standpoint, given by Rabbi Yossi Bryski, on Monday evenings. The class is geared towards religious law on business ethics. If Ronald were to self-surrender now, he would lose the opportunity to immerse himself in these lessons.

Ronald attends Sabbath services at the Chai Center every weekend. He hope he can continue to attend services up until sentencing.

Please allow Ronald to remain out until the BOP designates him so he can continue to observe and practice his religion.

Thank you for your care and concern.

Rabbi Menachem M. Katz

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Spark of Light Prison Program

Operation: Enduring Traditions Military Programs

F.E.E.L.S Family Program



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 1:21cr20485

RONALD STUART LUBETSKY,

Defendant.

_____ /

UNOPPOSED EMERGENCY MOTION TO STAY SURRENDER ORDER

Ronald Stuart Lubetsky, by and through the undersigned counsel, respectfully moves for a stay of the Court's November 4, 2022, order directing Lubetsky to surrender to the U.S. Marshals Service on December 5, 2022, at 12:00 p.m. (ECF 58). A stay is needed in order to preserve the status quo while the Court considers Lubetsky's separate, substantive motion that seeks postponement of his surrender until the Bureau of Prisons designates Lubetsky's place of imprisonment post-sentencing.

On November 30, 2022, AUSA Frank Tamen, on behalf of the Government, very graciously advised that the United States does "not object to a short delay of the surrender for purposes of having a measured ruling on the underlying motion."

Wherefore, premises considered, the Court should stay its surrender order (ECF 58) until it disposes of Lubetsky's Motion to Continue Surrender (ECF _____).

Date: December 1, 2022.

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Respectfully submitted,

CHAPMAN LAW GROUP

/s/ Jonathan Meltz

Jonathan Meltz

FL Bar No.: 096504

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Miami, FL 33126

jmeltz@chapmanlawgroup.com

T: (305) 712-7177

Counsel for Ronald Lubetsky

BRANDON SAMPLE PLC

/s/Brandon Sample

Brandon Sample

VT Bar No. 5573

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Washington, DC 20006

brandon@brandonsample.com

T: (202) 990-2500

Pro Hac Vice Counsel for Ronald Lubetsky

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CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that on November 30, 2022, I conferred with AUSA Frank Tamen about this motion and was advised that the United States is unopposed.

/s/Brandon Sample

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Unopposed Emergency Motion to Stay Surrender Order was duly filed and served upon counsel of record, via the Court's CM/ECF system, this 1st day of December, 2022.

By: /s/ Jonathan Meltz

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**UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA**

CASE NO.: 21-20485-CR-MIDDLEBROOKS

UNITED STATES OF AMERICA,

vs.

RONALD LUBETSKY,

Defendant.

**GOVERNMENT'S RESPONSE TO DEFENDANT'S
MOTION TO DELAY SURRENDER**

Defendant Ronald Lubetsky has filed a motion seeking to delay his surrender to prison until after he is sentenced and designated to a specific Bureau of Prisons institution. He claims that beginning his incarceration at the Federal Detention Center in Miami on Monday, December 12, as ordered by the Court, will necessarily impinge on his religious practices. He seeks the extension because he assumes that he will be designated to a prison that makes extensive accommodations to observant Orthodox Jews, and that this extension will thus allow him to avoid such impingement.

While the Religious Freedom Restoration Act relied on by the defendant is designed to ameliorate the effects of government actions on the free exercise of religion, there are practical limits to what accommodations can be made for convicted criminals facing incarceration. There are also distinctions to be made 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. The degree of protection the law affords to the former is necessarily much greater than the deference afforded to the latter.

Undersigned Government counsel does not intend to get involved in a theological discussion here. However, it should be obvious to the court that having kosher food is of

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considerably more consequence to an observant Jew than being able to eat from two challahs on the Sabbath eve. The former is commanded directly by the Torah, the Jewish Holy Scripture; the latter only a custom. The former is provided for by the Bureau of Prisons, the latter, not very likely.

Attached hereto is a Declaration on behalf of the Federal Detention Center in Miami (designated as "MIM" by the Bureau of Prisons). This Declaration makes clear that the expressed fears of the defendant about constrictions on his religious practices are largely unfounded, and that the Federal Detention Center's Chaplain will graciously go to great lengths to assist him in observing the most important aspects of his religious beliefs.

Title 18, United States Code, Sections 3142 and 3143 call for the detention upon conviction of a person convicted of a controlled substance offense. Moreover, the sentencing guidelines applicable to the defendant's offenses will call for a sentence of a number of years. Being incarcerated for federal felony convictions unavoidably affects almost any very observant defendant's religious practices. However, the attached Declaration makes it clear that requiring the defendant to surrender to FDC Miami on December 12 will not unnecessarily or illegally interfere with his exercise of his principle religious requirements.

The defendant's motion should therefor be denied.

Respectfully submitted,

JUAN ANTONIO GONZALEZ
UNITED STATES ATTORNEY

By: /s/ Frank H. Tamen
Frank H. Tamen
Assistant United States Attorney
Florida Bar No. 261289
99 Northeast 4th Street
Miami, Florida 33132-2111
Tel: (305) 961-9022
Frank.Tamen@usdoj.gov

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that today, December 7, 2022, the undersigned electronically filed the foregoing document, Government's "Response to Defendant's Motion to Delay Surrender," with the Clerk of the Court using CM/ECF.

By: Frank H. Tamen
Assistant U.S. Attorney

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 1:21-cr-20485-DMM

UNITED STATES OF AMERICA,
Plaintiff,

v.

RONALD STUART LUBETSKY,
Defendant.

DECLARATION OF K. KLETT

1. I am currently employed by the United States Department of Justice, Federal Bureau of Prisons (BOP), as an attorney at the Consolidated Legal Center (CLC) located in Miami, Florida. This CLC provides legal services to the following institutions: FDC Miami (MIM), FCI Miami, FCI Tallahassee, FPC Pensacola and FCI Marianna.

2. I discussed the religious accommodations available at MIM with Thomas Johnson, Supervisory Chaplain on December 1, 2022. Prior to our discussion, I provided Chaplain Johnson with a copy of the affidavit signed by Rabbi Menachem M. Katz of the Aleph Institute. Chaplain Johnson was not at the institution today to provide a declaration, thus necessitating this declaration summarizing our discussion.

3. The mission of the Chaplaincy Services department is to accommodate the free exercise of religion by providing pastoral care to all federal inmates and facilitating opportunities to pursue individual religious beliefs and practices in accordance with the law, Federal regulations and Bureau of Prisons policy. The department provides religious worship, education, counseling, spiritual direction, support and crisis intervention to accommodate the diverse religious needs of inmates. To fulfill this mission, MIM provides accommodations for religious practices considering the least restrictive alternatives that are consistent with the security and orderly running of the institution and religious resources are equitably distributed for the benefit of all inmates. The Chaplaincy Services department provides guidance to other departments on the accommodation of religious practices in the correctional setting.

Religious Property

4. Inmate religious property includes but is not limited to rosaries and prayer beads, oils, prayer rugs, phylacteries, medicine pouches, and religious medallions. Such items, which become part of an inmate's personal property, are subject to normal considerations of safety and security.

5. Inmates first coming into custody are allowed to keep personal religious items in accordance with the Program Statement No. 5580.08, *Inmate Personal Property* (available at www.bop.gov). After intake, inmates can purchase personal religious property from either commissary or through an approved catalogue source using the BP-A0200, Special Purpose Order

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Request – Inmate. No religious item can have a monetary value greater than \$100.

6. Inmates who have a SENTRY religious preference of “Jewish” are authorized to wear the following religious headwear throughout the institution when consistent with security: Yarmulke (black or white). Religious headwear worn throughout the institution may not be altered. With regard to ritual underclothing, the tallis katan or tzitzis, a small four-cornered garment, is authorized for Jewish male inmates.

7. At MIM, an inmate may arrive at intake with the following items on his/her person: (1) Torah; (2) prayer shawl; (3) phylacteries and (4) ritual underclothing, the tallis katan or tzitzis, a small four-cornered garment.

8. MIM has extra prayer shawls and Tefillin or phylacteries to provide to inmates until his/her religious articles are sent to the institution. To send in religious articles, an inmate needs to complete a package authorization form which is reviewed by Religious Services and once approved, the inmate is permitted to have the specific articles sent to him.

9. MIM also has Torahs available to inmates upon request.

Religious Diet

10. The Bureau provides inmates requesting a religious diet reasonable and equitable opportunity to observe their religious dietary practice within the secure and orderly running of the institution. At MIM, inmates approved for the religious diet program are provided with nationally recognized, religiously certified processed foods (e.g., halal and kosher). These meals are prepackaged and double wrapped in order to preserve the integrity of the religious certification.

11. To participate in the religious diet program, an inmate submits a written request articulating the religious motivation for participation in the religious diet program and a Chaplain will ordinarily conduct an oral interview of the inmate, in order to document the inmate’s purported religious dietary needs. Under normal operations, within 24 hours of Chaplain approval, the Chaplain will enter inmates approved to participate in the religious diet program into the SENTRY religious diet participant list. Under normal operations, Food Service will begin serving those approved for the certified processed food line within two days of SENTRY notification.

12. Chaplains and Food Service staff monitor the SENTRY religious diet participant list daily to ensure all eligible inmates are served religious diet meals with minimal delay upon intake or re-designation.

13. Chaplaincy Services will be available on 12/5/2022, to interview inmates who request a religious diet at intake. It is my understanding Chaplaincy Services are available to conduct this type of interview until 1:30 PM on 12/5/2022. If an individual arrives to intake after that time, he/she would be interviewed about his/her religious diet request on the following day.

Shabbat Services

14. Prior to the COVID-19 pandemic, MIM provided weekly Shabbat services for

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Jewish inmates. However, due to the pandemic MIM has not been able to provide weekly congregate group services for any religious or other programming group in accordance with nationwide BOP protocols to mitigate the spread of COVID-19. Under the national BOP protocol, there are 3 operating levels (minimum restrictions to heavily modified operations). The specific operating level depends on factors including the current community transmission rate, number of institutional cases, vaccination rate, etc. MIM has been operating at the most restricted operations level (Level 3) throughout the pandemic due to the inmate vaccination rate and high community transmission rate. Recently, the operating level transitioned to the least restrictive level (Level 1). If it remains in Level 1 operations pursuant to the BOP nationwide protocol, then congregate services, including weekly Shabbat services, will be provided again.

15. Guidance on group programming is forthcoming since MIM only recently returned to Level 1 after operating with Level 3 restrictions since 2020.

Torah Scroll

16. There is no Torah scroll at MIM. MIM only has a Torah scroll when Aleph Institute brings one in and it only remains at MIM for a prescribed time period. Prior to the pandemic, inmates were only provided access to this Torah scroll from Aleph Institute when volunteers were present due to concerns about damage by inmates.


Transit

17. Per Program Statement No. 5360.10, *Religious Beliefs and Practices*, inmates in transit are permitted by policy to have their essential daily prayer items (tallis, tefillin, yarmulke, and prayer book) transported on the same conveyance (bus, van, aircraft). Inmates will have access to these items for daily use at all holdover points. It is the responsibility of the inmates to return prayer items the next day to R&D until the final destination has been reached.

18. Additional information on general procedures, guidelines, and programs available is provided in Program Statement No. 5360.10, *Religious Beliefs and Practices*, available at www.bop.gov.

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

Executed this 2nd day of December 2022.



K. Klett
CLC Attorney
FDC Miami

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 1:21cr20485

RONALD STUART LUBETSKY,

Defendant.

_____/

**REPLY TO UNITED STATES' RESPONSE TO
MOTION TO CONTINUE SURRENDER**

Ronald Stuart Lubetsky, by and through the undersigned counsel, respectfully submits this Reply to the United States' Response (ECF 73) to Lubetsky's Motion to Continue Surrender.

I. The Government's Arguments

The Government in its response recognizes, generally, the importance of the Religious Freedom Restoration Act (RFRA). (ECF 73 at 1). Nevertheless, the Government's response does not address, in any particular fashion, RFRA's individual elements or the plethora of case law Lubetsky put forward in his initial motion. Instead, the Government argues, without citation to authority, that:

There are also distinctions to be made 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. The degree of protection the law affords to the former is necessarily much greater than the deference afforded to the latter.

(ECF 73 at 1). The Government next says that it "does not intend to get into a theological discussion" in its response, but then basically argues that keeping kosher is more important

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than having a Sabbath meal over two loaves of bread. (ECF 73 at 1-2). The Government says that kosher meals are provided by the BOP, challah “not very likely.” (ECF 73 at 2).

The Government offers a declaration from a Bureau of Prisons attorney which is based on conversations with the institution’s chaplain. (ECF 73 at 4-6). The Government says the declaration shows that Lubetsky’s concerns are “*largely* unfounded” and that the BOP will assist Lubetsky “in observing *the most important aspects* of his religious beliefs.” (ECF 73 at 2) (emphasis added).

The Government then concludes that 18 U.S.C. § 3142 and 3143 call for detention in controlled substances cases, the Guidelines will recommend “a number of years,” incarceration affects any “very observant defendant,” and the Court’s surrender order will not interfere with Lubetsky’s exercise of his “*principle* religious requirements.” (ECF 73 at 2)(emphasis added).

II. Lubetsky Has Met His *Prima Facie* RFRA Case

There are three things about Lubetsky’s *prima facie* case that the Government does not dispute: (1) the sincerity of Lubetsky’s beliefs; (2) that Lubetsky’s beliefs constitute the “exercise of religion” as that phrase is defined by 42 U.S.C. § 2000cc-5(7)(A); and that the Court, the United States and the BOP are “government” under RFRA. Without specifically using the phrase “substantial burden,” the Government seems to argue that Lubetsky’s beliefs will not be substantially burdened because the BOP in Miami will be able to accommodate *some* of his beliefs, or as the Government says, “*the most important aspects* of his religious beliefs.” (ECF 73 at 2).

The Court, in assessing whether its surrender order would work a substantial burden *may not* “inquire into whether [Lubetsky] prefers one sort of religious exercise over

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another.” *Smith v. Comm'r, Ala. Dep't of Corr.*, 844 F. App'x 286, 290-91 (11th Cir. 2021) (alterations added). Additionally, the Court *must* hold that “the availability of alternative means of practicing religion is not a relevant consideration.” *Id.* This is because, as the Supreme Court has made clear, the substantial burden test does not ask a court to decide “whether the RLUIPA claimant is able to engage in other forms of religious exercise.” *Holt v. Hobbs*, 574 U.S. 352, 361-62 (2015). The proper focus of the substantial burden analysis is whether Lubetsky is being “pressure[d], force[d], or coerce[d] [...] to abandon, forego, conform, or delay any of [his] religious beliefs or practices.” *Dorman v. Chaplains Office BSO*, 36 F.4th 1306, 1314 (11th Cir. 2022)(alterations added). Lubetsky is.

The Government readily admits that it cannot accommodate all of Lubetsky’s specific beliefs, offering instead to address what the Government believes are “*the most important aspects*” of Lubetsky’s “religious beliefs.” (ECF 73 at 2). But this is not the correct legal test, and even if it were, the Government’s own declaration demonstrates that Lubetsky may go without kosher food for several days upon admittance to the federal prison in Miami. Klett Decl. ¶¶ 11-13. This because the bureaucratic process for getting kosher food there requires an interview, permits 24 hours for chaplaincy staff to enter the approval in the BOP systems thereafter, and then gives food service staff another 48 hours to actually begin accommodating someone. *Id.* This delay alone is a “substantial burden” under RFRA. The BOP would surely provide insulin each day to newly admitted diabetic inmates. An individual’s rights under RFRA are not second-class.

A substantial burden exists because the Government cannot accommodate Lubetsky’s identified “exercise of religion.” It refuses to presently accommodate congregate Sabbath services, the provision of two loaves of challah bread with Sabbath

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services, Torah *scroll* readings, and it cannot ensure that Lubetsky will be able to practice *all* of his beliefs while in transit from Miami to his ultimate designated institution.

III. The Government Has Not Demonstrated A Compelling Governmental Interest Nor Has It Satisfied The Least Restrictive Means Test

The Government's response does not identify a compelling governmental interest for detention come Monday. To the extent the Government's bare reference to the *general* statutory requirement of detention after conviction for drug crimes, and that the Guidelines will recommend a sentence of imprisonment as its compelling interest—that itself is not enough. RFRA purposefully mandates, “under the compelling interest test, [] exceptions to “rule[s] of general applicability.” *Gonzales v. O'Centro Espirita Beneficente União do Vegetal*, 546 U.S. 418, 436 (2006)(alterations added). Lubetsky has been on bond throughout the case. There is no suggestion that he is a flight risk. There is no compelling interest in detention.

Finally, even assuming *arguendo* the Government has demonstrated a compelling governmental interest, as applied to Lubetsky, it most certainly cannot show that detaining him is the least restrictive means under RFRA. “[I]t is the government's burden to establish that there are no less restrictive means to adequately address its important interest.” *Ray v. Comm'r, Ala. Dep't of Corr.*, 915 F.3d 689, 701 (11th Cir. 2019). And if the Government claims “there are no less restrictive means, [...] the government must show [the Court] *how and why that is so.*” *Id.* (emphasis and alterations added). The Government has done none of this.

IV. Conclusion

The Court should allow Lubetsky to remain on bail until sentenced and then permit Lubetsky to self-surrender to the institution BOP designates him to. Lubetsky will be

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sentenced in a little more than 30 days. Lubetsky is not asking to avoid imprisonment all together—he understands the Court is likely to sentence him to a period of imprisonment. He merely wishes to make the transition to incarceration in a way that truly respects his deeply held religious beliefs and practices as protected by RFRA. This is not an unreasonable request.

Respectfully submitted,

CHAPMAN LAW GROUP

/s/ Jonathan Meltz
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Miami, FL 33126
jmeltz@chapmanlawgroup.com
T: (305) 712-7177

Counsel for Ronald Lubetsky

BRANDON SAMPLE PLC

/s/Brandon Sample
Brandon Sample
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1701 Pennsylvania Ave. N.W. # 200
Washington, DC 20006
brandon@brandonsample.com
T: (202) 990-2500

Pro Hac Vice Counsel for Ronald Lubetsky

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was duly filed and served upon counsel of record, via the Court's CM/ECF system, this 8th day of December, 2022.

By: /s/ Jonathan Meltz

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 1:21cr20485

RONALD STUART LUBETSKY,

Defendant.

_____ /

OPPOSED EMERGENCY MOTION FOR STAY PENDING APPEAL

Ronald Stuart Lubetsky, by and through the undersigned counsel, respectfully moves for an emergency stay of the Court's (A) December 2, 2022, order (ECF 73) directing Lubetsky to surrender to the U.S. Marshals Service by 12:00 noon on December 12, 2022, and (B) December 8, 2022, order (ECF 75) denying Lubetsky's Motion to Continue Surrender and redirecting Lubetsky to surrender to the U.S. Marshals Service by 12:00 noon on December 12, 2022. A ruling on this emergency motion is requested by close of business on December 8, 2022.

The Court must consider four factors when deciding whether to issue a stay: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009). As argued herein, each factor weighs in favor of Lubetsky.

First, Lubetsky has made a strong showing that he is likely to succeed on the merits in his appeal. Lubetsky argued in his Motion to Continue to Surrender that the Government

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would not accommodate his sincerely held “exercise of religion,” consistent with the Religious Freedom Restoration Act (RFRA), if he surrenders. *See*, ECF 68. The Government responded to Lubetsky’s motion; (a) without addressing the case law provided by Lubetsky; (b) without contesting that Lubetsky’s beliefs are sincere; (c) conceding the BOP will not accommodate or will delay accommodation of some of Lubetsky’s sincerely held beliefs; (d) suggesting that the Court can pick and choose which of Lubetsky’s beliefs are important enough to warrant protection under RFRA; (e) without clearly addressing what the Government’s compelling interest is in detention, as applied to Lubetsky, (f) and without—at all—discussing the *Government’s* obligation to *demonstrate* that detention is the least restrictive means under RFRA. Lubetsky’s reply addresses many of the deficiencies in the United States’ response (ECF 71). Based on the arguments in Lubetsky’s original motion (ECF 68) and reply (ECF 71), he has shown a substantial likelihood of success in an appeal.

The remaining factors also tilt in Lubetsky’s favor. Lubetsky’s rights under RFRA are important. The Eleventh Circuit has previously issued a stay of execution based on plausible allegations of a RLUIPA violation. *Ray v. Comm’r, Ala. Dep’t of Corr.*, 915 F.3d 689 (11th Cir. 2019). The Government will not be injured in any way if a stay is issued, and ensuring that Lubetsky’s RFRA rights are honored is in the public interest.

Lubetsky acknowledges the Court’s order which indicates, in part, that Lubetsky did not previously ask for a continuance of his surrender date based on RFRA. (ECF 72 at 1). Unfortunately, Lubetsky only recently became aware of the BOP’s inability or refusal to accommodate his exercise of religion. Thus, to the extent the Court’s order suggests Lubetsky may have purposefully delayed in bringing the matter to the Court’s attention,

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this is not true. And undersigned counsel, particularly *pro hac vice* counsel, Mr. Sample, has worked diligently to brief these important issues thoroughly and competently for the Court's review.

Based on the foregoing the Court should stay its surrender order pending appeal.

RULE 7.1(d) CERTIFICATION

In accordance with Rule 7.1(d), after reviewing the facts and researching applicable legal principles, I certify that this motion in fact presents a true emergency (as opposed to a matter that may need only expedited treatment) and requires an immediate ruling because the Court would not be able to provide meaningful relief to a critical, non-routine issue after the expiration of seven days. I understand that an unwarranted certification may lead to sanctions.

The Court has ordered Lubetsky to surrender to the U.S. Marshals' Service on December 12, 2022, by 12:00 noon. The Court denied Lubetsky's motion to continue mere hours ago on December 8, 2022. Lubetsky intends to appeal the Court's order to the Eleventh Circuit. Without a stay pending appeal, neither this Court, nor the Eleventh Circuit, can afford Lubetsky meaningful relief for his asserted violation of RFRA.

Respectfully submitted,

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Pro Hac Vice Counsel for Ronald Lubetsky

CERTIFICATE OF CONFERENCE

I HEREBY CERTIFY that on December 8, 2022, I conferred with AUSA Frank Tamen about this motion and was advised that the Government is opposed.

/s/Brandon Sample

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Unopposed Emergency Motion to Stay Surrender Order was duly filed and served upon counsel of record, via the Court's CM/ECF system, this 8th day of December, 2022.

By: /s/ Jonathan Meltz

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO. 1:21cr20485

RONALD STUART LUBETSKY,

Defendant.

_____ /

NOTICE OF APPEAL

Ronald Stuart Lubetsky, by and through the undersigned counsel, hereby gives Notice of Appeal from the Court's: (A) December 2, 2022, order (ECF 73) directing Lubetsky to surrender to the U.S. Marshals Service by 12:00 noon on December 12, 2022, and (B) December 8, 2022, order (ECF 75) denying Lubetsky's Motion to Continue Surrender and redirecting Lubetsky to surrender to the U.S. Marshals Service by 12:00 noon on December 12, 2022, to the U.S. Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Pro Hac Vice Counsel for Ronald Lubetsky

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was duly filed and served upon counsel of record, via the Court's CM/ECF system, this 8th day of December, 2022.

By: /s/ Jonathan Meltz