

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

DANIEL GREER

Plaintiff,

-v-

CONNECTICUT DEPARTMENT OF
CORRECTION; CHESHIRE CORRECTIONAL
INSTITUTION; and ROLLIN COOK,
Commissioner for the Department of Correction
in the State of Connecticut,

Defendants.

Civil Action No. 3:20-cv-00350-JAM
MARCH 27, 2020

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF
PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION**

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PRELIMINARY STATEMENT

Defendants effectively concede that Rabbi Greer has demonstrated an entitlement under RLUIPA to food on Passover that is kosher according to his Orthodox religious beliefs. They have not disputed the sincerity of his Orthodox religious beliefs or their obligation to accommodate those beliefs, and they have failed to show a compelling government interest justifying their failure to provide Rabbi Greer with an appropriate kosher for Passover diet. In an effort to avoid this reality, Defendants engage in misdirection—citing cases that either do not involve RLUIPA, pre-date RLUIPA, or both, and arguing, based on the opinion of a non-Orthodox rabbi, that CTDOC will provide kosher for Passover meals acceptable to Rabbi Greer’s beliefs. But competent evidence, including the opinion of an Orthodox rabbi, and Rabbi Greer himself, shows that the food CTDOC will provide does not qualify as kosher for Passover for Orthodox Jews. Defendants also throw up a host of other non-merits-based objections, including that Rabbi Greer has not exhausted the administrative remedy process, that “congregate gatherings”—something Rabbi Greer does not even seek—are prohibited, and that the Court lacks supplemental jurisdiction over the Connecticut RFRA claim. Each argument is more meritless than the last, and none overcomes the fact that Rabbi Greer is entitled to the injunctive relief he seeks.

ARGUMENT

I. CTDOC CANNOT ESCAPE THAT RABBI GREER HAS SHOWN A LIKELIHOOD OF SUCCESS ON THE MERITS.

The only requirement for a preliminary injunction contested by Defendants is whether Rabbi Greer has shown a likelihood of success on the merits. The evidence, and the law, show that he has.

A. Rabbi Greer Will Prevail On His RLUIPA Claim Because Defendants Have Not Shown a Compelling Government Interest Justifying Their Failure to Provide Him with Kosher for Passover Food.

As set forth in Rabbi Greer’s opening brief—and uncontested by Defendants here (*see* Opp. at 30)—under RLUIPA, once a prisoner establishes his religious sincerity and a substantial burden on his religious exercise, the burden shifts to the state to justify that burden based on a compelling government interest, which it enforces using the least restrictive means. *See* 42 U.S.C. § 2000cc-1(a). Defendants do not dispute either Rabbi Greer’s sincerity or that their failure to provide him with an acceptable religious diet for Passover will substantially burden his religious beliefs, but they do not justify their failure with a compelling government interest.

Instead, Defendants assert that CTDOC’s “policies and practices involving Common Fare with regard to . . . Orthodox Jewish religious practices have been subject to continuous court scrutiny for nearly thirty years” and have “been judicially scrutinized, ha[ve] withstood such judicial scrutiny and ha[ve] been given the imprimatur of approval from this this [*sic*] District Court which has declared with uniformity in numerous cases that Common Fare does not violate the constitutional or federal statutory rights under RLUIPA rights of Orthodox Muslim or Orthodox Jewish inmates.” (*Id.*) Whether or not any of that sentence is actually true, it is entirely irrelevant here. For purposes of this action, Rabbi Greer does not specifically challenge the Common Fare diet; he challenges the sufficiency of CTDOC’s kosher for Passover diet, which is an entirely distinct issue. And Defendants show no compelling government interest in not providing Rabbi Greer the kosher for Passover food he seeks and his religious beliefs require.

Although they appear to suggest that cost could be a compelling government interest (Opp. at 27), Defendants ignore entirely the substantial case law Rabbi Greer cited in his opening brief demonstrating that cost is *not* a compelling government interest. And cost could not possibly be a compelling government interest here, where Rabbi Greer only seeks kosher for Passover meals for

nine days *and is willing to pay for them*. (Greer Decl. ¶ 24.) Only the protection of public health, safety, or welfare qualify as compelling government interests. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Defendants’ failure to contest the law cited by Rabbi Greer on this issue waives any argument they now might make to the contrary. *See Packer v. SN Servicing Corp.*, 250 F.R.D. 108, 112 (D. Conn. 2008) (refusing to consider argument where “[t]he Court cannot identify any discussion of this issue” in plaintiffs’ opposition brief); *In re UBS AG Sec. Litig.*, 2012 WL 4471265, at *11 (S.D.N.Y. Sept. 28, 2012) (explaining a plaintiff “concedes through silence” arguments by defendants that it fails to address in its opposition brief).¹

In sum, the Court’s analysis of the likelihood of success of Rabbi Greer’s RLUIPA claim should end here: Defendants’ total failure to show a compelling government interest in denying him kosher for Passover food shows that Rabbi Greer will succeed in this action.

B. CTDOC Fails to Show that it Provides a Kosher for Passover Diet.

CTDOC would have the Court believe that the supposedly kosher for Passover food it plans to serve Rabbi Greer for Passover is sufficient and, therefore, moots this case. Not so. The declarations supplied by John Deluca and Rabbi Praver demonstrate that CTDOC will not, in fact, provide kosher for Passover food.

As Rabbi Greer is indisputably an Orthodox Jew, the only opinion that matters with respect to whether the laws of *kashrus* are being followed for Passover is the opinion of an expert on Orthodox kosher rules. Rabbi Praver may be knowledgeable about the laws of kosher,

¹ Defendants’ self-serving citation to *Kramer v. Dep’t of Correction*, 2019 WL 4805152, at *10 (D. Conn. Sept. 30, 2019) is inapposite. Defendants have not argued here that special treatment is their reason for denying Rabbi Greer’s request, but as explained in the opening brief, special treatment is not a compelling government interest, nor could it be since accommodating religious beliefs necessarily requires some level of special treatment. (*See* ECF No. 4 at 13-14.) There is also no way Rabbi Greer’s limited request—*which he would pay for*—would “strain logistical and financial resources,” *Kramer*, 2019 WL 4805152, at *10, and any suggestion that the prepackaged kosher for Passover meals Rabbi Greer would receive could be unsafe or contain contraband is absurd and also beside the point since CTDOC would be free to check the food before serving it. (Greer Decl. ¶ 25.)

and he may interact with many Jewish prisoners in his role as a chaplain, but his professional experience is not with Orthodox Judaism, and he is therefore not the right person to opine on the appropriateness of CTDOC's kosher for Passover menu.² It is especially telling that while CTDOC also employs an Orthodox rabbi, Rabbi Eli Ostrozyński (*see* Opp. at 2), he has not offered an opinion on CTDOC's purportedly kosher for Passover food. Nonetheless, even accepting Rabbi Praver's declaration at face value, there are several reasons why CTDOC's kosher for Passover food is inadequate.

First, while Mr. Deluca and Rabbi Praver claim that all items on the Passover menu have a kosher for Passover designation, they do not substantiate that claim. Mr. Deluca cites to an Orthodox Union ("OU") certification that lists only cake meal and *matza* products (ECF No. 25-4 ¶ 11 & Ex. A; ECF No. 25-6 ¶ 3), despite CTDOC's purported Passover menu including items not included on the OU certification list, such as boiled eggs, celery, baked potatoes, butter pats, tuna, and juice. (*See id.* Ex. B.) To be kosher for Passover, the food must itself be certified kosher for Passover, and it must be prepared in a manner that maintains that status. (Deren Reply Decl. ¶ 9.) The items on the Passover menu do not appear to be certified kosher for Passover, and moreover, they require preparation that renders them non-kosher for Passover. (*Id.*) Food loses its kosher for Passover designation if it is (1) prepared in a kitchen that has not been adequately cleaned for Passover (as described in Rabbi Deren's initial declaration), or (2) if it is not prepared in accordance with kosher for Passover law, *e.g.*, it comes into contact with leavened products. (*Id.* ¶ 10.)

Here, if certified and sealed kosher for Passover products are opened and prepared in the

² His declaration makes no mention of his qualifications, but Rabbi Praver served for more than a decade as a rabbi at a conservative (*i.e.*, non-Orthodox) synagogue. *See* <http://www.jewishledger.com/2015/06/newtowns-rabbi-leaves-the-pulpit/>.

Cheshire Correctional kitchen under the circumstances described by the Defendants, they will be made non-kosher for Passover. (*Id.*) Defendants note that “extreme precautions are taken and maintained during the perpetrating [*sic*] of these Passover meals to ensure that everything is separated” (Opp. at 24), but merely keeping kosher for Passover items separate from other kosher and non-kosher items is insufficient to ensure they maintain that status, as food considered kosher for Passover must have been processed under Orthodox rabbinic supervision. (Deren Reply Decl. ¶ 12.) Defendants further claim the meals are served in “closed clamshell containers, which are wrapped... so that the meals could not possibly be contaminated by anything non-[k]osher” (Opp. at 5), but a kosher for Passover item can only retain that status by avoiding contamination at every step of preparation and, as detailed by Rabbi Deren, the possibilities for contamination are endless. (Deren Reply Decl. ¶ 14.) It is therefore unsurprising that Defendants are silent as to whether the separate area where food is prepared is reserved for Passover year-round (which is unlikely). They do not explain whether the separate area is cleaned before Passover consistent with the laws of *kashrus*, nor do they state whether there is a separate refrigerator for Passover items, whether the white paper is fastened in any way to the table, whether it is a single layer, and what the procedure is when it rips. (*Id.* ¶ 15.)

Second, to the extent kosher for Passover products undergo any sort of preparation at Cheshire Correctional, a Sabbath-observant Jew must supervise the entire process for those products to maintain their designation. (*Id.* ¶ 16.) That Sabbath-observant Jew would need to be the only person with the key to the locked area in order to satisfy the minimum requirements of Jewish law ensuring food retains its kosher for Passover status. (*Id.*) Without such supervision, the food can easily be contaminated. (*Id.* ¶ 17.) Rabbi Praver relies instead on *yotzei v'nichnas*, which refers to unannounced spot-checks (ECF No. 25-6 ¶ 3), *but he does not actually say that*

such checks are conducted at Cheshire Correctional, only that the practice is “increasing in frequency” within state facilities. (Deren Reply Decl. ¶ 18.) In any event, this principle only applies in specific situations, typically when there are strong reasons to believe the food will be prepared in accordance with Jewish law. (*Id.*) And the practice hinges on the staff assuming the rabbi may enter at any moment, and that there will be severe consequences in the event he discovers any violations, points on which Rabbi Praver is understandably silent because those factors are not present here. (*Id.*)

Third, while Jewish inmates who sign up for Passover meals will receive six boxes of kosher for Passover *matza* (Opp. at 4, 9), Defendants, who provide a list with several kosher for Passover items that are certified by the OU, a recognized arbiter of what food qualifies as kosher for Orthodox Jews (ECF No. 25-4 at Ex. A), do not confirm whether the *matza* provided to inmates is, in fact, an item from that list. (Deren Reply Decl. ¶ 6.) Defendants also fail to indicate whether the *matza* is delivered to inmates in a manner that maintains its kosher for Passover status. (*Id.*) Moreover, the *matza* required for the *seder* needs to be handmade *shmura matza*, made with flour that has been supervised from the time the wheat was harvested in the field, to ensure it never came into contact with leavened products or became leavened. (*Id.* ¶ 7.) Defendants do not confirm that handmade *shmura matza* will be provided.

Finally, while the *seder* plate must include bitter herbs, haroses, a vegetable, an egg, and a piece of roasted meat (ECF No. 5 ¶ 17), Defendants mention only that Jewish inmates who sign up for Passover will receive two *seder* plates, one for each of the first two nights of Passover. (Opp. at 4.) They do not actually say what is provided in the *seder* plates or the kosher for Passover certification status of the food. (Deren Reply Decl. ¶ 19.) A *seder* also requires four cups of wine or grape juice, but Defendants never address this requirement.

C. CTDOC's Attacks on the Competence of Greer's Evidence are Frivolous.

Defendants argue that Rabbi Greer has submitted inadmissible declarations “based on incompetent assertions, speculation and hearsay.” (Opp. at 1, 13-14.) Not only do Defendants not seek to strike or exclude any of Rabbi Greer’s proffered evidence, they do not even explain how the evidence submitted by Rabbi Greer is incompetent, hearsay, or speculative. Of course, because the evidence Rabbi Greer has submitted plainly is admissible, they could not actually provide such an explanation.

Federal Rule of Evidence 601 provides that “[e]very person is competent to be a witness” unless the rules provide otherwise, and Rule 602 states that “[a] witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness’s own testimony.” Rabbi Greer submitted a declaration detailing his personal background, the importance of his ability to practice his Jewish faith, and CTDOC’s failure to commit to provide him with food an Orthodox Jew would consider kosher for Passover. All of that information is within Rabbi Greer’s personal knowledge, and, again, CTDOC never specifies what, if anything, Rabbi Greer has said that is not based on personal knowledge or is hearsay or speculation. Beyond the factual evidence Rabbi Greer provides, Rabbi Yisrael Deren submitted a declaration discussing Passover and the laws of kosher as they apply to Passover, both of which are subjects in which he is an expert. Indeed, CTDOC’s own rabbi does not contest (and even at times expressly agrees with) the testimony of Rabbi Deren. (*See* ECF No. 25-6 ¶ 7 (“[I] do not disagree with Kosher requirements as set forth in the affidavit of Rabbi Deren. . . .”).) Rabbi Menachem Katz, an official from the Aleph Institute, which assists Jewish prisoners, also submitted a declaration stating that the Aleph Institute could provide Rabbi Greer with

prepackaged kosher for Passover meals. CTDOC does not argue—nor could it—that Rabbi Katz lacks personal knowledge of his own organization’s ability to provide kosher for Passover food.³

In sum, Defendants’ complaints about the quality of Rabbi Greer’s evidence are worse than a red herring—they are a mirage, devoid of any factual or legal support. Defendants’ argument is frivolous and should be disregarded.

D. The Failure to Exhaust the Administrative Process is Irrelevant Here.

Defendants argue that Rabbi Greer has failed to exhaust his administrative remedies (Opp. at 17), but this argument is both misleading and ignorant of reality. First, while Defendants contend that Rabbi Greer “did not file any grievances related to kosher meals or the provisions for Passover,” he did, in fact, initiate the administrative process by submitting a request for kosher for Passover meals consistent with the relief he seeks herein on March 4, 2020. (Ex. A hereto.) This request was in addition to several unanswered requests Rabbi Greer made to Food Services concerning kosher food since his incarceration began in December 2019. (See *id.*; Greer Decl. ¶ 24.) On March 11, 2020, Rabbi Greer received a response to his request, effectively denying it by directing him to the inadequate kosher for Passover meals CTDOC provides. (See *id.*) Thus, while the record evidence submitted by CTDOC reflects no “grievances” filed by Rabbi Greer, CTDOC does not tell the whole story.

Second, while Rabbi Greer is complying with the administrative process, it may take too long, *i.e.*, until after Passover has started, for him to obtain relief, and there is no requirement that a prisoner fully comply with a process that will rob him of the relief he is seeking. As

³ Defendants’ cited authority does not apply here. In *Asdourian v. Konstantin*, 50 F. Supp. 2d 152, 156-58 (E.D.N.Y. 1999), the court denied the injunction not because some of the evidence was “hearsay, surmise, and conjecture,” but because defendant provided compelling evidence showing plaintiff likely would not succeed on the merits. Likewise, in *Juniper Entm’t, Inc. v. Calderhead*, 2007 WL 9723385, at *8-9 (E.D.N.Y. Aug. 17, 2007), the court did not exclude the alleged hearsay evidence but simply observed that it “require[d] close scrutiny,” and the court actually *granted* the injunctive relief sought.

CTDOC explains in its Opposition, the denial of Rabbi Greer's request has ripened into a Level-1 grievance, which must be submitted within thirty days of the "discovery of the cause of the grievance," and CTDOC then has thirty days to respond. (Opp. at 21.) Rabbi Greer today filed a Level-1 grievance, although it did not have to be filed until April 10, 2020 (by which time Passover will already be underway). Even if Rabbi Greer had filed his Level-1 grievance the day after he received the letter denying his request, CTDOC would not have been obliged to respond before April 11, again during Passover itself. As CTDOC acknowledges, prisoners are not required to exhaust the administrative process where doing so would be a "dead end" or where prison officials can "thwart inmates from taking advantage of a grievance process through machination." *Shehan v. Erfe*, 2017 WL 53691, at *6 (D. Conn. Jan. 4, 2017) (citation omitted). There is a risk CTDOC will use its administrative procedures to run out the clock by waiting until after Passover has commenced to rule on Rabbi Greer's grievance, and that is not a risk Rabbi Greer should be required to take.

Finally, even if Rabbi Greer had filed his Level-1 grievance prior to commencing this litigation—something he was not required to do, since he had until April 10 to file the grievance—CTDOC has already explained in its opposition what its conclusion is, and there is no reason to believe CTDOC would come to a new conclusion once the administrative process plays out. Indeed, CTDOC's opposition papers are powerful evidence that Defendants will not comply with the laws of kosher for Passover and provide Rabbi Greer with a religiously acceptable diet, as required under RLUIPA, either now or at the end of an administrative process. *See Miller v. Mann*, 2017 WL 6624007, at *2 (D. Conn. Dec. 28, 2017) (refusing to dismiss case for failure to exhaust administrative remedies upon finding a "plausible inference" that "the prison officials have already made up their minds to deny him relief") (Meyer, J.). Because

Rabbi Greer's resort to the full administrative remedy process would have been futile, CTDOC cannot hide behind that process to avoid Rabbi Greer's motion for preliminary injunctive relief.

II. RABBI GREER HAS NOT ASKED FOR A "CONGREGATE GATHERING," SO CTDOC'S ENTIRE ARGUMENT ON THE ISSUE IS AN IRRELEVANCY.

Defendants admit in footnote 26 that Rabbi Greer "does not seek . . . communal Seder meals," but nonetheless spend nearly four pages arguing that such "congregate gatherings" present safety and security risks and that there is no right of assembly in prison. (Opp. at 31-34.) Because Rabbi Greer has not sought to hold any "congregate gatherings," he takes no position on the merits of these arguments. The Court should ignore Defendants' arguments, too.

III. THE COURT HAS JURISDICTION OVER THE RFRA CLAIM.

Defendants argue that the Court lacks supplemental jurisdiction over Rabbi Greer's Connecticut RFRA claim (Opp. at 35), but this is wrong. There is no dispute that Rabbi Greer has stated a claim under a federal statute, RLUIPA, as Defendants have answered Rabbi Greer's complaint and have not moved to dismiss it under Rule 12(b)(6). Thus, regardless of the outcome of this motion, this case will move forward. Defendants rely on *Reynolds v. Cook*, 2020 WL 1140885 (D. Conn. Mar. 9, 2020), to assert that "plaintiff's state law claims should be dismissed," but they conveniently ignore that the court in *Reynolds* declined supplemental jurisdiction over plaintiff's state law claims because, following a bench trial, it held defendants had not violated plaintiff's First Amendment rights, and thus, the state law claims had to be dismissed, too. *Id.* at *24-25. Here, Rabbi Greer will show his rights under RLUIPA were violated, and his rights under Connecticut RFRA are coextensive with his rights under RLUIPA.

CONCLUSION

For all of the foregoing reasons, the Court should grant Rabbi Greer the preliminary injunctive relief he seeks.

Respectfully submitted,

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