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Resnick v. Adams: The Lawful Denial of a Jewish Prisoner's Right to Keep Kosher

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RESNICK V. ADAMS: THE LAWFUL DENIAL OF A JEWISH PRISONER'S RIGHT TO KEEP KOSHER?

I. INTRODUCTION

Make no mistake. Herman Resnick is a criminal. Herman Resnick is a convicted criminal in federal prison. Herman Resnick is also an Orthodox Jew.

As an Orthodox Jew, Resnick strictly abides by the "laws of the kashruth" (kashruth). According to kashruth, "Resnick must maintain a strict kosher diet at all times, even when imprisoned." For nearly six years, Resnick has been a prison inmate. Since January 1998, Resnick has been incarcerated at the United States Penitentiary at Lompoc, California (Lompoc). Like many prisons in the United States, Lompoc accommodates the religious dietary needs of its inmates through a food disbursement program called the Common Fare Program. In order for Resnick to receive a kosher diet, all he had to do was submit an application to the Common Fare Program. Resnick, however, refused to fill out the application.

1. 317 F.3d 1056 (9th Cir. 2002).
3. See Resnick, 317 F.3d at 1057.
4. See id.
5. Id.
7. See Resnick, 317 F.3d at 1057.
8. See id.
9. See id. at 1057–58.
10. Id. at 1058.
11. See id.
Instead, Resnick bypassed the proper procedure and directly sent letters to prison officials requesting kosher food. As a result, Resnick was never provided with a kosher diet.

Resnick brought suit, alleging that the prison official’s failure to accommodate his request for a kosher diet violated his constitutional right to the free exercise of religion. The case eventually reached the United States Court of Appeals for the Ninth Circuit.

The Ninth Circuit presented a very thorough and well-articulated analysis of the applicable legal issues. Ultimately, the court affirmed the district court’s decision to grant summary judgment to the defendants based on the doctrine of qualified immunity.

In affirming the district court’s decision, the court held that summary judgment was proper in this case because Resnick failed to even “alleg[e] facts [constituting] a constitutional violation.”

In the end, however, Resnick was still denied his constitutional right to receive a kosher diet in prison. Perhaps this fact alone may indicate that the Ninth Circuit overlooked something in its analysis.

II. BACKGROUND OF THE CASE

A. Obtaining a Kosher Diet Through the Common Fare Program

The Federal Bureau of Prisons created a program called the “Common Fare Religious Diet program to accommodate the religious dietary needs of observant Jewish inmates” in United States prisons. The Common Fare Program was created largely in part because of the growing demand by prisoners. "The general

12. See id.
13. Id.
14. Id. at 1058.
15. Id. at 1059.
16. See id. at 1059–64.
17. Id. at 1064.
18. Id.
19. See Forman, supra note 6, at 524. Specifically, “'[t]he Bureau [of prisons] provides inmates requesting a religious diet reasonable and equitable opportunity to observe their religious dietary practice within the constraints of budget limitations and the security and orderly running of the institution and the Bureaus through a common fare menu.’” Id. (citing 28 C.F.R. § 548.20 (1997)).
21. See Forman, note 6, at 509 n.186.
parameters of the [Program] . . . set forth in section seven of Program Statement Number 4700.04 (P.S. 4700.04),”^{22} provides:

The increased number of religious groups requesting diets requires a religious diet program that provides equity to all. Common Fare is intended to accommodate inmates whose religious dietary needs cannot be met on the main line. The common fare menu is based upon a 14-day cycle with special menus for the ten recognized Federal Holidays. The menus have been nutritionally analyzed and certified as exceeding minimum daily nutritional requirements.^{23}

According to P.S. 4700.04, if inmates require a religious diet, they must submit an application to the prison chaplain.^{24} In addition, inmates requesting a special religious diet are also required to "provide a written statement articulating the religious motivation for participation in the common fare program [sic]."^{25} Upon admission and orientation to the prison, the Religious Services Department also provides each inmate with a handout that discusses religious diets and provides "more specific guidance about the [Common Fare Program] . . . and the procedures for applying to the program."^{26} The handout also includes a standard application form that describes the Common Fare Program and "reiterates the need to submit an application for the [Common Fare Program] to the chaplain."^{27}

B. Resnick’s Failure to Comply with Proper Procedure

Resnick, like all newly arrived inmates at Lompoc, was aware of the Common Fare Program at Lompoc and was notified of the proper

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22. Resnick, 317 F.3d at 1058.
23. See Forman, supra note 6, at 524–25. Program Statement 4700.04 mandates a national policy governing the religious diet menu program at Bureau of Prisons institutions. Id.
24. Id. "[T]he Chaplain is the approving official for inmate participation and removal in the Common Fare Program." 28 C.F.R. § 548.20(a).
25. 28 C.F.R. § 548.20(a).
26. Resnick, 317 F.3d at 1058 (citing 28 C.F.R. § 548.20(a)).
27. Id. "Once an inmate has applied to the . . . [Common Fare Program], and the chaplain has approved the application, the chaplain is responsible for entering the necessary information into the computerized database known as Sentry." Thereafter, "the inmate shall ordinarily begin eating from the Common Fare menu within two days after Food Service receives electronic notification." Id.
procedure to obtain a kosher diet. Nonetheless, Resnick was informed by a prison chaplain “that he would be required to submit an application to participate in the [Common Fare Program] if he desired to receive kosher meals.” Resnick simply refused to do so. Instead of complying with proper procedure and submitting an application, Resnick wrote “letters to prison officials and the Lompoc chaplains requesting kosher food.”

In response to these letters, a Lompoc chaplain wrote back to Resnick, “asking [Resnick] to ‘please see . . . [a chaplain] and fill out an application for inclusion in [the] program.’” The chaplain also indicated that if Resnick encountered any problems, they would be “addressed appropriately by Food Service and Religious Services.”

“Lompoc warden Michael Adams also responded to Resnick’s letter[s].” Adams specifically informed Resnick that “[food Service and Religious Services . . . [were] willing to work with [Resnick and other] inmates who have identified special needs regarding religious diet.” Adams also urged Resnick to apply to the Common Fare Program and inform staff of any problems “so that [they] may be resolved.”

In the end, Resnick did not comply with the proper procedures. Because Resnick did not “fill[e] the required application to enter the [Common Fare Program] by the time he wrote the letters to [the] prison officials,” Resnick did not receive a kosher diet.

C. Resnick Alleges Violation of His Constitutional Rights

On August 19, 1998, Resnick filed a pro se action in the United States District Court for the Central District of California, asserting

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28. See id.
29. Id.
30. See id.
31. Id. These letters written by Resnick “were dated June 28 and 29, 1999, some 16 months after he was first incarcerated at Lompoc.” Id.
32. Id.
33. Id.
34. Id.
35. Id.
36. Id.
37. See id.
38. Id.
39. Id.
among other violations, that defendants infringed his constitutional right to the free exercise of religion by denying him kosher meals in prison. Resnick’s suit, after encountering several procedural hurdles, was eventually referred to a magistrate judge. With permission of the court, Resnick filed amended complaints, naming Michael Adams and Mike Szafir as primary defendants.

On February 25, 2000, defendants moved for summary judgment, claiming that they were entitled to qualified immunity. The magistrate judge recommended that the district court deny defendants’ motion for summary judgment. The district court, however, rejected the magistrate judge’s recommendation and granted defendants’ motion for summary judgment on the doctrine of qualified immunity.

In Resnick v. Adams, the United States Court of Appeals for the Ninth Circuit affirmed the district court’s order granting summary judgment to the prison officials on qualified immunity grounds.


41. See id.

42. See Resnick, 37 F. Supp. 2d at 1155.

43. Id. Referral of the case was administered pursuant to Local Magistrate Rule 1.3. Id.

44. Resnick, 317 F.3d at 1059. In its opinion, the court stated:
Resnick filed his first amended complaint which named various prison officials as defendants in their individual capacities. The magistrate judge, in response to the prison officials’ April 1999 motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim, recommended that the district court dismiss with prejudice all of Resnick’s claims against defendants in their official capacities, and dismiss without prejudice Resnick’s First Amendment and equal protection claims against defendants in their individual capacities. On August 6, 1999, the district court adopted the magistrate judge’s report and recommendation and granted Resnick leave to file a second amended complaint.

Id.

45. See id.

46. See id. For a brief discussion of qualified immunity, see discussion infra Part III.A.

47. See id.

48. See id. The order granting summary judgment was entered on July 12, 2001. Id.

49. See id. at 1064.
The court concluded that Resnick clearly had a constitutional right to a kosher diet in prison.\textsuperscript{50} However, in affirming the district court's decision, the Ninth Circuit stated that the prison officials did not violate that constitutional right.\textsuperscript{51} Specifically, the court determined that summary judgment was proper in this case because Resnick failed to even "alleg[e] facts [constituting] a constitutional violation."\textsuperscript{52}

III. ANALYSIS OF THE NINTH CIRCUIT'S DECISION

A. Evaluating a Claim for Qualified Immunity

The Supreme Court of the United States has defined qualified immunity as "an entitlement not to stand trial or face the other burdens of litigation."\textsuperscript{53} Only "when a public official acts in reliance on a duly enacted statute or ordinance, [may] that official [be] entitled to qualified immunity."\textsuperscript{54} In evaluating a claim for qualified immunity, a court must consider two questions.\textsuperscript{55} First, as a threshold question, a court must ask, "'Taken in the light most favorable to the party assessing the injury, do the facts alleged show that the officer's conduct violated a constitutional right?'"\textsuperscript{56} A court should only proceed to the second question when "'a violation could be made out on a favorable view of the parties' submissions.'"\textsuperscript{57}

The "next, sequential step" a court should take in evaluating a claim of qualified immunity is "'asking whether the right was clearly established.'"\textsuperscript{58} In determining whether a particular right is clearly established, the "'question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.'"\textsuperscript{59} Specifically, "'the right the official is

\textsuperscript{50} See id. at 1061.
\textsuperscript{51} See id. at 1064.
\textsuperscript{52} Id.
\textsuperscript{54} Resnick, 317 F.3d at 1063 n.6 (quoting Dittman v. California, 191 F.3d 1020, 1027 (9th Cir. 1999)).
\textsuperscript{55} Id. at 1059 (quoting Saucier v. Katz, 533 U.S. 194, 291 (2001)).
\textsuperscript{56} Id.
\textsuperscript{57} Id.
\textsuperscript{58} Id.
\textsuperscript{59} Id. at 1063 n.6 (quoting Saucier, 533 U.S. at 208).
alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant sense."\textsuperscript{60} That is, "the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."\textsuperscript{61}

\section*{B. The Ninth Circuit's Qualified Immunity Analysis}

1. Recognition of the District Court's error

The Ninth Circuit appropriately began its analysis by first "identify[ing] precisely the constitutional violation being asserted by Resnick."\textsuperscript{62} The court correctly established that Resnick had a constitutional right to receive a kosher diet in prison.\textsuperscript{63} However, after recognizing that Resnick was entitled to such a right, the court realized that such a constitutional violation was not at issue here.\textsuperscript{64} Although the Ninth Circuit affirmed the district court's decision granting defendant's motion for summary judgment, the court held that the district court erred in the manner it reached its decision.\textsuperscript{65} The Ninth Circuit perceptively recognized that the district court mistakenly skipped a step in evaluating the claim for qualified immunity by "proceed[ing] directly to the issue of whether Resnick's right to a kosher diet was 'clearly established.'"\textsuperscript{66} After recognizing this mistake, the Ninth Circuit completed the qualified immunity analysis.\textsuperscript{67}

The Ninth Circuit also pointed out that the district court actually "misidentified the alleged constitutional violation" asserted by Resnick.\textsuperscript{68} The court stated that "the only conduct in which

\begin{footnotes}
\item[60.] Id. (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
\item[61.] Id.
\item[62.] Id., at 1059.
\item[63.] Id., at 1061. The court followed the precedent established in Ashelman v. Wawrzaszkek, 111 F.3d 674, 677 (9th Cir. 1997) that prisoners have a First Amendment right to be "provided with food . . . that satisfies the dietary laws of their religion." (quoting McElyea v. Babbitt, 833 F.2d 196, 198 (9th Cir. 1987)). Specifically, prison officials must prepare and serve inmates who require it food that fully meets the requirements of religious dietary laws. See Ashelman, 111 F.3d at 678.
\item[64.] Resnick, 317 F.3d at 1059.
\item[65.] Id. at 1060.
\item[66.] Id.
\item[67.] Id., at 1059–64.
\item[68.] Id. at 1061.
\end{footnotes}
[defendants] engaged that could have violated [Resnick's] First Amendment rights was their insistence that he submit an application for the Common Fare Program before attempting to negotiate a diet that would satisfy the laws of kashruth." The court held that the district court incorrectly "focus[ed] on the 'implications of providing Resnick kosher meals'" and did not realize that "[t]he prison officials were not refusing to provide Resnick with kosher meals; rather, they merely were requiring him to file a standardized application before doing so." In making this distinction, the court concluded that "the only conduct in which [defendants] engaged that could have violated [Resnick's] First Amendment rights was their insistence that he submit an application for the Common Fare Program."  

2. Resnick's lack of standing to bring a claim

In addition, the Ninth Circuit recognized that Resnick lacked standing to bring a claim. The court stated that since "Resnick never applied for, let alone participated in, the [Common Fare Program], the evidence [Resnick] adduce[d] to demonstrate the failure of the [Common Fare Program] to provide kosher meals [was] irrelevant." As such, the court held that "unless Resnick participated, or attempted to participate, in the [Common Fare Program], he could not [have been] injured by, and would [not have had] standing to challenge, deficiencies in the administration of the program at Lompoc." Furthermore, the court addressed Resnick's contention that "he was excused from applying for the [Common Fare Program] because [submitting] any such application would have been futile." The court pointed out that "uncontroverted evidence" existed which "indicate[d] that [submitting] such an application would not have

69. Id.
70. Id.
71. Id. at 1060. The "defendants did not categorically refuse to provide Resnick with a kosher diet." Id. at 1059.
72. Id. at 1059.
73. Id.
74. Id. (quoting Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 166–67 (1972) (holding that plaintiff lacks standing to challenge club's membership policies because "[plaintiff] never sought to become a member").
75. Id. at 1060.
been futile."  

"First, prison officials did not categorically refuse to provide Resnick with kosher meals, nor did they tell him that the [Common Fare Program] was the only way for him to receive a kosher meal."  

"Instead, [the prison officials] assured Resnick that, once he applied to the [Common Fare Program], they would work with him to ensure that his problems [would be] addressed appropriately."  

Furthermore, the court correctly ruled that Resnick could not "claim that his application would have been futile." The court indicated "that there was at least one inmate at Lompoc [who received] a completely kosher diet." This information "establish[ed] that prison officials were capable of working with Resnick to guarantee that his needs would be addressed appropriately." In addition, the "[f]act that another prisoner received the type of kosher diet to which Resnick contend[ed] he [had] a right, clearly support[ed] the inference that, had he submitted an application to participate in the Common Fare Program, Resnick could have received the kind of religious diet he sought."  

3. Determining whether a prison regulation violates a constitutional right under a "reasonableness test"  

"The district court’s order, however, while very thorough and reasoned," failed to "make an evaluation regarding the nature of the alleged constitutional violation at the start of the analysis." As such, the Ninth Circuit assessed the "alleged constitutional violation . . . and its importance to the qualified immunity analysis."  

76. Id.  
77. Id.  
78. Id.  
79. Id. (quoting Jackson-Bey v. Hanslmaier, 115 F.3d 1091, 1195 (2d Cir. 1997) (holding that where a prisoner has decided "not to follow the simple procedure of registering his religion" with prison authorities, and where prisoner has failed to make a "substantial showing" that registration would be futile, prisoner lacks standing to bring suit)).  
80. Id.  
81. Id.  
82. Id. at 1060 n.4.  
83. Id. at 1060.  
84. Id.
First, the Ninth Circuit "determined that prison regulations . . . alleged to tread upon constitutional liberties should be evaluated under a 'reasonableness' test."85 The court established that even though "'prison walls do not form a barrier separating prison inmates from the protections of the Constitution,'"86 a test that was "'less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights'"87 was appropriate in this case.88 Following the bright-line standard established by the Supreme Court of the United States in Turner v. Safley,89 the Ninth Circuit proceeded in analyzing Resnick's allegation.

According to the test set forth in Turner, in determining the reasonableness of a prison regulation, "'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'"90 Turner established that in determining whether a regulation is reasonable, a court must balance and weigh four factors: (1) Was there a "valid, rational connection" between the regulation and the governmental interest?; (2) Are there alternative means available to the inmate which would permit him to exercise his religious beliefs?; (3) What impact would the accommodations to the prisoner have on the guards, other inmates, and the institution in general?; and (4) Do "obvious, easy alternatives" exist that may be regarded as evidence that the regulation is not reasonable?91

85. Id. at 1060–61.
86. Id. at 1060 (quoting Turner v. Safley, 482 U.S. 78, 84 (1987)).
87. Id. (quoting O'Lone v. Estate of Shabazz, 482 U.S. 342, 349 (1987)).
88. Id. The rationale is based on mere practicality, because "'[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration.'" Turner, 482 U.S. at 89.
89. 482 U.S. 78.
90. Resnick, 317 F.3d at 1061 (quoting Turner, 482 U.S. at 89).
91. Id. at 1061–62.
4. Analysis under *Turner*’s balancing test

The Ninth Circuit pointed out:

[The] district court correctly noted that *Turner*’s balancing test was applicable, but did not proceed through the four-part analysis required. The [district] court instead mistakenly concluded that because the prison officials failed to ‘delineate the budgetary, security or administrative implications of providing Resnick kosher meals . . . [Resnick] . . . met his burden of demonstrating that the right allegedly violated was clearly established.’

The Ninth Circuit realized that the district court’s “conclusion ignore[ed] [their] own finding that ‘the only conduct in which [the prison officials] engaged that could have violated [Resnick’s] First Amendment rights was their insistence that he submit an application for the Common Fare Program before attempting to negotiate a diet that would satisfy the laws of kashruth.” Appropriately, the Ninth Circuit completed “the balancing analysis—focusing on Resnick’s failure to file the required [Common Fare Program] application rather than the [prison officials’] alleged denial of kosher food.”

As stated above, *Turner* weighs four factors in determining the reasonableness of a prison regulation affecting constitutional rights. The first factor requires “‘a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it.’” Here, the Ninth Circuit determined that the legitimate governmental interest at stake was “the orderly administration of a program that allow[ed] federal prisons to accommodate the religious dietary needs of thousands of

92. *Id.* at 1061.
93. *Id.*
94. *Id.* The Ninth Circuit noted that if the district court “had performed the balancing analysis—focusing on Resnick’s failure to file the required [Common Fare Program] application rather than the prison’s alleged denial of kosher food—the district court’s own findings of fact and conclusions of law, viewed in light of *Turner*’s four factors, would support the conclusion that there was no constitutional violation.” *Id.*
95. See discussion *supra* Part III.B.3.
96. *Id.* (quoting *Turner*, 482 U.S. at 89 (citation and internal quotation marks omitted)).
prisoners." The court held that it was "clear that the application for the Common Fare Program at Lompoc [had] a 'valid, rational connection' to this legitimate interest." The application "[set] forth the ground rules of the [Common Fare Program], provid[ed] an opportunity for the chaplain to assess the sincerity of the applicant's belief, and, most important, provid[ed] a standardized form for each inmate seeking accommodation, thereby aiding in the administration of the program." Therefore, the court concluded that "the first Turner factor [was] satisfied.

The second Turner factor is "whether there are alternative means of exercising the right that remain open to prison inmates." The court determined that this factor weighed "in favor of the prison officials since Resnick [had] not shown, and indeed [could not] show, that he would not have been provided with a kosher diet had he filed the proper application." Here, the prison officials were "willing to work with Resnick once he submitted his application to ensure his needs were met." In addition, "there also was at least one other inmate at Lompoc receiving a completely kosher diet."

The third factor in determining the reasonableness of a prison regulation under Turner is "the impact accommodation of the asserted constitutional right will have on other inmates, the guards,

97. Id. (quoting 28 C.F.R. § 548.20; P.S. 4700.04).
98. Resnick, 317 F.3d at 1061.
99. Id.
100. Id.
101. Id. (quoting Turner, 482 U.S. at 90).
102. Id. at 1062.
103. Id.
104. Id. As the court aptly noted:
It is this factor that distinguish[ed] Resnick's claim from those of the inmates in Ward and Ashelman. In those cases, inmates seeking kosher diets were explicitly denied kosher diets. That is to say, the prison officials in Ward and Ashelman did not deny that they were refusing to supply the complaining inmates with kosher food. Rather, they openly admitted that they were not doing so and argued that the Constitution did not require them to do so. Here, however, prison officials [did] not dispute that Resnick [had] a right to a kosher diet; they argu[ed] only that requiring him to comply with the application requirement [did] not violate that constitutional right.

Id. at 1062 n.5 (citations omitted).
and prison resources.

The court made clear once more that "the accommodation Resnick [sought was] not of his right to a kosher diet, but rather of his right to a kosher diet without having to file the standard application." Thus, if the prison accommodated this request, it would have frustrated "the orderly administration of the [Common Fare Program] and of [the prison itself] generally by effectively eliminating the requirement that inmates seeking religious diets fill out a standardized application form." Thus, the third factor also cut in favor of the prison officials.

The fourth and final factor is the availability of "obvious, easy alternatives." The Ninth Circuit held that the most "obvious" and "easy" alternative for inmates who sought a religious diet was the requirement of filling out "the standard [Common Fare Program] application form." The Common Fare Program at Lompoc provided for a uniform procedure for inmate requests, allowing "the prison to channel those requests through the chaplain's office, which assess[ed] the sincerity of his request for a religious diet and, upon approval, enter[ed] the prisoner into a computerized database."

The court dismissed Resnick's alternative argument—"that the application requirement be waived or that his letters to prison authorities be deemed sufficient in lieu of the application itself— noting that it would make accommodating prisoners' religious dietary needs a far more complicated affair."

The court recognized that if the prison allowed inmates to make requests

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105. Id. at 1062 (quoting Turner, 482 U.S. at 90).
106. Id.
107. Id. The court, noting the validity of the Common Fare Program, stated: [B]y providing a procedure by which religious believers can request and receive special diets, it would appear that the prison has acted to advance, not infringe, the free exercise rights of the inmates. It would be a strange result indeed to conclude that such a program—designed to facilitate the accommodation of the religious dietary needs of thousands of inmates—actually violates inmates' First Amendment rights.

Id.
108. See id.
109. Id. (quoting Turner, 482 U.S. at 90).
110. Id.
111. Id.
112. Id.
outside this system, it "would frustrate the orderly administration . . . at Lompoc and other prisons."\textsuperscript{113}

After applying the four factors, the court concluded that "the requirement that Resnick submit an application to the [Common Fare Program] before prison officials attempted to provide him with a kosher diet [was] 'reasonably related to legitimate penological interests.'"\textsuperscript{114} Therefore, "the district court's own findings of fact and conclusions of law, viewed in light of Turner's four factors, [supported] the conclusion that there was no constitutional violation" at issue.\textsuperscript{115}

5. Determining whether a particular right is clearly established

The Ninth Circuit then proceeded to the "'the next, sequential step'" in the qualified immunity analysis: "'whether the right was clearly established.'"\textsuperscript{116} In determining whether a particular right is clearly established, the appropriate inquiry is "'what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards.'"\textsuperscript{117} In this case, the court determined that the prison officials "'were acting within the context of a federal prison.'"\textsuperscript{118}

"'[I]t is also clearly established that 'when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.'"\textsuperscript{119} The

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\textsuperscript{113} Id. (quoting Jackson-Bey, 115 F.3d at 1097).
\textsuperscript{114} Id. at 1063 (quoting Turner, 482 U.S. at 89).
\textsuperscript{115} See id. at 1061.
\textsuperscript{116} Id. at 1063 n.6 (quoting Saucier, 533 U.S. at 201).
\textsuperscript{117} Id. (quoting Saucier, 533 U.S. at 208; citing Anderson, 483 U.S. at 640).
\textsuperscript{118} Id.
\textsuperscript{119} Id. (quoting Turner, 482 U.S. at 89). The court noted that "'[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying
court aptly noted that the application requirement for the Common Fare Program at Lompoc was valid because it served two such interests: (1) "it enable[ed] prison officials to assess the sincerity of an inmate's religious belief"; and (2) it "aid[ed] in the efficient and orderly administration of the prison" by "requiring each inmate requesting a religious diet to file an identical form containing information regarding the [Common Fare Program]." Thus, the court stated that it was "eminently reasonable for [the prison officials] to have believed that requiring Resnick to file an application for the [Common Fare Program] was lawful."

Furthermore, the court also noted that the prison officials "were acting in reliance on 28 C.F.R. § 548.20(a), as elaborated in P.S. 4700.04 and Lompoc regulations, when they required Resnick to submit an application." The court reiterated, "'[W]hen a public official acts in reliance on a duly enacted statute or ordinance, that official ordinarily is entitled to qualified immunity.' Ultimately, the court did not identify a constitutional violation. Accordingly, the court did not proceed in analyzing qualified immunity.

C. Analysis of Resnick's Alternative Arguments

Lastly, the Ninth Circuit addressed Resnick's two alternative arguments. Resnick first contended that the United States Supreme Court's decision in Sloman v. Tadlock required the court "to conclude that the issue of reasonableness in this context was a factual question for the jury, not the judge, to decide." The Ninth Circuit, however, rejected Resnick's contention. The court reasoned:

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120. Id. (quoting O'Lone, 482 U.S. at 348) (citation and quotation marks omitted).
121. Id.
122. Id.
123. Id.
124. Id. (quoting Dittman, 191 F.3d at 1027).
125. Id. at 1063.
126. Id.
127. Id. at 1064.
128. 21 F.3d 1462, 1467 (9th Cir. 1994).
129. Resnick, 317 F.3d at 1063 n.7.
Sloman was decided seven years before Saucier, in which the Supreme Court unequivocally stated that 'to deny summary judgment any time a material issue of fact remains . . . could undermine the goal of qualified immunity to avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment.' \(^{130}\)

As such, the court stated that Saucier "[made] clear that reasonableness [was] a question of law to be decided by the court, not the jury." \(^{131}\)

Resnick alternatively contended that "the prison officials' refusal to investigate and to correct problems with the [Common Fare Program] at Lompoc was itself unreasonable and a violation of [his] First Amendment rights." \(^{132}\) Resnick's other contention was also rejected by the court. As stated previously, the "prison officials promised to work with [Resnick]—once he filed the proper form—to ensure that any problems he had with the program were addressed." \(^{133}\) Therefore, the court correctly held that "Resnick's charge that the officials failed to investigate [was] belied by their own promises to conform the [Common Fare Program] to meet [his] needs." \(^{134}\) 

"[U]nless Resnick participated, or attempted to participate, in the Common Fare Program, he could not be injured by, and would have no standing to challenge, deficiencies in the administration of the program at Lompoc." \(^{135}\) Thus, the court properly noted that "[i]f Resnick lack[ed] standing to challenge the deficiencies of the program itself, surely he [could not] challenge an alleged failure to investigate allegations of deficiencies in that same program." \(^{136}\)

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130. *Id.* at 1063–64 n.7 (quoting *Saucier*, 533 U.S. at 202) (citation and quotation marks omitted).

131. *Id.*

132. *Id.* at 1064.

133. *Id.*

134. *Id.*

135. *Id.* (quoting *Madsen v. Boise State Univ.*, 976 F.2d 1219, 1220–21 (9th Cir. 1992) ("There is a long line of cases . . . that hold that a plaintiff lacks standing to challenge a rule or policy to which he has not submitted himself by actually applying for the desired benefit.").

136. *Id.*
Resnick further contended that the Ninth Circuit’s decision in *Alexander v. Perrill*\(^\text{137}\) supported his claim. However, the court determined that the *Alexander* decision did not apply because the case “involved a situation in which prison officials ‘did nothing to inquire into or investigate [the inmate’s] complaints.’”\(^\text{138}\) The court noted that in that situation:

\[
\text{[P]rison officials stood willing to work with Resnick to correct any problems he had with the [Common Fare Program]. That prison officials never did so [was] the result of Resnick’s failure to comply with the requirement that he apply for the [Common Fare Program] rather than any dereliction of duty on the part of the officials. And since it was not unreasonable for prison officials to require Resnick to apply for the [Common Fare Program] before providing him with a kosher diet, it similarly [could not] be unreasonable for them to require him to apply to the program before working with him to address his complaints about it.\(^\text{139}\)
\]

The court concluded, stating that “Resnick [did] not alleg[e] facts sufficient to constitute a constitutional violation.”\(^\text{140}\) In so holding, the court affirmed the “district court’s order granting summary judgment to the prison officials.”\(^\text{141}\)

### IV. Evaluation of the Ninth Circuit’s Decision

#### A. A Case of “Forms over Substance”\(^\text{142}\)

The district court correctly found that Resnick had a clearly established right to a kosher diet while in Lompoc.\(^\text{143}\) The Ninth

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137. 916 F.2d 1392 (9th Cir. 1990). In this case, the Ninth Circuit, in affirming the district court’s denial of defendants’ motion for summary judgment on defense of qualified immunity, held that warden and administrative systems manager had clearly established duty to investigate prisoner’s claims regarding foreign jail credits and miscalculation of sentence. *Id.*

138. *Id.* at 1395.


140. *Id.*

141. *Id.*

142. Appellant’s Opening Brief at 9, *Resnick v. Adams*, 317 F.3d 1056 (9th Cir. 2002) (No. 01-56710) [hereinafter Appellant’s Opening Brief].
Circuit presented a very thorough and accurate analysis. The court concluded that Resnick "did not alleg[e] facts sufficient to constitute a constitutional violation." The court ultimately denied Resnick a kosher diet because he did not file the proper form in applying for the Common Fare Program.

Notwithstanding the Ninth Circuit's analysis, a troublesome fact remains. In the end, after all was said and done, Resnick was still denied a constitutional right—the right to receive a kosher diet in prison. This fact alone perhaps lends credence to the contention that something was overlooked in the Ninth Circuit's analysis; common sense dictates something might be wrong.

On the surface, the Ninth Circuit's analysis appears correct and accurate. The court decided that since Resnick did not request food from the Common Fare menu, Resnick could not assert a constitutional violation by the defendants based upon asserted defects in the Common Fare Program. The court determined that the only potential constitutional violation was the requirement that Resnick submit the standard application for the Common Fare Program as a prerequisite to addressing his request for a religious diet. After identifying the alleged constitutional violation at issue, the court held that the prison official's actions were constitutional because a reasonable prison official could have believed that it was lawful to require inmates to submit standard applications for a religious diet.

However, in granting summary judgment to defendants based on qualified immunity, it could be viewed that the court unconstitutionally denied a prisoner a kosher diet because of the prisoner's failure to file a form applying for a program that the prisoner repeatedly objected to as not meeting religious standards. In other words, this was a case of "forms over substance," and unfortunately, Resnick never received a kosher diet as a result.

143. Resnick, 317 F.3d at 1061.
144. See discussion infra Parts III.B–C.
145. Resnick, 317 F.3d at 1064.
146. See id.
147. The views expressed in this Comment are solely those of the author. They do not reflect the opinion of the Ninth Circuit Court of Appeals.
148. See Resnick, 317 F.3d at 1064.
149. Id. at 1060.
It is certainly indisputable that Resnick desired a kosher diet. It is also indisputable that Resnick made efforts to secure a kosher diet in prison. What is disputable, however, is the manner (form) which Resnick pursued to receive a kosher diet. The facts indicated Resnick wrote letters requesting a kosher diet and objecting to Lompoc’s failure to comply with the requirements of the Common Fare Program. Nevertheless, prison officials failed to accommodate Resnick’s requests. Was this action reasonable? Arguably, the answer is “No.”

B. The “Reasonableness” of the Defendants’ Action

In determining whether the prison officials acted reasonably in denying Resnick a kosher diet, the court may have committed an oversight. By granting summary judgment for defendants, the Ninth Circuit agreed with the government’s argument that the prison officials were reasonable in requiring that Resnick fill out a form for the Common Fare Program. The court explained that “Resnick’s letters to prison officials requesting a kosher diet and objecting to the Common Fare Program were not sufficient to meet this requirement.” However, it is certainly arguable that Resnick’s letters should have been sufficient to meet this requirement. “The ‘standard application’ would have provided prison officials no information not already contained in Resnick’s letters.” In fact, “the standard application [may have] provided less information than

151. See discussion supra Part II.B.
152. Id.
153. Appellant’s Reply Brief at 4, Resnick v. Adams, 317 F.3d. 1056 (9th Cir. 2002) (No. 01-56710). The defendants’ refusal to provide Resnick a kosher diet was unreasonable “or, at the very least, there was a material dispute over whether it was unreasonable.” Id.
154. Id. Resnick provided “several ‘written statements’ explaining his needs and his objection to the Common Fare Program at Lompoc. Resnick also repeatedly objected that the Common Fare Program at Lompoc did not meet kosher dietary laws. To require him to apply for the very program he was objecting to was not in any way reasonable.” Id. at 5.
155. See id.
156. Id. at 4–5.
Resnick’s letters that detained his dietary requirements and why the existing program was inadequate.'

It is difficult to accept a justification for denying Resnick a kosher diet. The Ninth Circuit also pointed out that the prison officials would have worked with Resnick to modify the Common Fare diet. This, however, may not be true. Requiring Resnick “to file an application for the very program that he [said] he [did] not want and that [would] not meet his constitutional right to a kosher diet,” certainly cannot be construed as reasonable.' If in fact the prison officials were reasonable, they “would have provided Resnick with a kosher diet and not insisted that he file a form for a program that did not meet his needs.” In addition, if the prison officials were reasonable, they could have “modified the Common Fare Program, as they asserted they were willing to do, and provided Resnick a kosher diet.” For example, “[t]hey did not need to wait for a form,” especially since Resnick wrote letters requesting kosher food. Nevertheless, the court believed that the prison officials’ actions were reasonable.

C. The Importance of Allowing Religious Observance in Prison

The Ninth Circuit’s decision is even more troublesome in light of the fact that religious observance in prison is essential to inmates’ spiritual livelihood. One of the “[t]he most universal complaints received from observant . . . inmates is the inability to obtain religiously acceptable food items.” In particular, religious

157. Id. 28 C.F.R. § 548.20 provides, “[t]he inmate will provide a written statement articulating the religious motivation for participation in the common fare program.” Id.

158. Id. at 6.

159. Id. “Reasonable officers would have provided Resnick with a kosher diet and not insisted that he file a form for a program that did not meet his needs Resnick did not want the Common Fare program, at Lompoc, even with minor modifications, because it was not kosher and ‘working with him’ was not going to correct its many failings.” Id.

160. See id. at 5–6.

161. Id. at 6. Summary judgment may not have been proper here because there was “a dispute over material fact as to whether modification was a viable solution here.” Id.

162. Isaac M. Jaroslawicz, How the Grinch Stole Chanukah, 21 CARDOZO L. REV. 707, 718 (1999). Before the 1960s, the courts rarely upheld prisoners’ free exercise of religion claims because of concerns that court intervention
observers of kashruth have fought for the right to keep kosher in prison because of its spiritual importance.

The Hebrew term "kashruth" is the "collective term for the Jewish laws and customs pertaining to the types of food permitted for consumption and their preparation." The main purpose of these laws is "not hygiene, but holiness." "What is involved is the issue of godliness." "Each person observing kashruth is treated as if [he] were in a direct relationship with God, observing what in other religions might be considered a priestly function at the table in the sequence of preparation and service of food and of prayers."

Observing kashruth, therefore, is not a frivolous notion. In fact, it is a "critical need of the Jew[s] to relate with [their] God in a series of instructions that have been [their] mark of distinction from the days that [they] left Egypt . . . thousands of years ago." Because of its importance, "an observant Jew must maintain a strict kosher diet . . . even when imprisoned, and the kosher dietary laws can be interrupted only when life is in danger."

In a prison context though, religious observance plays an especially "crucial role in managing a prison and the positive effects that religion can have on an inmate is immeasurable." For one, "the religious practice of adhering to kosher dietary laws has beneficial effects on Jewish prisoners' spiritual development." In addition, the practice of adhering to kosher dietary laws has "positive effects on Jewish prisoners' attitudes and behaviors." Furthermore, by adhering to kosher dietary laws, Jewish prisoners would interfere with the prisons' administration of penological objectives. Id.; see also Rain Levy Minns, Food Fights: Redefining the Current Boundaries of the Government's Positive Obligation to Provide Halal, 17 J. L. & POL. 713, 713 (2001). During the late 1960s, the majority of religious prisoner cases involved Muslim prisoners' dietary restrictions, and often the courts used a compelling interest standard, and therefore, sometimes found that prisoners were entitled to a pork-free diet. Id. at 722.

163. See Forman, supra note 6, at 480.
164. Id. at 481.
165. Id.
166. Id.
167. Id. at 481–82.
168. Id. at 485.
169. Id.
170. Id.
"gain a sense of identity." Therefore, "‘kashruth . . . is far more than a religious ritual, it is a bond which unites Jew to Jew, it is a tether which secures an individual to a nation, it is the energy which connects a people, and a nation, to its very roots.’” By denying such an important right, the court is doing a grave injustice to not only Jewish prisoners, but prisoners in general who seek to practice religion.

V. CONCLUSION

"Religious freedom is the ability to practice one’s own religion . . . without prosecution or discrimination.” However, “the scope of this freedom is set within certain boundaries” such as limits determined “by the needs of other [c]onstitutional, governmental and policy goals.” ” [T]he Constitution’s First Amendment guarantee of religious freedom is not an absolute freedom, but a relative freedom.”

In regarding religious dietary restrictions in prison, “[the] [g]overnment has some limited, positive obligations.” Why? The reason is simple. Prisons are “extremely closely regulated environments in which uniformity of schedule, appearance, and diet, are, for reasons of security and economy, very high priorities.” In prison, virtually any religious observance requires some minimal governmental involvement. This in turn creates a departure from otherwise applicable policies. Therefore, the right to receive an adequate diet, such as kosher food, in prison is also subject to certain restrictions. These restrictions on the right to receive a diet that

171. Id. “Kashruth for the contemporary Jew has become a rallying point for Jewish identity. So much so that even non-observant Soviet prisoners of Zion refused to consume non-kosher food in their prison cells in order to affirm their identification with the Jewish people past, present and future. Some Soviet Jewish heroes and heroines have subsisted on diets of tea and crackers for years rather than let a non-kosher morsel pass through their mouths.” Id.

172. Id. at 486.

173. Minns, supra note 162, at 713.

174. Id.

175. Id.

176. Id.


178. See id.

179. See id.
satisfies religious dietary law must be "reasonably related to legitimate penological concerns."\textsuperscript{180}

The district court and the Court of Appeals for the Ninth Circuit in \textit{Resnick v. Adams}, concluded that the Common Fare Program satisfied legitimate penological concerns, i.e., that the prison regulation was constitutional. Seemingly, such a bright-line rule protects a prisoner's constitutional rights. If a regulation is reasonably related to penological concerns, it is constitutional. If it is not, then a prisoner has a valid claim of constitutional violation. In practice, however, courts have found that restrictions on religious practice were usually constitutional.\textsuperscript{181} Thus, it should not be surprising that Resnick's allegation of a constitutional violation was also rejected in this case.

Looking at the end result, considering the limitations on religious freedom, the outcome just does not seem right. Failure to fill out a form as an excuse for denying an Orthodox Jewish inmate the kosher diet that his religion required and deemed so critical to spiritual fulfillment, should not be a valid justification for abridging a prisoner's constitutionally mandated right to receive a kosher diet.

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\textsuperscript{180} Ward v. Walsh, 1 F.3d 873, 877 (9th Cir. 1993).


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