IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA

UNITED STATES OF AMERICA,	:	CRIMINAL NO. 2:08-cr-1324
Plaintiff,	:	
vs.	:	MEMORANDUM IN SUPPORT OF DEFENDANT RUBASHKIN'S MOTION TO THE CHIEF DISTRICT JUDGE FOR REVOCATION OR MODIFICATION OF DETENTION ORDER
SHOLOM RUBASHKIN,	:	
Defendant.	:	

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MEMORANDUM OF LAW IN SUPPORT OF SHOLOM RUBASHKIN'S MOTION FOR REVIEW OF HIS DETENTION ORDER

I. INTRODUCTION

Pursuant to 18 U.S.C. § 3145(b) and Local Criminal Rule 5(a), Sholom Rubashkin, the Defendant, appeals to this Court, Linda R. Reade, United States District Judge, the Order of Detention (hereinafter "Detention Order") entered against him on November 20, 2008, by John S. Scoles, United States Magistrate Judge.

II. PRELIMINARY STATEMENT

On October 30, 2008, Sholom Rubashkin was arrested on criminal immigration charges and then released by the magistrate court on bail. *United States v. Sholom Rubashkin*, No. 08-MJ-00363 (JSS) (October 30, 2008). On November 14, 2008, he was arrested on bank fraud charges. *United States v. Sholom Rubashkin,* No. 08-MJ-00381 (JSS) (Nov. 14, 2008). When Sholom Rubashkin was presented on the second arrest, the government sought to detain him, claiming he was both a flight risk and a danger to the community. After holding a detention hearing on November 19, the Magistrate Judge issued a written Detention Order rejecting the government's contention that Sholom Rubashkin was a danger to the community, but detaining him for risk of his flight to Israel. Detention Order at 11.[1]

On December 5, 2008, Sholom Rubashkin filed a motion for reconsideration with Magistrate Judge Scoles. With the additional bail conditions proposed by Sholom Rubashkin in that motion, there now exist a package of proposed bail condition that "more than "reasonably assure," 18 USC § 3142(c), Sholom Rubashkin's presence.

Although Magistrate Judge Scoles has not yet had time to consider the motion for

1 On November 20, 2008 both the immigration charges and the bank fraud charges were incorporated into one indictment, the Second Superseding Indictment in *United States v. Sholom Rubashkin, et. al*., 08-Cr-1324-LRR.

reconsideration, Sholom Rubashkin now files this appeal pursuant to 18 USC § 3145(b) for review of Magistrate Judge Scoles Detention Order. Local Criminal Rule 5(a) requires that absent good cause shown, the appeal to this Court from the Detention Order must be filed within ten court days of the detention order (i.e., by today, December 8, 2008), Consequently, to comply with that deadline, Sholom Rubashkin files this appeal but at the same time respectfully requests that this Court first allow Magistrate Judge Scoles an opportunity to rule on the motion for reconsideration.

If and when it becomes necessary for this Court to turn to this appeal, the Court will see that Sholom Rubashkin's bail package has offered an extraordinary bail package, including: house arrest; 24 hour armed guard security with monitoring; $10 million or more in equity (from over 35 homes that will be forfeited should he flee); $225,000 in cash; waiver of extradition; and surrender of all the family's passports. Thus, for the reasons set forth below, he should be released.

III. BACKGROUND

A. RABBI RUBASHKIN

Sholom Rubashkin is a 49 year-old citizen of the United States born in Brooklyn, New York. He has no prior criminal record and he does not have any history of violence or drug abuse. He is married and the father of 10 children, all of whom reside in the United States, and eight of whom reside in Postville, Iowa, with or near Sholom Rubashkin and his wife. By all accounts he is a family man. "He is particularly devoted to his 15 year old son who suffers from physical and mental disabilities and is particularly reliant on his father." Detention Order at 7. According to the son's doctor, the disabled son's bond is especially strong with his father, and

his father is the primary caregiver. DX2 (Letter of Dr. Mordechai Lederman).[2] The doctor, who has known the family for years, expressed his view to the Court that Rabbi Rubashkin would not flee and abandon this son who is so in need of his father's care. *Id*.

Sholom Rubashkin has lived and worked in Postville, Iowa, for over 15 years, having served as the chief executive officer of the family meatpacking business, Agriprocessors, Inc., which has maintained a considerable economic and employment presence in the Postville area.

But his ties go far beyond Agriprocessors. Sholom Rubashkin is an active member of his respective commercial, secular, and religious communities, and is the backbone of the Jewish community that has settled in Postville. He was instrumental in establishing the infrastructure necessary to attract Jewish workers to the area, who in turn support the local economy. Detention Order at 7. He helped bring members of the Jewish community to the town, and he founded the lower school, the high school and the synagogue. He is such a central figure in the community that he recently added a second dining room to his house of sufficient size to host Postville's entire Jewish community at his home at once. As a reflection of his role in the community, some 275 friends—Jews and non-Jews—submitted letters to the Court describing their relationship with Sholom Rubashkin and expressing confidence in his commitment to show up in Court as required. DX5 (Letters from the Community).

Significantly, Sholom Rubashkin is not an Israeli citizen and has no bank accounts, property or other assets in Israel. He does not have an Israeli passport or visa. His wife, children and parents all reside in the United States and are all U.S.—not Israeli—citizens. The only contact with Israel that the government demonstrated in the hearing was a hotel receipt from

2 All numbered exhibits herein referenced were submitted to the Magistrate Court at the November 19, 2008, Arraignment and Detention Hearing.

Israel found in the Rubashkin home during the execution of a search warrant. Tr. 26[3]. The receipt reflects a short visit to Israel by Rabbi Rubashkin almost a year ago. *See* Detention Order at 6, 10; GX24 (Photo of Receipt). [4]

B. RABBI RUBASHKIN DID NOT FLEE, DESPITE REPEATED WARNINGS FROM THE GOVERNMENT THAT HE WOULD BE ARRESTED

Starting in May 2008, the government made clear to Sholom Rubashkin again and again that he was about to be charged with a variety of serious criminal charges, yet Sholom Rubashkin never fled. For example, on May 12, 2008, agents of the Department of Homeland Security, Immigration and Customs Enforcement ("ICE") executed a search warrant at on the headquarters of Agriprocessors, Rabbi Rubashkin's place of business. Detention Order at 1-2. He did not flee.

Later in May, the government sent Sholom Rubashkin a letter indicating that he was a target in the immigration investigation. DX3 (May 20, 2008, Letter from Matt M. Dummermuth). The next day the government sent him a letter indicating he was also a target in a bank fraud investigation. DX3 (May 21, 2008, Letter from Matt M. Dummermuth). Still Sholom Rubashkin did not flee. In September, the government sent a letter to counsel for Rabbi Rubashkin, indicating that Sholom Rubashkin was being investigated not only on immigration and bank fraud charges, but a host of other charges as well, including money laundering and RICO. DX3 (Sept. 18, 2008, Letter from Matt M. Dummermuth). Still, he did not flee.

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3 "Tr." refers to the transcript of the detention hearing before Magistrate Judge Scoles on November 19, 2008, in United States v. Sholom Rubashkin, No. 08-MJ-00381(JSS).

4 Millions of Americans have visited Israel. Roughly 541,000 Americans visited Israel in 2007 alone, *see* Tourist Arrivals by Country of Residence/Citizenship, Israeli Central Bureau of Statistics, http://www1.cbs.gov.il/shnaton59/st23_05.pdf, and over 331,000 Americans have visited Israel in the first half of 2008. Danny Sadeh, Ynet.com News, Iranian, Iraqui tourists visit Israel too, July 24, 2008, http://www.ynet.co.il/english/articles/0,7340,L-3572684,00.html.

In October, Sholom Rubashkin traveled to Canada for a few days. Detention Order at 10. He had a valid passport and was under no travel restrictions. Of significance to this appeal is the fact that he returned; he did not take advantage of the opportunity while abroad to flee the inevitable criminal charges. *See id.* On October 30, 2008, shortly after his return, Sholom Rubashkin was arrested on criminal immigration charges. With the agreement of the government, the Court ordered that Sholom Rubashkin be released subject to G.P.S. electronic monitoring, surrender of his passport and that of his wife, and a $1,000,000.00 bond with $500,000.00 secured by a surety acceptable to the government. *Id.* at 3.

C. AFTER HIS INITIAL ARREST AND RELEASE, SHOLOM RUBASHKIN STILL DID NOT FLEE, DESPITE REPEATED WARNINGS BY THE GOVERNMENT THAT HE WOULD BE ARRESTED *AGAIN*

The events leading up to the bank fraud arrest reinforce the conclusion that Sholom Rubashkin is not a flight risk. Simultaneously with the filing of the initial Criminal Complaint, on October 30, 2008, Sholom Rubashkin was sued by First Bank Business Capital, Inc. in connection with a $35,000,000.00 revolving line of credit extended by the Bank to Agriprocessors, Inc. Then, on November 4, 2008, Government agents executed a second search warrant at Agriprocessors, Inc., this time searching for evidence of the alleged bank fraud described in the civil complaint. Detention Order at 3-4. Notwithstanding his awareness of the civil complaint, the November 4 search, the earlier target letters, and the government's continuing investigation, Rabbi Rubashkin still did not flee.

On November 14, 2008, the Government filed a Criminal Complaint charging Sholom Rubashkin with bank fraud. *Id*. at 6; GX1 (Complaint). He was arrested on the same day, and the government searched his home pursuant to a search warrant. Detention Order at 6.

D. THE DETENTION HEARING

On November 19, 2008, the Court conducted a detention hearing. Most of the government's argument concentrated on demonstrating the weight of its evidence on the bank fraud charges.[5] It then sought to prove—ultimately unsuccessfully—that Sholom Rubashkin was a danger to the community because, if released, he would allegedly tamper with evidence.

With respect to the central issue of this appeal—risk of flight—the prosecution pointed to the following: that in the course of the November 14 search of the home, the ICE agents claimed to have found roughly $20,000 in cash; that much of the cash was in a tote bag of valuables in the master bedroom closet which also contained the passports of the children and the birth certificate of the Defendant; some of the cash was in a travel pouch; that there were adjacent lock boxes available for storage of valuables that were empty, implying that the Defendant was getting ready to go; and that there was the one hotel receipt from Israel, reflecting a short stay in December 2007. *See* Detention Order at 6, 10; GX24 (Photo of receipt). In an effort at guilt by association, the prosecution proved through hearsay newspaper reports that two other defendants, former supervisors at Agriprocessors, fled after the search. *See* Tr. at 21-22. One of the supervisors was a Muslim with Israeli citizenship, whom the government suspected to have fled to Israel via Canada. *Id*. at 27-28. The government intimated that because that Israeli citizen fled, presumably to Israel, that Sholom Rubashkin was also likely to flee to Israel. *Id.*

The prosecution also introduced a copy of Israel's Law of Return, which gives Jews who move to Israel the right to automatic citizenship. *Id*. at 27; GX28 (Israel Law of Return). But the prosecution did not demonstrate that Rabbi Rubashkin had planned to exploit any opportunity

5 While relevant, the weight of the evidence is not the most important factor in analyzing risk of flight. *See United States v. Friedman*, 837 F.2d 48 (2nd Cir. 1988) ("we have required more than evidence of the commission a serious crime and the fact that a potentially long sentence to support a finding of a risk of flight"); *United States v. Motamedi*, 767 F.2d 1403, (9th Cir. 1985) (the weight of evidence against the defendant is the least important factor).

presented by the Law of Return, nor did the prosecution demonstrate that Jews are more likely to flee because of the Law of Return. The prosecution then essentially argued that because the former Agriprocessor supervisor may have fled to Israel, and because Israel had a Law of Return under which Sholom Rubashkin could also obtain Israeli citizenship, that he too was a risk of flight to Israel. *Id*. at 27.

On the defense case, the defense demonstrated at great length Sholom Rubashkin's extensive family and community ties, particularly those to his disabled son. *See id.* at 32-42. The defense also showed that Sholom Rubashkin did not flee despite all the repeated signs of prosecution. *Id*. at 46-47. Similarly, the defense argued that Sholom Rubashkin's trip to Canada and his voluntary return demonstrated a commitment not to flee. *Id*. at 45-46.

As for the cash, the defense showed the Court that because of the government investigation, Agriprocessors was collapsing and Sholom Rubashkin's checks were bouncing. *Id*. at 48-52. This family of ten was collecting cash so as to be able to pay the bills. The defense introduced a receipt reflecting a car payment of approximately $1,700 in cash to demonstrate the sorts of bills that the family was paying in cash. *Id*. at 51-52; DX6 (MoneyGram receipt). The defense also pointed out that significant amounts of the cash were in $1 bills, ***in boxes***, and explained that these were community charity collections that were being amassed before being conveyed to the intended charity. *Id*. at 49. These masses of $1 bills could not be said to be evidence of flight; one does not flee with boxes of $1 bills.

As to the Law of Return, the defense pointed out at some length to the magistrate judge that there existed a current, up-to-date extradition treaty that would ultimately insure Rabbi Rubashkin's presence here in the United States for trial and sentence even if he were to flee to Israel and become an Israeli citizen. *Id*. at 43-44. The defense also stressed that the Bail Reform

Act does not permit ethnicity or religion to be considered as a bail-risk factor. *Id.* at 65.

Finally, the defense offered an extraordinary bail package. In addition to the $500,000 (equity in a relative's home) that Sholom Rubashkin had previously posted in connection with the immigration arrest, and in addition to electronic monitoring, the defense offered home detention, (at least for an initial period until Agriprocessors was sold), an additional $1.5 million in real property from relatives' homes in NY; and an additional $225,000 in cash. Finally, in an impressive display of confidence in Sholom Rubashkin, some thirty-five families in the Postville community offered to post their homes to secure his release. *Id*. at 39-40; DX4 (List of Postville Homes Available for Securing the Bond). The homes had an additional $2 million in equity. *Id*. Thus, the defense offered a financial package of about $4 million in equity in a variety of homes of friends and family that would be lost were he to flee, $225,000 in cash, continued electronic monitoring and house arrest. The defense also offered to turn in the children's passports, in addition to the parents' passports which had already been submitted at the time of the initial arrest. Tr. at 52-53.

In reply, the prosecution said the following with respect to the information provided by the defense on the extradition treaty:

> Counsel indicates that there is an extradition process, however, I don't believe that that is something the Court ought to consider when the question is whether or not there's a serious risk that the person will show up for a hearing or not, not whether or not we can get him back through an extradition process. It could take years. There's, of course, all sorts of reasons that that's a completely unacceptable alternative to having the defendant show up as ordered.

Id. at 75-6. The Court took the matter under advisement. While the matter was under consideration, the defense sent a letter to the Court advising that in addition to the property

previously offered, there existed a piece of a commercial property in New York that a friend was prepared to post that was worth $6 million that brought the total equity to $10 million.

E. THE DETENTION ORDER

The next day, November 20, the Magistrate Court issued a written detention order. Most of the order was devoted to a recitation of the immigration allegations and the bank fraud allegations. When it came to the actual issue of detention, on the issue of dangerousness the Court first found that the government failed to meet its burden of proving by clear and convincing evidence that Sholom Rubashkin presented a danger to the community. Detention Order at 11. The Court did conclude, however, that Sholom Rubashkin was a risk of flight and that he should be detained on that basis. *Id.* The Court relied first on the $20,000 cash and the circumstances under which the cash was found.

> [I]t is significant that during a search of defendant's home on November 14, ICE Agents found a bag containing a substantial amount of money together with defendant's birth certificate and the passports of some of his children.

Id. at 10. The Court accepted the government's argument that if Rabbi Rubashkin was not intent on fleeing he would have kept the valuables in a lock box, rather than in a tote bag. *Id.*

The Court then accepted the prosecution's argument regarding the Law of Return:

> Under Israel's "Law of Return" any Jew and members of his family who have expressed their desire to settle in Israel will be granted citizenship. At the time of the hearing the Government proffered that two supervisors at Agriprocessors, Inc. fled following the search on May 12, 2008. It is believed that Hosam Amara, a Muslim with Israeli citizenship, fled to Israel possibly through Canada.

Id.

The Court accepted the government's argument that somehow because Sholom Rubashkin is Jewish and Israel has a Law of Return for Jews, that Sholom Rubashkin posed a great risk of flight. *Id*. at 11.

F. THE PROPOSED NEW BAIL CONDITIONS: 24-HOUR SURVEILLANCE, WAIVER OF EXTRADITION, AND, IF NECESSARY, MORE EQUITY

As is recounted above, the defense offered an extraordinary bail package at the November 19 detention hearing. Those conditions, however, were not sufficient in Magistrate Judge Scoles view. Now, in addition to those earlier conditions of release, Sholom Rubashkin proposes the Court order that he be subject to 24-hour surveillance by Global Security Services ("GSS"). GSS's proposal is attached as Exhibit A. The company, based in Davenport, has the capabilities of setting up sophisticated camera surveillance, and/or 24 hour manned home surveillance by experienced security personnel. Sholom Rubashkin will not be able to leave his home without the accompaniment of armed security personnel, who will also be able to enforce any other conditions imposed by the Court. Sholom Rubashkin's family will absorb the cost of this surveillance. The armed security personnel have the authority to arrest him at gunpoint if necessary.

Further, Sholom Rubashkin is prepared to sign any waiver of extradition proposed by the government (even though there exists, as the defense sets forth below, an effective extradition process with Israel).

Further still, even though the defense has already proffered $10 million toward bail, friends are prepared to put up substantial additional property if necessary.

IV. ARGUMENT

A. STANDARD OF REVIEW

This appeal is taken pursuant to 18 U.S.C. § 3145 (b); s*ee also* 18 U.S.C. § 3142(c). As this Court has recognized, it must subject the magistrate judge's detention order to *de novo* review. *United States v. Koopman*, No. 07-CR-1014-LRR, 2007 WL 4200047 at *1 (N.D. Iowa, November 21, 2007) (citing *United States v. Maull*, 773 F.2d 1479, 1481 (8th Cir. 1985) (en banc)).

B. WITH THE PROPOSED NEW BAIL CONDITIONS, SHOLOM RUBASHKIN WILL NOT BE A FLIGHT RISK

1. THE LEGAL STANDARDS UNDER THE BAIL REFORM ACT

a. Bail Conditions Must "Reasonably Assure," but not Guarantee, the Defendant's Appearance

With respect to risk of flight, a defendant may be detained before trial "only if the Government shows . . . by a preponderance of the evidence that no condition or set of conditions . . . will reasonably assure the defendant's appearance. . . ." *United States v. Kisling*, 334 F.3d 734, 735 (8th Cir. 2003) (quoting *United States v. Orta*, 760 F.2d 887, 891 (8th Cir. 1985) (en banc) (emphasis omitted); *see also* 18 U.S.C. § 3142(c).

The Eighth Circuit has made clear that the conditions need only "reasonably assure" the defendant's presence, not "guarantee" that presence, and has reversed when the courts below have, in effect, detained because of the absence of a guarantee. *Orta*, 760 F.2d at 891.

b. The Bail Reform Act's Standards Point Strongly in Favor of Sholom Rubashkin's Release

The proposed bail conditions will more than "reasonably assure" Sholom Rubashkin's presence. This man will not cause 35 families in his community in Postville -- of which he is the backbone -- to lose their homes. He will not flee and cause his family members in New York who are posting their homes and their money to become homeless or impoverished. He will not

forfeit the bail package that currently exceeds $10 million. He will not abandon his wife and children, especially his 15 year-old disable son who is so dependent on him. He has already given up his passport and his wife's passport. The family will give up the children's passports, as well. Finally, he will continue to be subject to electronic monitoring and geographical restrictions.

Further, with the new proposed conditions, it will not be possible for him to flee. He will be under 24-hour surveillance. He will be accompanied by an experienced, armed security professional whenever he leaves his home. He will be detained, handcuffed, and turned over to the authorities should he ever attempt to flee. Even more, the second proposed new condition—the waiver of extradition—insures there is no utility in attempting to flee.

Finally, should the Court feel that more than $10 million in equity is required, friends will put up any additional equity ordered by the Court.

This extraordinary bail package is being offered on behalf of a man who never fled, despite the repeated warnings by the government that he would be indicted. The warnings began in May with the initial raid on Agriprocessors, followed later that month with two target letters, one advising him that he was a target of the immigration investigation, the other advising him that he is the target of the bank fraud investigation. DX3. The warnings continued in September, when the government sent his attorney a letter stating that Sholom Rubashkin was also being investigated for possible money laundering and RICO offenses. *Id.* And then they continued yet again in early November when the government executed a search warrant at Agriprocessors searching for evidence of bank fraud. At no time did he flee. And in October before his first arrest, at a time when it was perfectly lawful for him to do so, he traveled to Canada for a few days *and returned.*

In light of that background of no flight and the legal standard that requires a reasonable assurance -- but not a guarantee -- of a defendant's presence, the previously suggested bail conditions when coupled with the new proposed bail conditions are more than adequate. The government cannot meet its burden of proving risk of flight. Requiring anything more of Sholom Rubashkin would be tantamount to requiring a guarantee, in violation of the clear requirements of the Bail Reform Act. *Orta*, 760 F.2d at 891.

c. The Bail Cases Point Strongly in Favor of Sholom Rubashkin's Release

The prior proposed conditions of release, coupled with the new conditions, place Sholom Rubashkin in a situation where his bail proposal is far stronger than those routinely described in the caselaw. For example, in *Truong Dinh Hung v. United States*, 439 U.S. 1326 (1978), the defendant, after having been convicted for violating the Espionage Act, sought bail pending appeal. He was Vietnamese and not a United States citizen, had not established permanent residence in the United States, his parents still resided in Viet Nam, and there was no means to procure his return should he flee to Viet Nam. *Id.* at 1329 & n.5. Justice Brennan, sitting as Circuit Justice ordered him released:

> But if these considerations suggest opportunities for flight, they hardly establish any inclination on the part of applicant to flee. And other evidence supports the inference that he is not so inclined. Applicant faithfully complied with the terms of his pretrial bail and affirmed at sentencing his faith in his eventual vindication and his intention not to flee if released on bail. He has resided continuously in this country since 1965, and has extensive ties in the community. He has produced numerous affidavits attesting to his character and to his reliability as a bail risk. He has maintained a close relationship with his sister, a permanent resident of the United States since 1969. The equity in his sister's Los Angeles home constitutes a substantial measure of the security for applicant's bail. In addition, applicant's reply to the memorandum for the United States in opposition informs us that the "American Friends Service Committee and the National Council of Churches have come forward with large sums

which are now in the registry of the court in Alexandria."

Id. at 1329-30 (footnotes omitted).[6] Moreover, the defendant there was released even without the 24-hour security surveillance now proposed in this case.

The Eighth Circuit has consistently granted bail in cases involving risk of flight as great or greater than that presented here. *See, e.g.*, *United States v. Leisure*, 710 F.2d 422 (8th Cir. 1983) (lowering excessive bond for defendants charged with "serious and extremely violent crimes" because defendants had lived in the area with their immediate families for many years, owned real property, and had been released on bond in the past without failing to appear); *Orta*, 760 F2d at 892 (reversing and remanding to district court to determine whether the presumption of detention in narcotics case was rebutted by combination of conditions that "would reasonably assure [defendant's] appearance in the proceedings"). Numerous similar District Court cases in the Eighth Circuit are set forth in the margin.[7]

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6 Although this was a pre-Bail Reform Act case, its pronouncement as to what constitutes a risk of flight is just as valid today, and it has been cited after the 1984 enactment of the act. *See Robinson v. Sears*, No. 07-Civ-2890 (GEL) 2007 WL 2962338, at *2 (S.D.N.Y. Oct. 10, 2007) (citing *Truong*).

7 *See also United States v. Garcia*, 801 F. Supp. 258 (S.D. Iowa 1992) (finding detention of alien drug defendant unwarranted based on employment history and residence in area for nineteen years with girlfriend, five children, parents, and siblings); *United States v. Bautista*, No. 07-00187-02-CR-W-NKL, 2007 WL 2080327 (W.D. Mo. July 16, 2007) (finding that substantial bond was sufficient to "reasonably assure" appearance of permanent resident defendant charged with "conspiring to encourage and induce illegal aliens to reside in the United States for commercial advantage and private financial gain; money laundering; and a notice of criminal forfeiture"); *United States v. Ochoa-Crespo*, Crim. No. 4-87-106, 1987 WL 18447 (D. Minn. Oct. 14, 1987) (finding that alien drug defendant had rebutted presumption favoring detention by showing permanent residency; GED, social security card, and New York driver's license; employment; marriage to a naturalized U.S. citizen and presence of two children with one on the way; and no criminal record); *United States v. Gray*, 651 F. Supp. 432 (W.D. Ark. 1987) (defendant charged with conspiracy to murder entitled to bail despite evidence of past bad acts, intent to alter appearance, and threat of further harms, because evidence was hearsay and because current employment, knowledge of pending charges for three months prior to arrest, and presence of wife expecting baby contradicted risk of flight); *United States v. Leyba*, 104 F. Supp. 2d 1182 (S.D. Iowa 2000) (finding that alien drug defendant had rebutted presumption of detention by showing legal residence; no previous attempts to flee despite prior arrests; third-party's agreement to enter custody order; and agreement to submit to electronic monitoring); *United States v. Bradai*, No. CRIM.04-16(01)DWF/SR, 2004 WL 413281 (D. Minn. Feb. 26, 2004) (overturning detention of alien defendant brought on false documents charges where defendant had resided in same area for five years; had strong ties to community as a graduate student, teacher, and member of Muslim community; had cooperated with authorities; lacked connections to terror groups alleged by government; and was generally "law abiding").

In the Detention Order, the Magistrate Court relied in part on the case of *United States v. Friedman*, 837, F. 2d 48 (2d Cir. 1988). Detention Order at 7. In *Friedman*, a child pornography case, the Second Circuit reversed the lower court's decision detaining Friedman:

> *[I]t is undisputed that Friedman is a life long New York resident, that he has no prior criminal records, that he has no passport, or known ability to evade surveillance, that he has worked gainfully in the New York area for 25 years prior to his arrest, and that he is married and has three children, all of whom live in the New York area.* Moreover, Friedman apparently took no steps to leave the jurisdiction after Federal Agents executed a search warrant at his home on November 3, 1987 and after he was arrested at home on state charges three weeks later.

Friedman, 837 F.2d at 49-50 (emphasis added). The bail facts in *Friedman* remarkably mirror the relevant bail facts presented in this case, yet Friedman was released even without 24-hour security surveillance.

A review of recent cases involving Jewish or Israeli defendants demonstrates that such defendants are frequently released in circumstances involving a much greater risk of flight and far more contacts with Israel than are present here. *See, e.g., United States v. Ezagui*, 08-MJ-00530 (E.D.N.Y. July 28, 2008) (Docket no. 11, Israeli citizen charged with $15,000,000 bank fraud released on bond with home detention and monitoring despite fact of arrest at Kennedy Airport with a one-way ticket out of the United States and wife's and children's residence in Israel); *United States v. Maximov*, No. CR-08-0368-PHX-DGC, 2008 WL 4185834 at *2 (D. Ariz. September 5, 2008) (Israeli citizen arrested on bank fraud and money laundering charges released on bond despite acknowledged risk of flight); *United States v. Karni*, 298 F. Supp. 2d 129, 132-33 (D.D.C. 2004) (Israeli citizen charged with violating international export restrictions released on $75,000 bond with home detention and monitoring despite no ties to the United States other than his arrest there while on vacation); *United States v. Shereshevsky*, 08-MJ-01766

(S.D.N.Y. Sept. 4, 2008) (Docket no. 14, Jewish convicted felon charged in $250,000,000 securities fraud action released on bond with home detention and monitoring despite substantial international ties and business operations in Israel and Africa); *United States v. Wein Reis*, 08-Cr-00165 (DFH) (S.D. Ind. Nov. 6, 2008) (Docket no. 49, Jewish defendant released on bond despite net worth of $100,000,000.00 and significant ties to Israel). These cases are but recent samples of many where the Courts have released Israeli or Jewish defendants despite risk of flight claims substantially greater than the risk presented by Rubashkin. These cases, combined with the new proposed conditions, militate very strongly in favor of release.

C. BECAUSE OF THE EXTRADITION TREATY WITH ISRAEL, THE LAW OF RETURN CREATES NEITHER AN OPPORTUNITY NOR A MOTIVE TO FLEE

1. BACKGROUND: THE ISSUE OF ISRAEL AT THE DETENTION HEARING AND IN THE DETENTION ORDER

As recounted above, on November 19, 2008, the Magistrate Court conducted a detention hearing, at which the government sought to prove, in part, that if released Shalom Rubashkin would flee to Israel. Although the defense pointed out that an up-to-date, workable extradition treaty exists between Israel and the United States which renders attempted flight to Israel useless for Sholom Rubashkin, the Court evidently credited the government's argument that the extradition treaty is irrelevant and burdensome. In its November 20 order, the Court based its conclusion that Sholom Rubashkin presents a risk of flight to Israel, at least in part, on the existence of Israel's Law of Return and that Rabbi Rubashkin, as a Jew, is eligible for citizenship under that law. Detention Order at 10. The Court did not mention the extradition treaty. *Id*.

As shown below, not only was the government's characterization of the extradition process inaccurate and at odds with the official position of the Justice Department, but it was an

error of law for the government to argue that the extradition treaty is "something the Court ought [not] to consider" and "totally unacceptable," that the treaty raised questions as to "whether or not we can get him back through an extradition process," and that, in any event, "[i]t could take years" to effect Sholom Rubashkin's return under the treaty Tr. at 75-76. Because of the treaty, the Law of Return should have played no role whatsoever in the analysis.

a. Law of Return

Counsel's Westlaw research has not uncovered a single instance involving a Jewish criminal defendant where the prosecution invoked the Law of Return in support of detention. Leonard Joy, Esq., the current Federal Defender for the Southern and Eastern Districts of New York—which encompass New York City and its suburbs, and thus cover the largest Jewish population in the country—advises that in his decades of practice against the federal government, he can recall no instance where the prosecutor invoked the Law of Return in arguing that an American Jew is a bail risk.[8] If the argument has been pressed by the government in the past, it has not generated any published opinion. As shown below, an examination of the Law of Return, in light of the extradition treaty, shows that a Jewish defendant cannot succeed in trying to avoid trial and sentence by fleeing to Israel.

The State of Israel was founded in 1948. Israel's Law of Return, enacted just two years later in 1950, affirmed the already well-established right of any Jew to become an *oleh*, or immigrant, and to secure a visa, citizenship, and to settle in Israel. *See* GX28 (The Law of Return 5710 (1950), http://www.knesset.gov.il/laws/special/eng/return.htm).

Because of the long history of persecution of Jews throughout the world, the Law of

8 This representation was made on November 25, 2008, to Baruch Weiss, Esq., counsel who appeared before the Magistrate Court at the detention hearing.

Return was drafted to apply to all Jews. In the words of the Law of Return, "*[e]very Jew* has the right to come to this country as an oleh." *Id.* at Section 1 (emphasis added). In the prosecutors' view, anyone subject to the Law of Return is an increased flight risk. Consequently, under that view, "every Jew" is to be viewed for bail purposes as a greater risk of flight than a non-Jew. That means that 5,300,000 Americans would be viewed as heightened bail risks simply because they are Jews.[9] The government's logic would extend, for example, even to a Jew whose family lived in this country since the first Jews arrived on the shores of New Amsterdam in 1654.[10] It would also extend to the ultimate superior of the prosecutors pressing the Law-of Return argument, *i.e.*, the current Attorney General of the United States Michael B. Mukasey; the ultimate superior of the Homeland Security agents who have investigated this case, *i.e.*, Secretary Michael Chertoff; and two sitting Justices of the Supreme Court, Justices Steven Breyer and Ruth Bader Ginsburg. It is ironic that a law designed to provide refuge to persecuted Jews has now become the basis for detaining a Jew who might otherwise have been released pending trial.

Whatever validity may otherwise exist with respect to the prosecutors' Law-of-Return argument, there exists a streamlined, effective treaty that undercuts the argument entirely.

b. The Extradition Treaty

An extradition treaty between the United States and Israel has been in force since December 5, 1963.[11] It was recently amended and improved in a number of significant ways in a

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9 *See Haaretz.com, 12/09/07 at* http://www.haaretz.com/hasen/spages/903585.html (Israeli newspaper reporting on information collected by the Jewish Agency on the Jewish population of various countries). This is a conservative figure, because it includes only those who consider themselves Jews. Many individuals who do not consider themselves Jews would be so considered by the Law of Return. *Id.*

10 *See, e.g.*, Arthur Hertzberg, The Jews in America at 19 (1989).

11 Convention on Extradition Between the Government of the United States of America and the Government of the State of Israel, U.S.–Isr., Dec. 10, 1962, 14 U.S. T. 1707, corr. version in 18 U.S. T. 382 (effective Dec. 6,

protocol signed on July 6, 2005, and effective January 1, 2007.

Both the original treaty and the current amended version provide that each country must extradite its own nationals. Article IV of the original treaty provided that "[a] requested Party shall not decline to extradite a person sought because such person is a national of the requested Party." That means, of course, that Israel has undertaken to extradite its own nationals to the United States. Pursuant to the original treaty, there were numerous extraditions by Israel to the United States. Indeed, in 2005, the Justice Department advised the Senate that from 1999 to 2005, "the United States has extradited a total of 20 fugitives from Israel, *of whom 15 were Israeli nationals (including dual United States-Israeli nationals)* (emphasis added).[12]

Significantly, a number of those extradited cases involved fraud cases.[13] For example, in 2002, Michael Akva, an Israeli citizen, was extradited by Israel to the United States on securities fraud and insider trading charges.[14] In 2000, Sharon Haroush, an Israeli citizen, was extradited by Israel to the United States on fraud and theft charges.[15] Another notable case, similar to the scenario feared by the prosecution in the instant case, is particularly instructive. Chaim Berger, an American citizen from New York, was indicted in 1977 in the Southern District of New York for defrauding the government of many millions of dollars.[16] He fled to Israel where he had never lived previously, and claimed citizenship under the Law of Return. He was extradited

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1963) (DXB, attached).

12 Statement of Mary Ellen Marlow, Director, Office of Int'l Affairs, Criminal Div., Dept. of Justice, Senate Committee on Foreign Relations, Nov. 15, 2005, at 7 (DXC, attached).

13 The original version of the treaty set forth a list of specifically enumerated offenses for which extradition was available; among those offenses was the offense of "obtaining money . . . by false pretenses." Article II(14).

14 *See* U.S. Sec. and Exchange Comm'n, SEC Obtains Default Judgments Ordering Two Defendants to Pay $7.6 Million For Insider Trading, http://www.sec.gov/litigation/litreleases/lr18193.htm.

15 *See* Israel to Extradite Citizen to U.S., United Press Int'l Network, March 30, 2000.

16 *See* Randal Archibald, Israeli Court Allows Return of Man Indicted in Fraud, N.Y. Times, Aug. 7, 2001, available at http://query.nytimes.com/gst/fullpage.html?res= 9C02E1DA1E3CF934A3575BC0A9679C8B63.

back to the United States, pleaded guilty and was sentenced to six years imprisonment.[17] All of these extraditions took place under the pre-amendment treaty.

In its 2005 statement to the Senate, the Justice Department reviewed the state of extraditions from Israel to the United States, and found the pre-amendment approach "to be workable." DXC, Marlow Statement at 7.[18] Of course, that statement is entirely at odds with the prosecutors' characterization of the treaty as "totally unacceptable." Indeed, in 2006, the Attorney General of the United States publicly praised Israel for its pre-amendment extradition to the United States of an Israeli who was a suspected mob boss on drug charges.[19] Nonetheless, despite the history of successful extraditions, the Administration sought and obtained Senate ratification for a protocol amending the treaty in a way that would "significantly streamline[] the process of requesting extradition." *Id.* at 6. For example, the amended treaty now

- allows the use of hearsay, *id.*;[20]
- "streamline[s] the procedures for 'provisional arrest,'" *id.* at 7; *see* Article XI;
- expands the list of extraditable offenses, providing that any crime that constitutes an offense in both countries and is punishable by imprisonment of one year or more is extraditable. Article II.
- requires that only one offense need be extraditable; as long as there is one extraditable offense in the U.S.'s request, Israel can extradite on non-extraditable offenses as well. Article II, section 4.

Most importantly, the amended version of the treaty reiterates the principle that nationality is no

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17 *See United States v. Berger*, No. 97-Cr-00410-BSJ (S.D.N.Y. May 23, 2002) (Docket 167, Filed Judgment as to Defendant Chaim Berger).

18 At one time there had been a problem because, despite the extradition treaty, Israel enacted a 1978 law that conflicted with the treaty when it came to Israeli nationals. *Id.* at 6. That domestic Israeli law has, however, since been amended to yield the "workable" framework. *Id.* at 6-7.

19 *See* U.S. Attorney General praises Israel for fight against terror, international crime, Associated Press, June 27, 2006, 6/27/06 APALERTCRIM 15:54:33.

20 *See* Article X *bis*, section 2 (providing that the information in the extradition request "shall be admissible as evidence in extradition proceedings even though they would be considered hearsay or otherwise would not conform to evidentiary rules applicable at trial").

defense to extradition. Article IV, section one, of the amended treaty provides: "the requested Party shall not refuse extradition solely on the basis of nationality."[21] Protocol between the Government of the State of Israel and the Government of the United States Amending the Convention on Extradition Signed at Washington, D.C., on Dec. 10, 1962, U.S.-Isr., July 6, 2005, *available at* http://purl.access.gpo.gov/GPO/LPS65673 (DXD, attached). Thus, Sholom Rubashkin's citizenship and nationality would be no bar to extradition, even were he to become an Israeli citizen under the Law of Return.[22] Any American, whether Jewish or not, would be extraditable in the same way from Israel.

Not surprisingly, extraditions after the new protocol from Israel have increased. The new extradition cases continue to include Israeli citizens extradited in fraud cases. For example, this past September, the United States Attorney's Office, Southern District of New York announced that Israel arrested nine Israelis in a lottery telemarketing fraud scheme. According to the government's press release, "[t]his case involves the largest number of Israeli citizens ever to be provisionally arrested by Israel in anticipation of extradition."[23]

Finally, extradition defendants—if they jumped bail to travel to Israel—are typically detained by the Israelis pending extradition. For example, Michael Akva, an Israeli citizen extradited in 2002 for securities fraud and insider trading, *see supra* at 14, who had jumped bail

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21 That clause is introduced with the phrase, "except as provided in the Article . . . ." But none of the exceptions apply to Rubashkin.

22 A limited exception applies to persons who were Israelis at the time of the offense. Such persons are still to be extradited from Israel to the United States, but only on the condition that they be returned to Israel to serve their sentences. *See* Marlow Statement at 6 -7; *see also* Israel's Extradition Law, 5714-1954, as amended, at section 1A. But that was part of the pre-existing procedure that the Justice Department found to be workable. *Id.* at 7. In any event, Sholom Rubashkin, is not and has never been an Israeli citizen, and certainly was not an Israeli citizen at the time of the alleged offenses, and is thus subject to all the extradition provisions of the treaty, and if extradited to the United States, would serve his sentence here.

23 *See* Israel-Based Defendants Indicted and Arrested in Loterry Telemarketing Fraud Targeting U.S. Citizens, http://www.usdoj.gov/usao/nys/pressreleases/September08/mayoetalarrestindictmentpr.pdf

in the United States, was detained by the Israelis until extradited to the United States.[24]

In sum, there exists an extradition treaty that has always been "workable." After the recent amendments it is now better than "workable"; it is an up-to-date, streamlined treaty, regularly invoked for all serious criminal matters, including fraud cases. It applies to everyone, Jews and non-Jews. It even applies to Israelis. This treaty will insure that Rubashkin—even if he were to become a citizen of Israel under the Law of Return—will be returned to the United States, tried in the United States, and if convicted, that he will serve any sentence in the United States. Were he to flee to Israel, he would be detained pending extradition. Because of this treaty, the Law of Return is irrelevant. Any American, whether Jewish or non-Jewish, would be treated the same way if he or she were to flee to Israel.

Because of this effective treaty, the Law of Return does not create the opportunity for successful flight. And it therefore creates no motive to flee—any Jewish defendant who checks will see that he or she will be detained in Israel and then extradited back to the United States.

Moreover, in successfully urging the Court not to consider the extradition treaty, the prosecutors committed an error of law. Courts are required to consider whether the United States has an extradition treaty with the country to which the defendant allegedly has ties in determining whether the defendant is a flight risk. Thus, in *United States v. Samet*, 2001 WL 568148 (2nd Cir. 2001) (unpublished opinion) the District Court ordered pretrial detention, but the Second Circuit remanded for consideration in light of the existence of the extradition treaty with Israel.[25] *See also United States v. Paterson*, 780 F.2d 883, 888 (10th Cir. 1986) (McKay, J.,

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24 *See* SEC Obtains Default Judgments Ordering Two Defendants to Pay $7.6 Million for Insider Trading, *supra*, n.13 (noting that Akva received "credit for time that he served while in custody in Israel awaiting extradition").

25 The Second Circuit does not permit citation of unpublished opinions prior to January 1, 2007 as precedent.

dissenting) (expressing the view that bail was appropriate because "Canada is not an uncivilized country, and we have extradition treaties with Canada that are routinely honored").[26]

Finally, to accelerate the extradition procedure, some courts have required as a condition of bail that defendants with strong ties to Israel (including citizenship) execute irrevocable waivers of extradition. *See United States v. Simon*, 2006 U.S. Dist. LEXIS 52979 (D. Nev. July 27, 2006) (Israeli citizen released upon condition of executing extradition waiver); *United States v. Karni*, 298 F. Supp. 2d 129, 133 (D.D.C. 2004) (same); *United States v. Cohen*, No. 00-CR-00100 (S.D. Fla. May 5, 2000); *United States v. Cohen*, No. 02-MJ-02592 (S.D. Fla. May 3, 2002); *United States v. Freund*, No. 99-CR-00561 (S.D.N.Y. May 10, 1999). Sholom Rubashkin would execute such a waiver in this case.

D. BY INVOKING THE LAW OF RETURN, THE GOVERNMENT VIOLATED SHOLOM RUBASHKIN'S RIGHT TO EQUAL PROTECTION

As demonstrated below, bail is a constitutional right under the Eighth Amendment. Because it is a constitutional right, it is especially important to insure that all classes of individuals are treated equally with respect to bail. Jews are a protected class for Equal Protection purposes. Thus, singling Jews out in any way when determining bail is unconstitutional, unless the government's action survives strict scrutiny. The discrimination here

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See 2d Cir. R. § 32.1(c)(2) (2008). Counsel cites *United States v. Samet* only for the court's persuasive reasoning on remarkably similar facts.

26 Conversely, the absence of a treaty with a country with which the defendant has ties, militates in favor of detention. *See United States v. Epstein*, 155 F. Supp. 2d 323, 325-26 (E.D. Pa. 2001) (defendant's extensive ties to Brazil, a country with which the United States had no extradition treaty, was the "crucial factor" in court's determination that defendant was a flight risk); *United States v. Hernandez*, 154 F. Supp. 2d 240, 244 (D. Puerto Rico 2001) (defendant's ties to Venezuela, coupled with an indication that extradition would be illegal under Venezuelan law, was a factor considered in determining that defendant was a flight risk); *United States v. Terrones*, 712 F. Supp. 786, 795 (S.D. Cal. 1989) (defendant's ties to Mexico, and fact that United States did not have an extradition treaty with Mexico weighed in favor of finding defendant to be a flight risk); *Government of the Virgin Islands v. Callwood*, 296 F. Supp. 943, 944 (D. Virgin Islands 1969) (defendant considered a flight risk, in part, because he had ties to the British West Indies and there would be "difficulties involved in formal extradition," were he to flee there).

cannot survive strict scrutiny at all, especially because there is an effective extradition mechanism in place.

1. Bail is Subject to Equal Protection Analysis

The Eighth Amendment provides that "[e]xcessive bail shall not be required." A defendant cannot be deprived of the right to bail, i.e., liberty, in a manner that violates the Due Process clause of the Fifth Amendment. *United States v. Salerno*, 481 U.S. 739, 750 (1987); *Foucha v. Louisiana*, 504 U.S. 71, 83 (1992) (citing *Salerno*, 481 U.S. 755). The Fifth Amendment's Due Process clause, applicable to the federal government, contains within it an Equal Protection component.[27] *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954).[28] "[T]he Constitution prohibits selective enforcement of the law based on considerations such as race. . . . [T]he constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause." *Whren v. United States*, 517 U.S. 806, 813 (1996).

That is especially true when judicial proceedings are involved. The Equal Protection requirement that discrimination be eliminated from all official proceedings is most compelling in the judicial system. *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (citation omitted). Thus, in determining whether or not to grant bail, the government must act in accordance with Equal

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27 The Fourteenth Amendment's Equal Protection clause applies on its face only to States, and in this case we are, of course, dealing not with a state but with the federal government.

28 *See also United States v. Sperry Corp*., 493 U.S. 52 (1989) (discussing "the equal protection component of the Due Process Clause" in reviewing the constitutionality of a federal statute); *Immigration & Naturalization Service v. Pangilinan*, 486 U.S. 875 (1988) (considering "the possibility of a violation of the equal protection component of the Fifth Amendment's Due Process Clause" in reviewing action by the federal government); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2 (1975) (referring the "Fifth Amendment equal protection claims")); *U.S. v. Deerling*, 179 F.3d 592, 594 (8th Cir. 1999) ("The equal protection component of the Due Process Clause of the Fifth Amendment precludes selective enforcement of the law based upon an "unjustifiable" factor such as race."); *Gavin v. Branstad*, 122 F.3d 1081, 1089 (8th Cir. 1997) (examining whether legislation violated the equal protection component of the Fifth Amendment's Due Process Clause).

Protection principles. *See Hall v. Furlong*, 77 F.3d 261, 364 (10th Cir. 1996); *Pugh v. Rainwater*, 557 F.2d 1189, 1201 (5th Cir. 1977).

Any bail decision that treats Jews differently for purposes of bail is constitutional only if consistent with basic Equal Protection principles.

2. Jews are a "Protected Class" for Equal Protection Purposes

Whether Jews constitute a race or a religion, Jews are nonetheless considered a protected class for constitutional and statutory analysis. *See Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) (Jews are members of a protected class able to make out claim for racial discrimination under 42 U.S.C. § 1982); *Sinai v. New England Telephone & Telegraph Co.*, 3 F.3d 471, 474 (1st Cir. 1993) (Jews are members of a protected class for purposes of § 1981 race discrimination and Title VII national origin discrimination claims); *Jews for Jesus, Inc. v. Jewish Community Relations Council of N.Y., Inc.*, 968 F.2d 286, 291 (2d Cir. 1992) (Jews are members of a protected class able to make out claim for civil rights conspiracy under 42 U.S.C. § 1985(3)); *Shain v. Center for Jewish History, Inc*., 418 F. Supp. 2d 360, 366 (S.D.N.Y. 2005) (Orthodox Jews are members of a protected class for purposes of Title VII religious discrimination claim); *Boex v. OFS Fitel, LLC*, 339 F. Supp. 2d 1352, 1362 (N.D. Ga. 2004) (Jews are members of a protected class for purposes of § 1981 discrimination claims on the basis of race and ancestry); *United States v. Somerstein*, 959 F. Supp. 592, 595 (E.D.N.Y. 1997) (whether persons of the Jewish faith are considered a religion or a race or both, they are members of a protected class such that the *Batson* rule applies to government's use of peremptory challenges).

As shown below, because Jews are a protected class, any action by the government that treats Jews differently than non-Jews can be upheld only if it can withstand strict scrutiny, the most rigorous level of scrutiny in the realm of constitutional analysis.

3. Because Jews are a Protected Class, any Judicial Rule that Operates to Their Collective Disadvantage Must be Subjected to Strict Scrutiny

When a classification operates to the peculiar disadvantage of a particular race, equal protection analysis requires that the classification be examined using strict scrutiny. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312-13 (1976); *see also* Johnson, 543 U.S. at 506 (strict scrutiny is applied to "*all* racial classifications to [assure that government] is pursuing a goal important enough to warrant use of a highly suspect tool") (emphasis in original); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) (all racial classifications imposed by the government must be analyzed by a reviewing court under strict scrutiny).

Because Jews are a protected class, and because treating Jews differently than non-Jews effectively creates a racial or religious classification, strict scrutiny applies. *See Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 168 (3d Cir. 2002) (government's selective application of ordinance to conduct motivated by Orthodox Jewish beliefs is sufficiently suggestive of discriminatory intent that it must be reviewed with strict scrutiny); *United States v. DeJesus*, No. CRIM. 99-728(JBS), 2002 WL 32989738, at *8 (D.N.J. Jan. 24, 2002) (because "categorical striking of a juror based upon denominational affiliation-such as striking a juror solely because he or she is a Catholic, Jew or Muslim" can alternatively be viewed under the framework of both the equal protection clause and the free exercise clause, this Court is of the view that strict scrutiny applies to such challenges.").

4. The Government's View that Jews Constitute Heightened

Bail Risks Because of the Law of Return Does Not Survive Strict Scrutiny

"[I]t is the rare case in which ... a law survives strict scrutiny." *Republican Party of Minnesota v. White*, 416 F.3d 738, 763 (8th Cir. 2005) (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)). When government action is subject to strict scrutiny, it "always, or nearly always, is struck down." *Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 319 (1976) (Marshall, J., dissenting) (citation omitted); *Britton v. Rogers*, 631 F.2d 572, 576-77 (8th Cir. 1980) ("Typically, strict scrutiny is fatal for the governmental action in question."). Racial classifications in particular have almost always "proven automatically fatal." *Missouri v. Jenkins*, 515 U.S. 70, 121 (1995); *Roe v. Crawford*, 514 F.3d 789, 794 (8th Cir. 2008) ("Racial classifications are viewed as immediately suspect . . . .").[29]

In fact, almost no laws discriminating on the basis of race have been upheld by the Supreme Court — the primary exception being its now-discredited decision in *Korematsu v. United States* condoning the Japanese internment during World Ward II, 323 U.S. 214, 219 (1944);[30] *see also Missouri v. Jenkins*, 515 U.S. at 121 (noting that "aside from two decisions rendered in the midst of wartime," strict scrutiny has "proven automatically fatal"); *Britton v. Rogers*, 631 F.2d at 576-77 (8th Cir. 1980) (noting that "[i]n only one case has the Supreme Court upheld explicit racial discrimination after applying

29 The high hurdle posed by the "strict scrutiny" caused one renowned commentator to concluded that "strict scrutiny" has become "'strict' in theory and fatal in fact." Gunther, "The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a new Equal Protection," 86 Harv. L. Rev. 1, 8 (1972).

30 The Supreme Court has recognized *Korematsu* as "demonstrat[ing] vividly that that even "the most rigid scrutiny" can sometimes fail to detect an illegitimate racial classification." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995); *see also id.* at 275 (Ginsburg, J. dissenting) (noting that in [*Korematsu*], scrutiny the Court described as most rigid nonetheless yielded a pass for an odious, gravely injurious racial classification).

strict scrutiny. That was *Korematsu v. United States* . . . .").[31]

Under strict scrutiny, the government has the burden of proving that its racial classification is a narrowly tailored measure that furthers compelling government interests. *Adarand*, 515 U.S. at 227. As shown below, the government has failed to demonstrate a compelling government interest in a rule that implicates all Jews, and has failed to demonstrate that its interest here cannot be met with a more narrowly tailored approach.

The government clearly has a compelling interest in insuring that defendants are present at trial. *Salerno*, 481 U.S. at 749. But it has no compelling interest in a rule that Jews are a heightened bail risk, for the simple reason that is has failed to demonstrate any statistical correlation between Jews and flight risk. In other words, the government introduced no evidence that Jews are more likely to flee because of the Law of Return than non-Jews. An unproven assumption is fatal in a case subject to strict scrutiny.

If race or religion is ever to enter the analysis (a proposition that the defense rejects), it must, at the very least, be shown to be "statistically related to suspected criminal activity." *Farag v. United States*, 2008 WL 4965167 (E.D.N.Y. November 24, 2008) (quoting Sheri Lynn Johnson, *Race and the Decision to Detain a Suspect*, 93 Yale L.J. 214, 237 (1983)). Time and time again the Courts have rejected any generalized effort, unsupported by strong statistics, to attribute suspected illegal activity to any ethnic group. "Where . . . any substantial number . . . of people share a specific characteristic, that characteristic is of little or no probative value in determining criminality. *United States v. Montero-Comargo*, 208 F.3d 1122, 1131 (9th Cir. 2000) (en banc). In *Montero-Comargo*, the Ninth Circuit, sitting en banc, applied strict scrutiny

31 There have also been a smattering of decisions such as *Grutter v. Bollinger*, 539 U.S. 306 (2003), upholding race-based policies designed to remedy past discrimination. *See* H. Lau, Formalism: From Racial Integration to Same-Sex Marriage, 59 Hastings L.J. 843, 849 (2008) (identifying only two exceptions since 1972).

in concluding that Hispanic appearance may not be considered as a factor in determining whether particularized reasonable suspicion exists for an investigatory stop near the Mexican border. The Court came to that conclusion after carefully examining the population statistics in California and finding that the government failed to meet its burden of demonstrating a correlation between Hispanic appearance and status as an illegal alien. *Id.* at 1134-35.[32] That is the view of the Eighth Circuit as well. *See United States v. Clay*, 640 F.2d 157, 159 (8th Cir. 1981) ("this court has consistently rejected the use of race in combination with other factors" to conclude that a defendant committed a crime that would justify a search or seizure); *United States v. Hayden*, 740 F. Supp. 650, 653 (S.D. Iowa 1990) ("defendants' race would provide no basis for a reasonable suspicion, and it would be fundamentally wrong for an officer to act, even in small part, on the basis of a motorist's race.").

The absence of any strong statistical evidence was fatal to the government's claim that it can consider Arab ethnicity to be considered as a factor in determining whether there is probable cause to believe that an individual may be involved in terrorism.

> Even granting that all of the participants in the 9/11 attacks were Arabs, and even assuming *arguendo* that a large proportion of would-be anti-American terrorists are Arabs, the likelihood that *any given airline passenger* of Arab ethnicity is a terrorist is so negligible that Arab ethnicity has no probative value in particularized reasonable-suspicion or probable-cause determination.

Farag, 2008 WL 4965167 at *21 (citing cases) (emphasis in original).

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32 The Ninth Circuit noted that the Supreme Court in *United States v. Birgnoni-Ponce*, 422 U.S. 873 (1975), also held that the apparent Mexican ancestry of the occupants of a car, standing alone, does not furnish reasonable grounds for even a "modest" investigatory stop to determine whether the occupants are illegal aliens. *Id* at 884. But then in "brief dictum consisting of only half a sentence," 208 F.3d at 1132, the Supreme Court said that the population statistics of California would make Mexican ancestry relevant , if instead of standing alone it was one of a number of other factors. 25 years later, the Ninth Circuit examined the updated population statistics, as well as subsequent Supreme court law, and concluded that Hispanic appearance is no longer a relevant factor even if considered along with other factors 208 F.3d at 1135.

For that reason, the government has not demonstrated a compelling interest in invoking the Law of Return.

Moreover, there are clearly narrower, tailored measures, that would be effective rather than subjecting Jews to a different set of standards. Rather than locking Jews up with greater frequency, the United States could rely on the general array of bail conditions, and then utilize the valid, streamlined, regularly-invoked extradition treaty with Israel in those few cases where the defendant actually flees. Certainly it is better to have the government on rare occasion be forced to resort to this streamlined extradition treaty than to brand over five million Americans as bail risks. The government should not be permitted to invoke the Law or Return in the case of every Jewish defendant, including defendants who may not be aware of it, or have no interest in moving to Israel. Otherwise, the government slurs Americans because of a law passed by a foreign country over which these Americans have no control and which they may have no desire to invoke.

Rather than attempting to create a rule that applies to all Jews, the government is requird to engage in a particularized analysis that focuses specifically on Sholom Rubashkin. That would properly shift the inquiry from opportunity to flee to inclination to flee. *See Truong Dinh Hung v. United States*, 439 U.S. at 1329-30 (fact that defendant had ties to Vietnam and that U.S. "would have no means to procure his return," if he fled indicated an opportunity to flee, but not an inclination to flee; thus, lower court's bail revocation was reversed). That would individualize the determination in a constitutionally permissible way. Thus, for example, the government can point to his hotel receipt, for what little that is worth. That would constitute the individualized determination that Sholom Rubashkin is entitled to.

The government's heavy handed effort in this case, without any individualization, without any statistical support, when other, less drastic means are available, is constitutionally barred. Race or religion is a prohibited factor which cannot play a role, even in combination with other factors, in the bail determination.

V. CONCLUSION

Sholom Rubashkin urges this Court to revoke the prior Order of Detention and release him on bail on the conditions the defense proposes, or any others the Court deems reasonable.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA

CERTIFICATE OF SERVICE

I hereby certify that on 8th Day of December, 2008, I electronically filed the foregoing with the Clerk of Court using the ECF system which will send notification of such filing to the following:

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