No. 14-1055

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

LUBAVITCH-CHABAD OF ILLINOIS, INC.,
LUBAVITCH-CHABAD OF EVANSTON,
INC., d/b/a THE TANNENBAUM CHABAD HOUSE,
and RABBI DOV HILLEL KLEIN,

Plaintiffs-Appellants,

v.

NORTHWESTERN UNIVERSITY, TIMOTHY
STEVENS, and PATRICIA TELLES-IRVIN,

Defendants-Appellees.

Appeal from the United States District Court for
the Northern District of Illinois, Eastern Division
Case No. 1:12-cv-07571
The Honorable Judge John W. Darrah

APPELLANTS' PETITION FOR REHEARING AND
REHEARING *EN BANC*

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RULE 26.1 DISCLOSURE STATEMENT

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing item #3): Appellants Lubavitch-Chabad of Illinois, Inc., Lubavitch-Chabad of Evanston, Inc., d/b/a The Tannenbaum Chabad House, and Rabbi Dov Hillel Klein

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Lewin & Lewin, LLP
Law Offices of R. Tamara de Silva
Jonathan D. Lubin, Attorney at Law

(3) If the party or amicus is a corporation: (i) Identify all its parent corporations, if any; and (ii) List any publicly held company that owns 10% or more of the party's stock:

Appellants have no parent corporations and issue no shares of stock.

Date: December 22, 2014

/s/ Nathan Lewin
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UNITED STATES COURT OF APPEALS
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LUBAVITCH-CHABAD OF ILLINOIS,
INC., LUBAVITCH-CHABAD OF EVANSTON,
INC. d/b/a THE TANNENBAUM CHABAD
HOUSE, and RABBI DOV HILLEL KLEIN,

CASE NO. 14-1055

Plaintiffs-Appellants,

v.

NORTHWESTERN UNIVERSITY, TIMOTHY
STEVENS and PATRICIA TELLES-IRVIN,

Defendants-Appellees.

APPELLANTS' PETITION FOR REHEARING AND REHEARING *EN BANC*

Appellants hereby move through undersigned counsel for rehearing and rehearing *en banc* of the panel decision of this Court issued on November 6, 2014 (Doc. 38). On November 10, 2014, this Court granted appellants an extension of time to December 22, 2014, to file this Petition (Doc. 41).

RULE 35(b) STATEMENT

The panel decision in this case conflicts with decisions of this Court and of the Supreme Court of the United States. Consideration by the full Court is also necessary to secure and maintain uniformity of the Court's decisions. In addition, the panel's decision presents questions of exceptional importance because the

panel's decision conflicts with authoritative decisions of other United States Courts of Appeals that have addressed these issues.

(1) The panel decision invokes and relies on evidence "not taken from the record of the case" (as the concurring Judge acknowledges) and therefore conflicts with the established rule under which "federal appellate courts will not consider . . . evidence . . . not part of the trial record." *IBM Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975).

(2) The panel decision misapplies and unjustifiably limits the application of this Court's *en banc* decision in *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009), which concerned discrimination against a Jewish condominium resident because of hostility to her Orthodox Jewish religious observance of affixing a mezuzah to her door-frame. The panel opinion declares erroneously that the *Bloch v. Frischholz* decision imposed liability for "hostility to Jews" and not for "hostility based on a religious disagreement." The panel decision also conflicts with the Supreme Court's decision in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

(3) Judge Posner should have recused himself under 28 U.S.C. § 455(a) because his "impartiality might reasonably be questioned" as a result of his having received an honorary degree from Northwestern University, the principal defendant in this case.

(4) The "tone of derision that pervades" Judge Posner's opinion and the unilateral reliance on material that "was not part of the record" demonstrates that this appeal should have been heard by "a different . . . judge" than Circuit Judge Posner under the standard subsequently announced by Judge Posner in *Stuart v. Local 727, Int'l Bhd. Of Teamsters*, 2014 WL 5906562 (7th Cir. Nov. 14, 2014).

(5) The scheduling of the oral argument in this case – in which the date for oral argument was fixed six days ***before*** the Appellants' Reply Brief was filed – suggests that the argument date was deliberately scheduled so that a particular panel of Circuit Judges would hear the appeal. Such deliberate scheduling violates this Court's procedures regarding random assignment of appellate panels.

GROUNDS FOR PANEL REHEARING

1. The panel opinion misstates facts at least ten times. The opinion erroneously states:

(i) that Rabbi Klein "made no effort to limit consumption of alcohol,"

(ii) "that [Rabbi Klein] . . . was himself intoxicated,"

(iii) that Rabbi Klein was "plying minors with hard liquor,"

(iv) that there was "underage and excessive drinking by the kids who frequent the Chabad house,"

(v) that Rabbi Klein's claim is "that the university should have told him to exercise closer supervision over alcohol consumption at the house,"

(vi) that Rabbi Klein "wants a second chance,"

(vii) that Rabbi Klein "had gotten away for more than a quarter of a century with an irresponsible attitude toward excessive underage drinking that went on under his nose in the Chabad house,"

(viii) that Rabbi Klein "thought that he could continue to do so, with impunity, indefinitely,"

(ix) that Rabbi Klein "was given multiple chances,"

(x) that Rabbi Klein was "warned repeatedly, but did not react."

None of these factual assertions in the panel opinion was found by the District Court, none is based on evidence in the record, all are categorically false, and all would have been denied by Rabbi Klein had he been confronted with them. The "findings" stated in the panel's opinion were baseless assertions by the author of the panel opinion and appear to reflect his preconceived opinion of Chabad-Lubavitch and Rabbi Klein – derived entirely from the author's own improper extra-record research.

2. The panel opinion ignores and eradicates the separate legal interests of the organizational plaintiffs by declaring that "for simplicity we'll pretend that Rabbi Klein is the only plaintiff."

ARGUMENT

I.

THE PANEL DECISION IS IMPROPERLY BASED ON FACTS "NOT TAKEN FROM THE RECORD OF THE CASE"

In his concurrence Judge Bauer noted what is obvious from even a superficial reading of the panel opinion: The decision is not based on the appellate record but on Judge Posner's personal excursion into "youtube" and other websites. The facts recited in the panel opinion – disparaging to Rabbi Klein personally and to Lubavitch-Chabad generally – are, as Judge Bauer observed, "not taken from the record of the case."

It is well-established that "federal appellate courts will not consider . . . evidence . . . not part of the trial record." *IBM Corp. v. Edelstein*, 526 F.2d 37, 45 (2d Cir. 1975). See also *Lee County Branch of the NAACP v. City of Opelika*, 748 F.2d 1473, 1481 (11th Cir. 1984); *Johnson v. Just Energy*, 547 Fed. Appx. 71, 72 (2d Cir. 2013); *Gorelik v. Gorelik*, 443 Fed. Appx. 586, 587 (2d Cir.2011); *Gang Chen v. China Central Television*, 320 Fed. Appx. 71, 73 (2d Cir. 2009). This Court warned against unilateral reliance, without any advance notice, on even highly reliable government websites. *Pickett v. Sheridan Health Care Center*, 664 F.3d 632, 648 (7th Cir. 2011). The Court held in *Pickett* that it is a violation of Rule 201 of the Federal Rules of Evidence for a District Court to take judicial

notice of information in a government website without providing a party with advance notice and an opportunity to be heard. That same legal principle surely applies to decisions by federal appellate judges.

Moreover, Judge Posner's own investigation of Rabbi Klein's appearances on "youtube" and his individual appraisal of Rabbi Klein from the "youtube" films as a "colorful figure" who is "lively, engaging, eminently approachable, enthusiastic, and one might even say charismatic" exceeds the permissible bounds of judicial authority assigned to a federal appellate judge. This evaluation of Rabbi Klein appears to have influenced Judge Posner in crafting an opinion that included a wealth of wholly erroneous factual assertions. See pp. 12-13, *infra*. Indeed, the independent investigation made unilaterally by the judge would warrant disqualifying him from rendering any judgment regarding Rabbi Klein. See *Costello v. Flatman, LLC*, 558 Fed. Appx. 59 (2d Cir. 2014).

II.

THE PANEL OPINION CONFLICTS WITH THIS COURT'S DECISION AND WITH DECISIONS OF THE SUPREME COURT

In *Bloch v. Frischholz*, 587 F.3d 771, 775 n. 5 (7th Cir. 2009), this Court in a unanimous *en banc* decision sustained the right of a Jewish plaintiff to claim that 42 U.S.C. § 1982 had been violated when she was discriminated against on account of her religious observance – *i.e.*, her observance of the Jewish obligation

to affix a mezuzah to her doorpost. The plaintiff in *Bloch v. Frischholz* was not the only Jewish resident of the condominium, and there was no claim that all Jewish residents were victims of discrimination. The panel opinion plainly errs when it declares that *Bloch v. Frischholz* concerned "hostility to Jews, not . . . hostility based on a religious disagreement." Affixing a mezuzah is a religious observance, and discriminating against a tenant in a condominium because the tenant affixes a mezuzah is "discrimination on the basis of religious identity, beliefs, or observances."

The governing principles regarding the applicability of Sections 1981 and 1982 to claims such as plaintiffs' were articulated by the Supreme Court in *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987), and in *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987). The panel decision in this case conflicts with the understanding of various courts (including this Court in *Bloch v. Frischholz*) that Jewish religious observances are protected by these Reconstruction Era civil rights laws. See, *e.g.*, *Singer v. Denver School District No. 1*, 959 F. Supp. 1325, 1330-1331 (D. Colo. 1997); *Mass v. McLenahan*, 893 F. Supp. 225, 230 (S.D.N.Y. 1995); *LeBlanc-Sternberg v. Fletcher*, 781 F. Supp. 261 (S.D.N.Y. 1991). (In their brief in this Court at page 21, the appellees asserted that the *LeBlanc* decision "is incorrect . . . and should not be followed here.")

III.

JUDGE POSNER SHOULD HAVE RECUSED HIMSELF IN AN APPEAL IN WHICH A UNIVERSITY FROM WHICH HE RECEIVED AN HONORARY DEGREE IS THE PRINCIPAL APPELLEE

An extrajudicial "factor" that also requires recusal of Judge Posner from this appeal is his receipt of an honorary degree of Doctor of Laws from Northwestern University in 2001. Because this Court's standard practice is not to disclose the names of the judges who would be hearing this appeal until the morning of the oral argument, counsel for the appellant did not know before the morning of the oral argument that Judge Posner was on the panel that would be hearing the appeal. Nor did counsel learn, until after the decision was rendered (just 10 calendar days after the oral argument), that Northwestern University – the principal appellee in this case whose counsel presented oral argument – had conferred an honorary degree on Judge Posner.

When taken together with the private investigation that Judge Posner made into the character of Rabbi Klein, this case is comparable to *SCA Servs., Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977), in which this Court held that 28 U.S.C. § 455(a) required recusal of a District Judge who engaged in a "confidential inquiry" to determine the nature of his brother's role in the litigation. This Court said that since counsel "were not present and were unaware of the inquiry at the

time it was made," the inquiry created "an impression of private consultation and appearance of partiality which does not reassure a public already skeptical of lawyers and the legal system." 557 F.2d at 116. The appellants were surely unaware of Judge Posner's canvass of Rabbi Klein's appearances on "youtube" and could not respond to whatever impressions they made on Judge Posner.

Conferral of an honorary degree is a favor that naturally inclines the recipient to prefer the institution that gives him or her that honor. If the institution is only peripherally involved in litigation, that inclination might not be sufficient to require recusal under the standard of Section 455(a) as applied in *Liteky v. United States*, 510 U.S. 540 (1994). But when the institution is the central party in civil rights litigation and it is accused of engaging in deliberate unlawful discrimination, a reasonable observer is likely to conclude that a judge who has been publicly honored by that institution is not truly impartial.

Nor is this case comparable to *Schurz Communications, Inc. v. Federal Communications Commission*, 982 F.2d 1057 (7th Cir. 1993), in which Judge Posner denied a recusal motion based on his having submitted an expert-witness affidavit 16 years earlier that "repeated views about antitrust policy that [he] had stated in many different fora over a period of years." 982 F.2d at 1062. The *Schurz Communications* case concerned policy views expressed on the merits of specific antitrust issues. In this case the appearance of partiality grows out of perceived

personal favoritism to one party in litigation. And if the issue of recusal presents a close question whether a reasonable person might harbor doubts about a judge's impartiality, the judge should recuse himself. *Republic of Panama v. American Tobacco Co., Inc.,* 217 F.3d 343, 347 (5th Cir. 2000).

IV.

UNDER THE STANDARD APPLIED BY JUDGE POSNER IN DISQUALIFYING A DISTRICT JUDGE, JUDGE POSNER IS DISQUALIFIED IN THIS CASE

In *Stuart v. Local 727, Int'l Bhd. of Teamsters*, 2014 WL 5906562 (7th Cir. Nov. 14, 2014), this Court, in an opinion by Judge Posner, disqualified District Judge Shadur on remand of a case because the District Judge had "instruct[ed] his law clerk to request the plaintiff's EEOC charge from the plaintiff's lawyer, without telling the defendant, even though the charge was not part of the record" and because the Court found "unmistakable (and to us incomprehensible) tone of derision that pervades his opinion." Similar conduct and attitude appear in this case.

Without telling the appellant, Judge Posner has relied on material that is "not part of the record" in this case. And the panel opinion that he has authored is at least as singular in its "tone of derision that pervades his opinion" as was the District Court's opinion in *Stuart v. Local 727, Int'l Bhd. of Teamsters*, 2014 WL

1089117 (N.D. Ill. March 18, 2014). Applying the same standard that resulted in the disqualification of District Judge Shadur in the *Stuart* case (decided only 8 days after this decision), Judge Posner should be disqualified in this case.

V.

THE SCHEDULING OF ORAL ARGUMENT IN THIS CASE RAISES DOUBTS ABOUT THE RANDOM SELECTION OF THE PANEL

Under the briefing schedule set by the Clerk of the Court in this case the appellant's Reply Brief was due to be filed on October 8, 2014. While appellant's counsel was busy drafting the Reply Brief, he was notified on October 2, 2014, that oral argument would be held on October 28, 2014.

There was, to be sure, no urgency to this appeal. It was an appeal from dismissal of a complaint in a civil case. Appellant's counsel expected that, pursuant to Circuit Rule 34 and this Court's standard procedures, a panel would be randomly selected by the Clerk after the Reply Brief was filed. Indeed, appellant's counsel had not been asked to submit any written indication of dates when he would be unavailable. (In fact, appellant's counsel returned from overseas travel on the evening of October 27 and, if he had been given an opportunity, would have requested that oral argument not be held, for this reason, on October 28, 2014.)

Appellant's counsel has appeared and argued orally in every Circuit of the United States Court of Appeals. Ordinarily, in counsel's experience, oral argument

is held not less than one month after the Appellant's Reply Brief is filed. In this case, it was held 20 days after the filing of Appellant's Reply Brief. This extraordinary scheduling gives rise to reasonable doubt regarding the process by which a panel was to be randomly selected.

VI.

CONTRARY TO STANDARDS FOR REVIEW OF SUMMARY JUDGMENTS, THE PANEL OPINION RECITES MANY ERRONEOUS FACTUAL ALLEGATIONS THAT ARE DENIED BY THE APPELLANT

The panel opinion fails to begin with the usual recitation when this Court reviews summary judgments – *i.e.*, that the appellate court (like the trial court) must view all facts "in a light most favorable to the non-moving party" (*Burnell v. Gates Rubber Co.*, 647 F.3d 704, 707-708 (7th Cir. 2011)) and that any doubt regarding a material fact must be resolved in favor of the non-moving party (*Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 443 (7th Cir. 1994)). The reason for this omission is obvious. The opinion contains an abundance of factual assertions that are wholly unsupported by any evidence whatever, and many are false. None of them was found by the District Court when it purported to follow the appropriate summary-judgment standards.

We have enumerated at pages 3-4, *supra*, ten (10) such factual assertions that Rabbi Klein and the other appellants deny. None of these assertions has any

probative evidentiary support in the record, and none was relied on by the District Court. All are stated in the panel opinion as established facts.

This Court should, in the interest of fairness and consistent application of its standards of review of summary judgments, vacate the panel opinion that violates these standards and rehear the case on its proper appellate record.

VII.

THE INTERESTS OF TWO OF THE APPELLANTS HAVE BEEN OBLITERATED IN THE INTEREST OF "SIMPLICITY"

The panel opinion makes the curious assertion that "for simplicity, we'll pretend that Rabbi Klein is the only plaintiff." There are, in fact, two other plaintiffs with substantial interests – Lubavitch-Chabad of Illinois and the Tannenbaum Chabad House. Each is substantially harmed by the conduct of Northwestern and the individual defendants. The panel opinion totally ignores these interests in its derisive rejection of Rabbi Klein personally.

The plaintiffs other than Rabbi Klein are entitled to a fair and dispassionate consideration of their claims. This Court should vacate the panel opinion and consider this case as it affects all plaintiffs, even if the appeal is thereby made less "simple."

CONCLUSION

For the foregoing reasons the panel opinion should be vacated and this appeal reheard before a randomly selected panel of Circuit Judges other than Judge Posner.

Respectfully submitted,

s/Nathan Lewin

December 22, 2014

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 35(b)(2) of the Federal Rules of Appellate Procedure, I hereby certify that this petition complies with the volume limitations in that the Petition for Rehearing and Rehearing *En Banc* does not exceed 15 pages, exclusive of material not counted under Federal Rule of Appellate Procedure 32.

Pursuant to Rules 32(a)(5) and 32(a)(6), this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman.

By /s/ *Nathan Lewin*

Dated: December 22, 2014

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2014, I electronically filed the foregoing brief with the Clerk of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

By /s/ *Nathan Lewin*

In the

United States Court of Appeals

For the Seventh Circuit

No. 14-1055

LUBAVITCH-CHABAD OF ILLINOIS, INC., *et al.*,

Plaintiffs-Appellants,

v.

NORTHWESTERN UNIVERSITY, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 12 C 7571 — **John W. Darrah**, *Judge*.

ARGUED OCTOBER 28, 2014 — DECIDED NOVEMBER 6, 2014

Before BAUER, POSNER, and TINDER, *Circuit Judges*.

POSNER, *Circuit Judge*. There is a branch of Hasidic Judaism (on Hasidic Judaism see the article of that name in *Wikipedia*, http://en.wikipedia.org/wiki/Hasidic_Judaism#Characteristic_ideas (visited November 6, 2014, as were the other websites cited in this opinion)) known as Chabad (with the "Ch" pronounced like the German "ch" in Bach or Achtung) or Chabad-Lubavitch (with the accent in "Lubavitch" falling on the second syllable). "Chabad" is an acronym for the He-

brew words for wisdom, understanding, and knowledge, and Lubavitch is the name of the Belorussian village to which the headquarters of the movement moved shortly after its beginning in the eighteenth century and remained for a century. Chabad has grown to be one of the largest (maybe the largest) Jewish religious organizations in the world, with branches in many countries. It emphasizes mysticism over the legalism emphasized in other branches of Judaism and its ritual and observances are distinctive. (For additional detail see "Chabad," *Wikipedia*, http://en.wikipedia.org/wiki/Chabad.)

There are Chabad "emissaries," as they are called, on many American college campuses. The emissaries manage "Chabad houses" located on or near the campuses. The Tannenbaum Chabad House is located near Northwestern University's main campus, in Evanston, Illinois. Since 1985, when the house was founded, it's been presided over by a Rabbi named Dov Hillel Klein. For a video of him, see "L'Chayim" ("to life"), Nov. 18, 2007, www.youtube.com/watch?v=r9cA-YjohnQ. (Considerable other online material about him can be obtained by Googling his name.) He is a colorful figure and is at the center of this case, which pits him and the Illinois chapter of Chabad against the university and two of its officials; for simplicity we'll pretend that Rabbi Klein is the only plaintiff.

Until the university broke with him as described below, Rabbi Klein had a sideline: Northwestern paid a company called Sodexo to provide food for its students and Sodexo agreed with Chabad to pay Klein for rabbinic supervision of the company's provision of kosher food to Northwestern in

order to ensure compliance with kosher law. Northwestern reimbursed Sodexo for the payments to Klein.

Religious organizations that desire access to particular Northwestern facilities and services (for example, in the case of Jewish religious organizations, access to the names of Jewish students matriculating at Northwestern) must be "recognized" by the university's chaplain. Tannenbaum Chabad House had from its founding been one of the university's religious "affiliates," the university's term for the religious organizations that it recognizes. But in 2012 it terminated its affiliation with the Chabad house.

Back in 2001 the university had learned that underage students (the drinking age in Illinois, as in all states, is 21, except that an alcoholic beverage can lawfully be served to a person under 21 "in the performance of a religious ceremony or service," 235 ILCS 5/6-16(a)(iii)) had vomited after excessive consumption of alcoholic drinks at a party at Tannenbaum Chabad House. One of the students had to be hospitalized. In the wake of that incident the university's chaplain met with Rabbi Klein and emphasized to him the need to control the consumption of alcohol at his Chabad house. Nevertheless in 2005, at a dinner in a university dining hall to celebrate the Bar Mitzvah of Rabbi Klein's son, alcohol was served, including to underage students, even though when reserving the dining hall Klein had assured the responsible university official that no alcohol would be served. And not only wine but also hard liquor, mainly scotch and vodka, was served.

Although the chaplain spoke to Klein about the incident and extracted an apology from him, alcohol, including hard liquor, continued to be served to students at the house, both

on Jewish holidays and on Friday evenings, when the Jewish Sabbath begins. The students who attended these affairs were not asked to present proof of age, though undoubtedly many were under 21—most college students are. Rabbi Klein testified that to require attendants at the events to carry identification would violate religious law. He made no effort to limit consumption of alcohol at the events and drank along with the students attending. There is evidence that he was himself intoxicated at some of these events, though he denies that.

As far as we've been able to determine, plying minors with hard liquor is not required by any Jewish religious observance. It's true that according to some adherents of Chabad Lubavitch "it is a mitzvah [a divine command] to drink, and drink to excess, on Purim" (and possibly on other holidays as well). Yanki Tauber, "The Purim Drink," www.chabad.org/holidays/purim/article_cdo/aid/2814/jewish/The-Purim-Drunk.htm. But drinking an alcoholic beverage is not mandatory; one is allowed to be drunk simply on "happiness." Tzvi Freeman, "Purim & Alcohol," www.chabad.org/holidays/purim/article_cdo/aid/1146095/jewish/Purim-Alcohol.htm#footnote2a1146095. Klein acknowledges that grape juice can be substituted for wine on the Sabbath; what we don't know is whether it is considered proper under Jewish law and excused by secular law to permit or encourage minors to drink hard liquor on Purim or other Jewish holidays.

Another rabbi, not of the Chabad persuasion, whose son was a graduate of Northwestern, complained to the university chaplain about the drinking at the Chabad house, at the same time acknowledging that he had religious differences

with Rabbi Klein. The chaplain relayed the complaint to the university's vice president for student affairs, prompting her to conduct an investigation. On the basis of the results of the investigation and with the agreement of the chaplain, she decided, and informed Rabbi Klein, that unless he was replaced as the head of Tannenbaum Chabad House the university would terminate its affiliation with it. (Both the chaplain and the vice president for student affairs are codefendants with the university in this suit.) Klein was not replaced, and continues to supervise the activities of the house as before—but the university made good on its threat to disaffiliate.

Among the consequences of disaffiliation, Klein alleges, he and his Chabad house were barred from "contracting with Sodexo." The letter in which Northwestern informed Klein of the disaffiliation stated that as a result of it Klein's role as a consultant to Sodexo could not be renewed. Sodexo followed up with a letter to Klein terminating their consulting agreement.

Originally this suit claimed that the disaffiliation, and also the resulting cancellation of Klein's contract with Sodexo, were motivated by antisemitism and for that reason violated two federal antidiscrimination statutes, 42 U.S.C. § 1981 and 42 U.S.C. § 2000d. The district court disagreed and granted summary judgment in favor of the defendants, precipitating this appeal, in which however Klein has dropped his challenge to the dismissal of his section 2000d claim.

Section 1981(a) provides that all persons "shall have the same right … to make and enforce contracts … as is enjoyed by white citizens." The kosher supervision contract was, obviously, a contract; and section 1981(b) defines making and

enforcing a contract to include "the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." As for affiliation between the university and religious groups, this too is, if less clearly, contractual, because the university grants specified privileges to the group and in return they assume specified responsibilities and must supply the university with certain information. See "Student Religious Organizations and Advisers at Northwestern University," www.northwestern.edu/religious-life/media/pdfs/Privileges-and-Responsibilites-of-Religious-Orgs3.pdf. There is sufficient mutuality to make affiliation a contractual arrangement.

Most Jews are white, but section 1981 has been interpreted to provide a remedy to members of any racial or ethnic group. Judaism of course is the name of a religion rather than of an ethnic group, but persons whose parents are Jewish are considered Jewish even if they (and their parents, for that matter) are entirely secular. (In the United States, Jews who convert to another religion generally are no longer considered Jewish.) Secular Jews form not a religious group (obviously), but an ethnic group, just as the Irish do even though many Irish people, like many ethnic Jews, are not religious.

Rabbi Klein does not argue that the disaffiliation of Tannenbaum Chabad House was motivated by hostility to ethnic Jews; and that would hardly be plausible, considering how many Jews there are in the university's student body, faculty, and administration. Even the university's president, Morton O. Schapiro, is Jewish. Klein argues rather that the motivation for disaffiliating was hostility to the Chabad sect. Even if true, this does not help Klein's case. For there is no

mention of religious discrimination in section 1981, or for that matter in the other (the abandoned) ground of his suit, section 2000d, which forbids discrimination "on the ground of race, color, or national origin" by recipients of federal financial assistance (which includes Northwestern). The Supreme Court held in *Shaare Tefila Congregation v. Cobb*, 481 U.S 615, 617 (1987), that 42 U.S.C. § 1982, which provides that "all citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property," protects "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics."

The only difference between sections 1981 and 1982 is that one deals with contracts and the other with property. Neither refers to discrimination on the basis of religious identity, beliefs, or observances. The Supreme Court's ruling in *Shaare Tefila* that section 1982 protects only groups defined by "their ancestry or ethnic characteristics" therefore applies equally to section 1981. *Bachman v. St. Monica's Congregation*, 902 F.2d 1259, 1261–62 (7th Cir. 1990); *Anooya v. Hilton Hotels Corp.*, 733 F.2d 48, 49–50 (7th Cir. 1984). And so that section does not "protect against discrimination based on sex or *religion* or age." *Id*. (emphasis added, footnotes omitted).

Against this Klein cites *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009) (en banc), which held that a condominium association's prohibition against displaying mezuzahs (a mezuzah is a piece of parchment, usually encased, containing a Hebrew prayer and displayed on the front-door frame of a home) was forbidden by the Fair Housing Act, because it

was discriminatory. The opinion does mention section 1982 in passing, as an additional basis for the ruling, but the condominium association's discrimination was based on hostility to Jews, not, as alleged in this case, hostility based on a religious disagreement.

There is more that is wrong with Rabbi Klein's case. There is no evidence that the apparent distaste for Chabad of the former student's father who complained to the university about the alcohol problem at the Chabad house influenced the university's decision to investigate Klein; so far as appears, the investigation was precipitated by the father's complaint about the heavy drinking there. And the only discrimination—treating differently things that should be treated alike—alleged is that the university staff did not take the same measures against student organizations that it did against the Chabad house, even though, as is well known, excessive (and underage) drinking is common in such organizations, notably fraternities. But unlike Chabad houses, fraternities are not managed by adults and are components of the university rather than separate entities merely affiliated with it. And the fraternity drinking incidents to which Klein refers occurred before the current vice president of student affairs assumed office, so leniency regarding such drinking was the policy of a different decision-maker.

As is apparent from the Klein video that we cited at the outset of this opinion, Rabbi Klein is lively, engaging, eminently approachable, enthusiastic, and one might even say charismatic. Were he more responsible concerning underage and excessive drinking by the kids who frequent the Chabad house, the university would have maintained its affiliation with the house. Klein says that the university should have

told him to exercise closer supervision over alcohol consumption at the house, as a condition for retaining the affiliation, and that had the university done this he would have complied. In other words, he wants a second chance. But he admits that he never asked for that second chance. He had gotten away for more than a quarter of a century with an irresponsible attitude toward excessive underage drinking that went on under his nose in the Chabad house, and seems to have thought that he could continue to do so, with impunity, indefinitely. He was given multiple chances. He was warned repeatedly, but did not react. Why should he be given fourth and fifth and nth chances? Had he stepped forward on his own initiative and promised to mend his ways, the Tannenbaum Chabad House might still be a Northwestern University affiliate.

The judgment of the district court dismissing the suit is

AFFIRMED.

BAUER, *Circuit Judge*, concurring. I cheerfully concur in this enlightening opinion. The background and the various nuances of the religious groups discussed, or alluded to, are not taken from the record of the case but are both enlightening and, I confess, entertaining. Since the result meets my legal and religious inclinations, I have no reason not to endorse the dissertation and ruling and therefore I do.