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Third Annual National Moot Court Competition

In the

Supreme Court of the United States

October Term, 2015

No: 985-2015

SIHEEM KELLY,

Petitioner,

v.

KANE ECHOLS, in his capacity as Warden of Tourovia Correctional Center and *SAUL ABREU, in his capacity as Director of the Tourovia Correctional Center Chaplaincy Department.*

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TOUROVIA

985 F. Supp. 2d 123
March 07, 2015

SIHEEM KELLY, Plaintiff,

v.

KANE ECHOLS, Warden of Tourovia Correctional Center and SAUL ABREU, Director of the Tourovia Correctional Center Chaplaincy Department.

Opinion:
Montelle, District Court Judge.

Plaintiff Siheem Kelly ("Kelly") filed a complaint in the United States District Court for the Eastern District of Tourovia against an employee and an official of the Tourovia Correctional Center ("TCC" or prison). The Defendants are the Warden of TCC, Mr. Kane Echols, and the Director of the Tourovia Correctional Center's Chaplaincy Department, Mr. Saul Abreu ("Abreu") (collectively, "Defendants").

Kelly moves the Court, by way of this suit, to grant declaratory and injunctive relief for alleged violations of his First Amendment rights, specifically violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") on two grounds. First, Kelly alleges that the Tourovia Correctional Center violated his rights under RLUIPA when it denied his request for a nightly congregational service after the evening meal; second, that the prison deprived him of his placement in a religious diet program, which in turn forced him to disobey the dietary laws of the Nation of Islam. Defendants have moved for summary judgment, claiming that, as a matter of law, Kelly failed to prove that his religious rights were substantially burdened, on both counts. Defendants argue that a substantial burden was not imposed on Kelly's religious freedom when he was denied a nightly congregational service because the prison was providing all religions with appropriate and sufficient Designated Prayer Times. Defendants further contend that the denial of the additional prayer service was warranted due to prison security concerns and administrative restrictions. On the second ground, Defendants claim that removing Mr. Kelly from the vegetarian diet program was warranted because Kelly himself broke his religious diet. Thus, it is Kelly's choice and not the prison policy that compelled him to violate his beliefs.

For the reasons set forth below, we deny the Defendant's motion for summary judgment and find for the Plaintiff, as a matter of law.

I. Standard of Review

Summary judgment is permissible when there is " no genuine issue as to any material fact and … the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(C). In deciding a motion for summary judgment, the court may only consider evidence that would be admissible at trial under the Federal Rules of Evidence. *See Stinnett v. Iron Works Gym/Exec. Health Spa, Inc.*, 301 F.3d 610, 613 (7th Cir. 2002). The Court views the record and all reasonable inferences drawn in the light most favorable to the non-moving party. *See* FED. R. CIV. P. 56(C). "In the light most favorable" simply means that summary judgment is not appropriate if the court must make "a choice of inferences." *First Nat'l Bank of Ariz. v. Cities Serv. Co*., 391 U.S. 242, 255 (1986). Further, pursuant to FED. R. CIV. P. 56(f), in the absence of a dispute regarding material facts, the court may, on its own, grant summary judgment to either party.

II. Factual Background

Mr. Kelly was convicted of several drug-trafficking charges and one count of aggravated robbery. In the year 2000, after his conviction, Kelly became an inmate at TCC, a maximum security prison. Two years following his arrival at the prison, he converted to the Nation of Islam (also known as "the Nation" or "NOI"). Kelly subsequently filed a required "Declaration of Religious Preference Form" to change his religious affiliation from no religion to membership with the Nation. Kelly also requested that his last name be changed to "Mohammed" and that prison officials address him by his new name. [1] The "Declaration of Religious Preference Form" is required for inmates who desire to partake in religious services and related dietary restrictions. An inmate becomes an acknowledged member of a religious group eligible for services when he files the form with the prison and obtains written approval from the Warden.

The Nation is a subgroup of the traditional Sunni Muslim religion and is a minority religious group of the prison population at TCC, constituting less than 1 percent of the general prison population. To date, and throughout the last decade, the prison's Nation membership has never exceeded more than ten (10) acknowledged members. Currently, the Nation has a total of seven acknowledged members at TCC who are eligible to take advantage of prayer services and the special diet programs. Members of the Nation at TCC participate in a strict vegetarian diet (or Halal) and fast for the month of Ramadan (as well as two other special holidays that the Nation recognizes).

The NOI members have generally maintained satisfactory behavioral standing with the prison for the last five years. None of the current members of the Nation at TCC have any record or history of violence within the prison; however, this could be because the members never move through the facility alone. Nation members are well known to travel to their daily activities with at least one or two other members or as a whole group. As a result, they are not harassed by other groups, but the prison also monitors them to make sure they are not engaging in illicit or gang activity.

The Nation of Islam requires that their adherents pray five (5) times a day as outlined in the *Salat*, which means prayer guide in Arabic. Their prayer times are termed "Obligatory and Traditional Prayers" which

1 This Court will not refer to the Plaintiff by his alias.

are; 1) Dawn, 2) Early Afternoon, 3) Late Afternoon, 4) Sunset and 5) *Late Evening* (emphasis added).

During each of their prayers, most adherents claim to require a very clean and solemn environment. Adherents must wash themselves and their clothes (as best as they can) and secure a clean surface on which to kneel and face Mecca. Once prayer has started, the members should not be interrupted in any way. Members of the Nation prefer to pray in the company of each other, although the religion does not mandate this outside of the holy month of Ramadan and on Friday evenings. At TCC, the Nation's prayer-times are limited to three times a day outside of the cell, and twice a day inside the cell. The prison does not assign cellmates based on religion, therefore, the assigned cellmates of a Nation member may or may not be a member of the Nation. However, as a general policy, if there are specific incidents of violence towards other individuals, outside of the inmate's faith, the cellmate can request to be transferred, but this only occurs with the Warden's approval.

In August of 1998, Tourovia Correctional Center changed a more open religious service policy to a more restrictive one by banning the option to petition for prayer services at night with a prison service volunteer. The prison revoked the option when it was discovered that, during the prayer services, the service volunteer was relaying gang orders from incarcerated members of the Christian community to gang-affiliated individuals outside of the prison's walls. Soon after, several members of the Christian and Sunni Muslim groups who were attending the night prayer services also attempted to disregard security policy, regarding the last in-cell daily evening headcount, by staying in their prayer rooms longer than authorized. Thus, TCC banned the use of all prison volunteers and of all nightly services partly as punishment, but primarily to ensure that inmates of all religious groups were back in their cells promptly at 8:30 P.M. for the final headcount. This policy change is reflected in Tourovia Directive #98.

Since August of 1998, if no official chaplain is available, no services may be held. A chaplain's hours of operation are only during the three Designated Prayer Times in the Tourovia Directive Definitions. The chaplains at TCC are only authorized to work outside of those hours in two emergency situations where (1) the prisoner is either near death or (2) the prisoner is unable to attend prayer services due to illness or physical incapability.

Prison policy clearly states that it will punish any inmate who is not in their cell before head count and/or if there is evidence of any misconduct regarding their daily meals or their religious diet. If any inmate fails to be present in their cells by the last head count at 8:30 P.M., the inmate risks being placed in solitary confinement as punishment.

The prison's considerations in determining whether a group will have their requests for prayer services granted are: demand, need, staff availability, and prison resources. The Nation is a recognized religion at TCC that receives prayer services. The prison mandates that each prayer service must include an official chaplain to oversee and lead each prayer service to make sure that the tenets of the religion are being discussed and adhered to. Currently, the prison staffs and maintains three services per day for Catholic, Protestant, Muslim, and Jewish inmates. The prayer services are held in one chapel and four other classrooms. Counter-majoritarian groups may only meet once a day.
In February of 2013, Kelly, acting in a liaison capacity for the other six acknowledged

members of the Nation, filed a written prayer service request for an additional congregational nightly prayer service after the last meal at 7:00 P.M. The prayer service request specifically petitioned for and included: the names of the six acknowledged members of the Nation who were the sole members allowed in the service and that the service be held at 8:00 P.M. after the last meal but before final head count at 8:30 P.M. A week later, Abreu notified Kelly that the request was denied due to the prison policy prohibiting all inmates from going anywhere (but their cells) before the final head count. Further, Abreu verbally indicated to Kelly that the three services already provided were adequate to fulfill the Nation's prayer requirements and, in any event, they could pray in their cells.

Kelly currently attends all services but maintains that he is entitled to additional worship accommodations, namely, five rather than three separate services, outside of his cell, with fellow members of the Nation, daily. Kelly verbally expressed to Abreu that he would compromise for at least one additional service in which to conduct his last two prayers of the day with his brothers. He additionally requested that the prayer service be conducted away from non-NOI inmates and with a Chaplain of NOI religious affiliation. Kelly received no response to his verbal request.

After the prayer service denial from Abreu, Kelly filed two grievances. Kelly asserted that the reason he wanted an additional prayer service was because he was unable to pray in his cell any longer. Kelly stated that any prayers in the cells were distracting and disrespectful to his religion. When prompted for his reasoning, Kelly went on to describe incidents in which his non-NOI cellmate intentionally ridiculed him or engaged in lewd behavior on those nights when he attempted to pray. Kelly stated in the grievance that several more of his brothers in the Nation were going through the same ridicule and distraction, caused by their non-NOI cellmates, whilst they prayed. The grievance was denied on the grounds that Kelly had not proven that his cellmate was actually engaging in the negative conduct described in the grievance.

Kelly's response was to file a second grievance by sending a letter to Abreu which stated that praying in a cell where a toilet was only a few feet away was a disgrace to Allah's preference that he pray in a clean and solemn environment with other members of his faith. The grievance was again denied.

Finally, Kelly decided to file a formal grievance with the prison that included the claims contained in the two previous grievances. He again requested a nightly congregational service for himself and his brothers in the Nation, to be held somewhere other than his cell. This formal grievance included verses from the *The Holy Qu'ran* that explained why, according to his faith, a congregational prayer service held every night was obligatory:

"Keep up prayer from the declining of the sun till the *darkness of the night*, and the recital of the Quran. Surely the recital of the Quran at dawn is witnessed" [2] (emphasis added); and, "...[C]elebrate the praise of the Lord before the rising of the sun and before its setting, and glorify [Him] *during the hours of the night* and parts of the day, that thou mayest be well pleased." [3] (Emphasis added.)

Warden Kane Echols responded to Kelly, in a letter, stating that Kelly's request violated TCC policy and, in any event, allegations

2 *THE HOLY QU'RAN*, 17:78

3 *THE HOLY QU'RAN*, 20:130

about his cellmate could not be verified. Echols suggested that a better strategy for Kelly would simply be to request a transfer out of his current cell to see if a new cellmate would be more respectful of his personal prayer time.

Pursuant to Tourovia Directive #99, if any inmate is found to bully any another inmate for their food or is caught breaking their respective religious diets – the prison reserves the right to take him off his diet program. If any violence or threat of violence is connected to any member of a faith group, the prison may suspend the inmate's freedom to attend religious services for any amount of time TCC sees fit.

Two weeks after the formal grievance was denied, a new inmate, who was Kelly's new cellmate, reported to a superintendent that Kelly was threatening him with violence if he did not provide Kelly with his dinner, which was meatloaf. The superintendent immediately informed both Warden Echols and Abreu so that the incident would be investigated and documented. No evidence of Kelly perpetrating actual violence against the new cellmate was alleged or discovered. During a subsequent search of Kelly's cell, prison officials did discover meatloaf wrapped in a napkin under Kelly's mattress. As a result, the prison removed Kelly from TCC's vegetarian diet program. Additionally, the prison barred Kelly from attending any worship services for one-month as punishment for the threats against the new inmate and for deviating from his religious diet program.

Kelly was insistent in denying that the meatloaf was his, but the prison nevertheless revoked his special diet program. Kelly's response was to refrain from eating anything; he began a hunger strike, refusing to eat anything from the standard menu options at TCC. After two days of this strike, prison employees forcibly began to tube-feed Kelly. Due to the invasiveness and pain of the tube feeding, Kelly ended his strike and complied with eating the food provided to the general population.

Kelly ultimately filed a complaint in the Federal District Court of Tourovia for the Twelfth Circuit challenging the validity of the prison's prayer services and diet program policies, claiming that those policies violated his First Amendment rights as reflected in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Specifically, Kelly argued he was denied the requisite number of prayer services he was entitled to under RLUIPA, that he and his brothers were entitled to additional evening congregational prayer, outside their cells, and away from the presence of non-NOI inmates or any type of bathroom apparatuses. Kelly further argued that the prison's decision to remove him from the vegetarian diet program had compelled him to violate his religious beliefs and practices.

In their answer, the Defendants generally stated thatTCC allows all offenders to worship according to their faith preference in their cells using the allowed items such as sacred texts, devotional items, and materials. They further stated that the TCC policy is fully receptive to allowing all inmates the freedom to pursue their religious practice as long as that practice is consistent with agency security, safety, order, and rehabilitation concerns. The Defendants stated that the approval of all religious services is based on demand, need, and prison resources. Thus, since the prayer accommodations would impose heightened staffing burdens on the prison, to conduct a nightly service only for several people, the denial was proper under RLIUPA and prison policy. The prison provided a lengthy affidavit attested to by the Director of the Chaplaincy Department, Abreu, attesting to the validity of the prison's

reasons for the prayer and diet policies. The affidavit also included an addendum with the prison's documented cost containment stratagems.

Additionally, the Defendants argued that Kelly failed to establish that his religious practices were substantially burdened by the denial of the congregational evening service. Defendants stated that their prayer service policies are the least restrictive means of furthering the compelling interests of security and personnel and financial concerns for the prison, its inmates and employees. In any event, the Nation lacked the demand necessary to support an additional group meeting. Thus, the denial, pursuant to the policy on inmate prayer service requests, was appropriate.

In response to Kelly's challenge to his removal from TCC's vegetarian diet program, the Defendants conceded that it had occurred but argued that it was justified under the prison policy. The Defendants asserted that Kelly's conversion to the Nation after two years of practicing no religion placed him on a watch-list of inmates who might potentially assume religious identities to cloak illicit conduct and assimilate into gang activity. In their papers, Defendants provided the Court with a written statement from Kelly's former cellmate that attested to his being threatened by Kelly for a meatloaf dinner. Kelly's threats to the inmate, in the attempt to extort food, raised serious questions about Kelly's religious sincerity. Thus, the prison's removal of Kelly from the program did not compel him to violate his own religious beliefs and religious practices; instead, Kelly's own actions violated the principles of the NOI, which Kelly allegedly had adopted.

We now turn to the legal issues of this case.

III. The Religious Land Use and Institutionalized Persons Act

Section 3 of RLUIPA provides that "[n]o government shall impose a substantial burden on religious exercise of a person residing in or confined to an institution… even if the burden results from a rule of general applicability," unless the government demonstrates that the burden is "in furtherance of a compelling governmental interest" and is "the least restrictive means of furthering that … interest." Religious Land Use and Institutionalized Persons Act of 2000, § 3(a), 42 U.S.C. §2000cc-1(a). "Government" includes any official of a "State, county, municipality, or other governmental entity created under the authority of a State" and any other person "acting under color of State law." 42 U.S.C. § 2000cc-5(4)(A).

Once a "plaintiff produces prima facie evidence to support a claim alleging a violation" of RLUIPA, "the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the [challenged policy, practice or law] substantially burdens the plaintiff's exercise of religion." *Id.* at § 2000cc-2(b). In particular, the government must prove that the burden in question is the least restrictive means of furthering a compelling governmental interest. *Garner v. Kennedy*, 713 F.3d 237, 241 (5th Cir. 2013). In order to show a substantial burden, the plaintiff must show that the challenged action "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Id.*

Congress crafted RLUIPA in response to a Supreme Court decision holding that laws of general applicability that incidentally burden religious conduct do not offend the First

Amendment. *Employment Division v. Smith*, 494 U.S. 872, 890 (1990). In this decision, the Supreme Court "openly invited the political branches to provide greater protection to religious exercise through legislative action." *Id*. Thus, RLUIPA was enacted by lawmakers who, based upon the language cited above, anticipated that courts entertaining complaints under §3 of RLUIPA would adhere to the legislature's intent to afford due deference to the experience and expertise of prison and jail administrators.

IV. Religious Exercise

We first must decide the threshold question of whether the conduct at issue is a protected religious exercise under RLUIPA. RLUIPA defines a religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of belief." 42 U.S.C. §2000cc-5(7)(A). The definition is intentionally broad. *See Greene v. Solano Cnty. Jail*, 513 F.3d 982 (9th Cir. 2008). It covers "not only belief and professions but the performance of… physical acts [such as] assembling with others for a worship service …." *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

An additional prayer service plainly meets this standard. A physical act of congregating for prayer is intended to bring about communication with Allah, and prayer is a prototypical religious exercise employed by the members of the Nation. In *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981), prayer was appropriately defined as a "quintessential religious practice." While the Nation of Islam is not yet a mainstream religion in the United States, RLUIPA does not, and constitutionally could not, pick favorites among religions. *Lindell v. McCallum*, 352 F.3d 1107 (7th Cir. 2003) (concluding that a follower of Odinism, or purist White Supremacy, had a stated claim under RLUIPA).

As it pertains to the revocation of Kelly's diet program, the act of dieting or fasting that is compelled by or preferred in connection with one's religious belief is certainly also a religious practice. *See Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008) (holding that the prisoner's right to a non-meat diet was clearly established under RLUIPA).

Thus, we conclude that the additional prayer session after the evening meal and the participation in a vegetarian diet program are both religious exercises that fall under RLUIPA protection.

V. Substantial Burden

We must now turn to whether the prison's refusal to grant the prayer accommodation and the prison's revocation of the diet program constitute a "substantial burden" on Kelly's exercise of religion. In the RLUIPA analysis, the plaintiff bears the burden of proving that he suffered a substantial burden on his religious exercise. 42 U.S.C. 2000cc-2(b). Statutory interpretation begins first with the language of the statute in question. *Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). Because RLUIPA does not define a "substantial burden," the Court has given the term its ordinary and natural meaning. *Id.* Although the legislative history of a statute is relevant to the process of statutory interpretation, we do not resort to legislative history to cloud a statutory text that is clear." *Id.* Instead, we look to the Court's definitions and discussions of what a "substantial burden" is.

The Supreme Court's definition of a "substantial burden" has changed over time. *See, e.g., Hobbie v. Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 141 (1987)

(finding a substantial burden when government put "substantial pressure on an adherent to modify his behavior and to violate his beliefs"); *Bowen v. Roy*, 476 U.S. 693, 707-08 (1986) (finding no substantial burden where government action interfered with, but did not coerce, an individual's religious beliefs); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988) (indicating that no substantial burden exists where the regulation does not have a "tendency to coerce individuals into acting contrary to their beliefs); *Thomas v. Review Bd. Of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981) (finding a substantial burden to be identical to the *Hobbie* case).

A. Removal from vegetarian diet program

Federal and state prison officials are required to make accommodations for a prisoner's religious dietary needs. 28 C.F.R. § 548.20. But courts are split over whether or not prison officials must continue to accommodate "backsliding prisoners," or those who lapse in the practice of their religion. *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988). Whether or not revoking special diet programs is a substantial burden on an inmate has never been decided by the Supreme Court and circuit courts are split as to whether the prison should or can withhold religious diets after prisoners fail to keep them. *See Daly v. Davis*, 2009 WL 773880 (7th Cir. 2009); *see also Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006).

In *Lovelace v. Lee*, a Nation of Islam prisoner, Lovelace, was removed from the prison's Ramadan observance pass list after breaking his fast one time – and this was found to be a substantial burden on his religious practice. *Lovelace*, 472 F.3d at 187 (4th Cir. 2006). The *Lovelace* court's reasoning was that once Lovelace's name was removed from the list, he was excluded from special meals and could not participate in NOI group prayers or services. *Id.* at 188. Lovelace's inability to fast and attend services was a substantial burden because it prevented him from fulfilling one of the five pillars of Islam. *Id*. at 186. The prison policy that removed prisoners from the diet list when breaking a fast, also restricted the religious exercise of that same inmate: because he deviated from his fast, he could also be restricted from participating in group services or prayer, even though he might still wish to do so. *Id.* at 188. This case is analogous to what occurred to Kelly and should be treated the same because Kelly is also being compelled to miss out on his prayer services due to an alleged deviation from his halal diet. The prison's policy is causing Kelly to violate the pillar of his mandated Friday congregational prayer and has effectively pressured him to abandon his religious diet.

Here, due to an allegation of one cellmate, Kelly's cell was immediately searched and meat was discovered under his mattress, a clear violation of his religious dietary restrictions. Unlike the prison officials in *Lovelace*, the Defendants do not allege that they actually saw Kelly breaking his fast or eating meat; still, as a result of the prison's discovery of meatloaf, Kelly was banned from attending any prayer services indefinitely. Regardless of whether Kelly actually consumed the meatloaf, it was substantially burdensome for the prison to ban him from services for a month based on one inmate's written statement.

Similar to the situation in *Lovelace,* in *Reed v. Faulkner*, a Rastafarian inmate, Reed, sued the prison in which he was being housed when they removed him from his vegetarian diet after he was observed eating meat, in contravention to Rastafarian tenets. *Reed*, 842 F.2d at 962. The *Reed* court declined to

question whether Reed was a sincere adherent to his faith due to this discrepancy. *Id.* That court disagreed with the lower court's determination that Reed's "backsliding" was conclusive evidence of his insincerity and was sufficient justification to remove him from his religious diet program. *Id.* at 963. The *Reed* court stated that "the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere…[and] [b]y forfeiting the religious rights of any inmate observed backsliding, [this places] guards and fellow inmates in the role of religious police." *Id.*

This Court concludes that TCC engaged in the exact aforementioned "religious policing" tactics that violates a prisoner's right to free exercise under RLUIPA. Prison officials who employ harsh punishments, based on a small indiscretion like a one-time or occasional break from a religious diet, are clearly placing substantial burdens on a prisoner's free exercise rights by obstructing their courses of action once they are caught eating the food given to the general prison population.

In *Colvin v. Caruso*, the Sixth Circuit also expressed concern that a prison's denial of religious meals violated a prisoner's rights under RLUIPA. *Colvin v. Caruso*, 605 F.3d 282 (6th Cir. 2010). In *Colvin*, the prisoner, Colvin, was caught with non-kosher protein powder in his cell. *Colvin*, 605 F.3d at 296. Colvin sued for a declaratory judgment and injunctive relief when he was removed from the kosher-meal program and was denied reinstatement by several prison officials. *Id.* at 295. The *Colvin* court properly noted, albeit in dicta, that the prison's policy of removing a prisoner from the kosher-meal program for mere possession of non-kosher food may be overly restrictive of the inmate's religious rights. *Id.* The *Colvin* court did not, however, decide the issue because it found that it did not have sufficient judicial guidance on the law to find the prison practice unconstitutional. *Id.* at 297. This Court finds sufficient guidance in the cases cited above to find that the practice of revoking a prisoner's dietary religious preferences for one specific infraction violates RLIUPA and is unconstitutional.

Even if this Court decided to engage in speculation about Kelly's religious sincerity, we would find that Kelly does not need to prove centrality or compulsion, but only that his religious beliefs are sincere and religious. *See* 42 U.S.C. §2000cc-5(7)(A) (stating that RLUIPA protects any exercise of religion, whether or not compelled by, or central to a system of religious belief). Here, there is substantial evidence to demonstrate that his beliefs were sincere. First, Kelly took it upon himself to advocate for the six other members of the Nation to get an additional nightly prayer service. Insincere inmates might not take the initiative to challenge the prison administration with this type of demand. Second, Kelly was the only member of the Nation known to file any grievances with the prison. The fact that he was the only Nation member to file any grievances shows that he cared and took a leadership role with matters related to his faith. For these reasons, we find Kelly's beliefs to be religious-based and sincere.

Regardless of any infractions involving his diet, it seems clear that Kelly was an observant and particularly self-motivated Nation member. This Court cannot agree with the prison officials' suspicions of him as an insincere inmate merely because he converted while incarcerated or because he may have been "backsliding." Many individuals genuinely find religion and spirituality after they are incarcerated; imperfection in their adherence to their faith, is not an indication of insincerity.

This Court finds that the Defendants violated RLUIPA and Kelly's free exercise rights under the First Amendment when they removed him from his religious diet.

B. Denial of the nightly congregational prayer service

In order for a person's religious beliefs to be substantially burdened, the court must determine whether the belief is central or important to the individual's religious practice. *Ford v. McGinnis*, 352 F.3d 582, 593-94 (2d Cir. 2003). This Court will employ the language of the Supreme Court in *Thomas v. Review Bd. Of Ind. Emp't Sec. Div.*, 450 U.S. 707 (1981). In that case, a substantial burden was defined as any policy that "put substantial pressure on an adherent to modify his behavior and to violate his beliefs…" *Id.* at 718. This Court finds that substantial pressure existed for Kelly to modify his behavior and violate his beliefs for the following reasons:

First, Kelly's initial request for a nightly prayer service can certainly be construed as being essential to his beliefs, as the prayer service constitutes the *late evening* time of the day in which the Qu'ran mandates prayer. The prison's policy that no nightly congregational service may be held after the last meal certainly acts to put substantial pressure on Kelly to violate his own beliefs in bypassing the *late evening* prayer service. Because of the prison's blanket prohibition on leaving one's cell after a head count, Islamic inmates who need a quiet and clean place to pray must do so under potentially hostile, unsanitary, and chaotic circumstances.

The recent case of *Walker v. Beard* sheds light on the problems that Kelly faces with praying in the presence of non-Nation inmates. The *Walker* court addressed issues related to the housing of inmates from different religions and how this housing could have the potential to violate the prisoner's rights under RLUIPA. *Walker v. Beard*, 789 F.3d 1125 (9th Cir. 2015). In *Walker*, prisoner and devout Aryan racist Dennis Walker, filed suit against a Texas state prison under RLUIPA. *Walker*, 789 F.3d at 1130. Walker claimed that his religion, which was Aryan Christian Odinism, prohibited any integration with members of other races. *Id.* Walker challenged a prison policy for classifying him as eligible to occupy a prison cell with an individual of a different race, alleging that such a placement interfered with his religious practice. *Id.*

The religious practice that was at issue in this case was Walker's claimed practice ritual known as "the spiritual circle of Odinist Warding," which was conducted in order to communicate with the gods. *Id.* at 1131. Walker argued that integrated housing or bunking with an non-Aryan individual would interfere with this ritual because the presence of a Non-Aryan individual in his cell would "pollute" the spiritual circle. *Id.* Walker's contentions failed in the lower court, but he then appealed to the Ninth Circuit. *Id.*

On appeal, the relevant issue decided by the Ninth Circuit was whether Walker's classification as racially eligible, to share a cell with a non-Aryan, under the prison's Housing Policy, violated his rights under RLUIPA. *Id.* at 1135. They answered that question in the positive. The *Walker* court recognized that, if they took Walker at his word, a non-white cellmate would make it impossible to perform the Warding ritual in his cell. *Id.* The fact that Walker accepted discipline rather than the restriction of his religious practice was telling – it plainly placed him under pressure to conform to the prison policy. *Id.* This Court finds the *Walker*

court's rationale and findings to be persuasive and applicable to Kelly's circumstances at TCC.

The *Walker* court also appropriately incorporated a focus on the threat of prison punishment as a crucial factor in the "substantial burden" discussion. The *Walker* court did this by citing to the recent case of *Holt v. Hobbs*, 135 S.Ct. 853 (2015). In *Holt*, a Muslim Arkansas prisoner challenged the Arkansas Department of Corrections (or "the Department") and other prison officials for their denial of a religious accommodation under the Department's grooming policy. *Holt*, 135 S.Ct at 856. The policy did not allow a prisoner to grow more than a half-inch beard. *Id.* at 857. The court held that any threat of "serious disciplinary action" in response to following one's religious beliefs constituted a pressure to conform. *Id.* at 862. Here, Kelly also faced a threat of punishment (which was being locked in solitary confinement) if he failed to obey the prison's determination that he could not hold night prayer services.

The inabilities or difficulties involved in conducting religious exercises in the presence of other inmates not of their own religion were addressed in *Walker*. The threat of punishment for refusing to violate one's religion due to a prison policy, and thus having to accept the punishment that comes with that was addressed in *Holt*. Both cases were decided in favor of the prisoner; and, both cases closely resemble the choices given to Kelly by the prison policies at TCC.

Here, Kelly filed a total of three written grievances due to his issues with a cellmate who consistently ridiculed him and behaved in a lewd manner anytime Kelly knelt to pray. These grievances were uninvestigated and essentially ignored by prison officials on the grounds that Kelly could not produce evidence of the taunting. It is disingenuous on the part of the Defendants to dismiss multiple grievances based on a prisoner's inability to produce concrete proof of wrongdoing by his cellmate. It is obvious that a prisoner lacks ways to secure evidence while incarcerated. Unfortunately, most prisoners must endure significant abuse or physical injuries before any grievance against a cellmate can be substantiated.

Kelly, in his liaison capacity, also raised his faith group's concern about praying next to bathroom facilities. The sad reality of prison life is that religious individuals must conduct a substantial portion of their prayer rituals and study time only a few feet away from bathroom facilities. Here, the practice of nightly congregational prayers may or may not be mandated by the religion, but they are important to the sacred ritual of prayer. Surely, the presence of a disrespectful cellmate's ridicule or usage of the toilet during someone's prayer undercuts the sanctity of prayer and derogates from the protections set forth for institutionalized persons under RLUIPA. So, it is clear that the presence of Kelly's cellmate affected his religious exercise of prayer and made it almost impossible to conduct it in a manner that the Islamic religion mandates.

As in *Holt*, Kelly faced a real threat of punishment if he chose to disobey the prison's policy and conducted his prayer services outside of his cell, instead of being present within his cell for the final head count. The prison policy prohibiting any services outside of his cell after a certain hour gives him two choices: either miss the last count and be thrown in solitary or pray in your cell in an environment that effectively derogates your religious beliefs.

For the reasons above, we find that Kelly has

demonstrated that TCC's policy substantially burdened his sincere religious practices.

VI. Least Restrictive Means of Furthering A Compelling Government Interest

Since Kelly has demonstrated that his religious practices have been substantially burdened, the onus shifts to the Defendants to show that the prison policy is the "least restrictive means of furthering *a compelling state interest*." 42 U.S.C 2000cc(a)(1)(B) (emphasis added). However, RLUIPA does not expressly define what constitutes a "compelling governmental interest." The Supreme Court and federal circuit courts offer guidance in deciding this issue. However, this Court is of the position that "[c]ontext matters" in applying this "compelling government interest" standard. *Cutter*, 544 U.S. at 723.

In *Murphy v. Missouri Dept. of Corrections*, a prisoner in the Christian Separatist Church Society (or "CSC") brought a §1983 action and a RLUIPA claim against prison officials, alleging that he was denied privileges given to other, less separatist groups. *Murphy v. Missouri Dept. of Corrections,* 372 F.3d 979, 982 (8th Cir. 2004). The *Murphy* court held that, while they acknowledged that the prison had a compelling interest in institutional security, the prison had to do more than merely assert a security concern – they had to demonstrate the security concern. *Murphy*, 372 F.3d at 988. Although prison officials are given "wide latitude within which to make appropriate limitations," they must do more than offer conclusory statements and post hoc rationalizations for their conduct. *Id.* at 989. Hence, to satisfy RLUIPA's higher standard of review, prison authorities must provide some basis for their concern of possible gang-related or other illegal activities that might result from the prayer request.

Turning to the Defendants' contentions, they argue that prison safety, personnel, and financial concerns for the prison, its inmates and employees constitute compelling interests that warrant deference to their methodology in achieving those interests.

Congress, in crafting RLUIPA, aimed to prohibit "exaggerated fears" that allow prison officials to prevent prisoners from exercising their religious rights. *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007) (quoting 146 Cong. Rec. S7775) (daily ed. July 27, 2000)) Here, TCC's prison policy, as related to nightly congregational services, seems to be predicated upon some "exaggerated fear" of inmates conducting illicit conduct during the prayer services at night.

Even if TCC's concerns were warranted by prior or probable prisoner misconduct, the same potential for illicit conduct exists during the daytime prayer services. This fact diminishes the Defendant's contention that this prison policy will not only ensure prison security and safety but that it is the only way to do so.

Of course, we agree that security in prisons deserves "particular sensitivity." *Cutter*, 544 U.S. at 722. While we seek to employ the required sensitivity to general security involved in state prisons, we do not feel that banning a night prayer service or banning a religious inmate from his religious diet after one known transgression are compelling government interests that go beyond an exaggerated fear of misconduct that Congress sought to discredit in crafting RLUIPA.

Defendants offer little support for the validity of their security concerns, especially as it pertains to Kelly and the NOI members he speaks for. They merely mentioned facts in an affidavit that influenced the change in

their prior policy, which were predicated on events that occurred over a decade ago. For the diet program removal, the Defendants submitted the written statement of Kelly's cellmate, who recorded Kelly's alleged threats, to support their decision to take Kelly off the diet program. Neither the history behind the policy changes nor the allegations of the cellmate had anything to with the Nation itself, but rather were generalized and unsubstantiated accounts of suspicious behavior of Sunni Muslim and Catholic groups. Further, other than the alleged threats of violence against another inmate for his dinner, Kelly has had no history of physical violence with non-NOI inmates or those of his own faith group. We find that the Defendants' reasoning in their decision to reject Kelly's prayer request was insufficient and we are of the opinion that this was an "exaggerated fear" based on curbing gang-related activity at TCC, activity that was not religious in nature.

Even if we held that the government demonstrated a compelling interest, we would not find that the government used the least restrictive means to achieve that interest. Under RLUIPA, the burden is on the government to show that the challenged policy is the least restrictive means of achieving their interests. 42 U.S.C 2000cc(a)(1)(B). This means that the policy must be narrowly tailored in achieving the government's stated interests and the government would need to demonstrate that alternative means of achieving those interests were *actually* considered and deemed insufficient. *See generally*, *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005).

In determining whether the prison policy or regulation employs the least restrictive means we should not only look to see if the prison tried other alternatives, but we should look to see if the prison actually ruled out other viable alternatives. The prison could have scheduled a final head count after an inmate returned to his cell or they could possibly group NOI inmates into the same cells or adjacent cell blocks. The prison has not brought forth any evidence that either of these choices (or any other course of action) were tried or even considered.

In *Shakur v. Schriro*, a Muslim inmate, Amin Shakur, filed suit against the Arizona Department of Corrections or ("ADOC") when they denied him a kosher-meat diet that would cure his flatulence problems, incurred by an existing lacto-vegetarian diet. 514 F.3d 878 (9th Cir. 2008). Shakur requested to change his diet because the flatulence caused by the diet was interfering with the Muslim state of "purity and cleanliness" needed for Muslim prayer. *Shakur,* 514 F.3d at 882. The ADOC refused his request stating that the prison's refusal to grant his request was based on "avoiding the prohibitive expense of acquiring Halal meat for all Muslim inmates or providing…[i]nmates with kosher meat." *Id.* at 889. To prove that this represented the prison's least restrictive means, the prison offered an affidavit, signed by Abreu, to prove the request was denied due to cost containment ($1.5 million). *Id.* at 890. The information in the affivadit was from departmental officers whose sources were unclear and who could have been relying on inaccurate and inadmissible evidence. *Id.* at 890.

The *Shakur* court acknowledged that "maintaining good order, security and discipline, consistent with consideration of costs and limited resources" is a compelling government interest. *Id.* at 889. Yet, the court found that a prison could not meet its burden to prove the least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice. *Id.* at 890. The court found that the

affidavit was insufficient to prove that the least restrictive means were reached. We find that while these are compelling interests, the Defendants have not satisfied their burden in showing that, on balance, these interests are more compelling than allowing a low-risk religious group to conduct one more service before the final head count, or even that prison officials could not conduct the head count during their service.

We agree with the observations of *Shakur*. In the case at bar, the Defendants also did not provide enough competent evidence as to the additional threats to safety and administrative convenience that allowing Kelly's request would bring about.

We find that here the Defendants did not adequately demonstrate that they explored or adopted the least restrictive means to further their interests. The Defendants fail to even consider what effort would have been involved in conducting a nightly prayer service, save for problems involved in changing the prison's head count reporting times.

Conclusion

We deny the Defendant's motion for summary judgment and, pursuant to F.R. Civ. Pro 56 (f), hold that there is no dispute of material facts and that the nonmovant plaintiff is entitled to judgment as a matter of law.

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

983 F.3d 1125
June 1, 2015

Kane Echols and Saul Abreu, Appellants

v.

Siheem Kelly, Appellee

OPINION:
Before GRADY, VAUGHN, and MONTISANTI, Circuit Judges.

The facts presented in the opinion by the District Court for the Eastern District of Tourovia in *Kelly v. Echols*, 985 F. Supp. 2d 123 (N.D.T.O 2015), are adopted and incorporated by reference.

In the 2005 case of *Cutter v. Wilkinson*, Justice Ginsburg aptly stated, albeit in dicta, that any prison's decision to accommodate religious requests must be measured so that it does not override other significant interests. *Cutter*, 544 U.S. 709 (2005). Justice Ginsburg further stated:

> "[S]hould an inmate request for a religious accommodation become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective function of an institution, the facility would be free to resist the imposition." *Id.* at. 725.

Since this Court finds that Kelly's request for a nightly congregational prayer accommodation does all three of the above, we *reverse* the decision of the lower court.

I. Religious Exercise

This Court's guidance comes directly from RLUIPA, which Congress enacted because it found that some prisons restricted religious liberty "in egregious and unnecessary ways." *See* 146 Cong. Rec. S7775 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy, co-sponsors of RLUIPA). However, due deference to prison officials in their expertise regarding what is best for inmates under their watch is an issue of the utmost importance.

First, we turn to whether Kelly's nightly congregational prayer service and diet program are religious exercises under RLUIPA. RLUIPA defines this for us. A "religious exercise" includes "any exercise of religion, whether or not compelled by, or central to, a system of religious belief. §2000cc-5(7)(A). The exercise of religion often involves not only belief and profession but the performance of…[p]hysical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine…" *Employment Div., Dep't of Human Res. Of Oregon v. Smith*, 494 U.S. 872, 877 (1990). This Court does not at all dispute that Kelly's request for a night service and his religious

diet are both religious exercises that qualify under RLUIPA. Thus, we concur with the lower court's reasoning and conclusion that both practices involved in this case are undoubtedly religious practices and, therefore, subject to RLUIPA.

Nevertheless, regarding dietary requests or the retention of a religious diet, we disagree with the lower court's conclusion that the sincerity of an inmate's religion is not a significant factor to consider. We believe that the quality of an inmate's adherence to his faith is an important question to consider and that the inmate's sincerity is a legally cognizable consideration for any court deciding the validity of a prison's decision to revoke diet or prayer service privileges.

We now turn to the issues.

II. Substantial Burden

The threshold inquiry under RLUIPA is whether the challenged governmental action substantially burdens the exercise of religion. The burden of proving a substantial burden rests on the religious adherent. 42 U.S.C. §2000cc-2(b). The meaning of a "substantial burden" is not defined by statute. However, this circuit considers a "substantial burden," for purposes of applying RLUIPA, as a government action or regulation that "truly pressures the adherent to significantly modify his religious behavior and significantly modify his religious beliefs." *See Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007).

The Supreme Court has granted prison officials broad discretion in adopting and enforcing regulations to ensure the safety and security of their facility. *Turner v. Safley*, 482 U.S. 78 (1987). While not codified in the statutory language of RLUIPA, the Senate Judiciary Committee noted that courts should give "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter,* 544 U.S. at 723. The District Court substituted the experience and expertise of prison and jail administrators with their own overly broad and impracticable reading of RLUIPA.

A. Denial of the Nightly Congregational Prayer

In the case at bar, Plaintiff Kelly requested a specific worship accommodation. Inmate prayer requests usually can be placed into two categories: 1) a request to observe particular times of worship and 2) a request for a particular form of group worship. Kelly's request fell into both categories. First, Kelly sought to hold prayer services at a late hour in the context of a prison; second, he sought that the prison provide a staff member (who must be a NOI chaplain) to be in attendance at a congregational prayer service at that hour. We find that Kelly's request was unfeasible within the confines of a state funded institution. The request was also the perfect example of an "excessive" accommodation, as discussed by Justice Ginsburg in *Cutter*. *Id.* at 725.

A governmental action or regulation does not rise to the level of a substantial burden on religious freedom if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or prevents the adherent from acting in a way that is not otherwise generally allowed. *Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004). Here, Kelly, if granted a nightly congregational prayer, will certainly be granted the benefit of an extra service, exemption from the final count, and the unprecedented perk of having a different

routine from other inmates. Denying this request, does not constitute a substantial burden to prayer; further, it can prove to be quite a security risk in a maximum security facility. Five years after Congress enacted RLUIPA, the Supreme Court commented that in "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries… and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths." *Cutter*, 720. Furthermore, the Court attempted to address the accommodation concerns of prisoners with "non-mainstream" religions and said "RLUIPA does not differentiate among bona-fide faiths." *Id.* at 723. An additional prayer service, at TCC, would be "some benefit" that is not "generally available" to the general population. This additional prayer service, if not granted to all faiths, would create danger of violence between religious group members and would provide any inmate, including those who intend to illicitly use a prayer service, with a strong argument for equal treatment.

"Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Id.* at 717-18. In the case at bar, no religious group has the privilege of attending prayer services more than three times a day. All inmates, whether they are religious or not, must be in their cells by a certain time in order to make sure all inmates are accounted for and safe. For these crucial reasons, we hold that the District Court erred in finding that the prison was violating his rights under RLUIPA by denying Kelly's request for a night service.

Any perceived differential treatment among the inmate population could pose a threat to prison morale and, therefore, to prison safety and security. *Kahey v. Jones*, 836 F.2d 948, 951 (5th Cir. 1988). If the Defendants allowed the Nation to receive nightly services, that could mean that other religious groups would also demand night services accommodations. Prison officials are responsible for ensuring that no tension arises from a perception of special treatment to one group over another. Mandating the prison to hold nightly congregational services for one religious group would mean allowing them for all religions. This would pose serious security, financial and staffing problems for the prison.

In *Lyng v. Northwest Indian Cemetery Protective Association*, the Supreme Court limited the broad interpretation of the Free Exercise Clause that the Court pronounced in *Thomas*. *Lyng,* 485 U.S. 439 (1988). In *Lyng*, the plaintiff, a Native American organization sought to block construction of a road on the grounds that the construction of the road would substantially burden their faith (among other claims). *Id.* The *Lyng* court denied the plaintiff's claims – effectively rejecting the broad reading of the Free Exercise Clause that the *Thomas* court had adopted. 485 U.S at 450-51. The *Lyng* court recognized that the "incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals from acting contrary to their beliefs, require government to bring forward compelling justification of its otherwise lawful actions." *Id.*

This Court is careful to honor the distinction between a direct and substantial burden that coerces an inmate into non-adherence to religious principles and exercise, as opposed to a lawful policy that has incidental yet

necessary effects on the every day lives of the incarcerated. The prison and its officials are always in the best position to determine whether those lawful policies should be imposed on the general prison population, regardless of issues related to one's religious beliefs and practices.

It is well known that Muslims, generally, do not need to attend a place of worship in order to complete their five daily prayer sessions. However, the prayer ritual, at a minimum, requires the inmate to stand, bend, and kneel in a stationary location. Thus, Kelly cannot feasibly allege that his prayer time is substantially burdened by having to conduct some of them in a cell and in the presence of another inmate. The only time that the Muslim faith seeks to make nightly congregational prayers mandatory is during the holy month of Ramadan. The facts under which this suit is predicated did not occur during that timeframe.

Kelly has not sufficiently shown that denying him an additional evening prayer service substantially burdens his religious exercise. A substantial burden occurs when a state or local government, through an act or omission, puts substantial pressure on an adherent to modify his behavior and to violate his beliefs. *Lovelace,* 472 F.3d at 187. Congregational prayer is not a compulsory aspect of prayer within the Nation; is it only preferred. Thus, the regulation is merely depriving an inmate of a benefit that is not otherwise generally available. That does not constitute a substantial burden under RLUIPA.

Even if the prison policy could be perceived as a burden on religious exercise, the Defendants have indicated that another nightly service would not be financially sustainable or staffed appropriately. In *Adkins*, the prison had a uniform policy that a prison volunteer needed to be in attendance at any congregational service. *Adkins,* 393 F.3d at 562. The prisoner, Adkins, challenged this policy, under RLUIPA, because he was not able to observe particular days of rest and worship, which was a requirement of his faith. *Id.* Adkins could not observe certain days because there were no available volunteers to hold the service during the times in question. *Id.* at 565. The panel in *Adkins* found that the prison's limitations upon inmates' access to prayer services were permissible because "the requirement of an outside volunteer did not place a substantial burden" on the plaintiff's religious exercise under RLUIPA. *Id.* at 571. The Adkins court appropriately noted that the prison policy did not violate RLUIPA because Adkins was prevented from congregating with other members of his faith due to a lack of qualified outside volunteers, not because a prison policy prevented it.

This Court adopts the Adkins court's approach in that volunteers are not essential to guarantee the prisoner's religious rights. Here, the prison policy – due to security concerns based on prior events of volunteers engaging in illegal activities during prayer services – rightfully excludes a requirement for a prison volunteer to be in attendance at prayer services (a volunteer who may not have any qualifications to conduct a prayer service). The prison officials are acting within their rights to ensure that prayer services are not the breeding ground of any gang activity or illicit conduct. Thus, the only persons who can conduct prayer services under TCC policy are prison Chaplains, who are fully qualified to oversee and facilitate religious gatherings. Usually, Chaplains work a normal schedule that does not include coming to the prison late at night and outside the designated prayer times. The reason that the prison assigns these times for the Chaplains to conduct services is because the

prison staffing is also available to ensure that the prisoners are getting safely to and from each service and that a chaperone is present with the Chaplain at all times. If nightly services are required, that would impose burdensome administrative and financial impositions on the prison to ensure that every prisoner and every prison employee is safe.

B. Revocation of Kelly's Diet Program

Turning to the diet program, this Court follows the sound observations of the Seventh Circuit in *Daly v. Davis*, 2009 WL 773880 (7th Cir. 2009), where a federal prisoner sued the prison in which he was being housed when they suspended him several times from the prison's religious diet program. *Id.* at *1. Prisoner Daly was observed purchasing and eating non-kosher food and trading his kosher tray for a regular tray. *Id.* The *Daly* court found that government action revoking a prisoner's religious diet benefit substantially burdens religious exercise only if prevents or inhibits religiously motivated conduct. *Id.* at *2. The court found that the prison did not substantially burden this prisoner because his repeated conduct, in breaking his kosher diet, were not because his religious beliefs prevented him from adhering to the diet program; on the contrary, his conduct was a voluntary departure from his alleged religious beliefs and practices. The prison's diet program itself did not compel any conduct that put the prisoner in a position where he was prevented or inhibited from following his beliefs. *Id.*

Here, the diet program did absolutely nothing to force Kelly's hand into threatening other inmates to give him their dinner. Kelly's choices were his own.

Kelly argues that his inability to consume vegetarian food has pressured him to modify his behavior and violate his sincerely held religious beliefs. Since this Court has no basis, in the record, to determine the sincerity of an individual's beliefs, we defer to the prison's findings that Kelly's action did indeed call his religious sincerity into question, and thus his dietary program was revoked as punishment. The facts contained in the written statement of the cellmate raise alarming questions as to whether Kelly was feigning the need for a religious diet in order to reap the benefits of being an acknowledged member of a religious faith group. The inmates who are under the auspices of the faith group are provided with special foods not afforded to other, non-vegetarian inmates. The inmates who participate in prayer services are provided with added fellowship and rest days on special holidays that non-acknowledged religious members may not receive. Thus, there is motivation for inmates feigning sincere religious beliefs in order to obtain these benefits.

III. Compelling Governmental Interest

We agree with the District Court's analysis that "context matters" in applying the compelling governmental interest standard. *Cutter*, 544 U.S. at 723. Courts should apply this standard with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Id.* at 723. (quoting the joint statement of Sen. Hatch and Sen. Kennedy, RLUIPA's co-sponsors). Of these enumerated concerns, "security deserves particular sensitivity." *Cutter*, 544 U.S. at 722. RLUIPA, essentially, is not meant to "elevate accommodation of religious observances over an institutional need to maintain good order, safety, and discipline or to control

costs." *See Lovelace v. Lee,* 472 F.3d 174, 190 (4th Cir. 2006).

IV. Least Restrictive Means

Even if this Court concludes that the prison's grounds for denial of Kelly's demands stem from a compelling government interest, the Defendants still have the burden of proving that their policies are the least restrictive means of furthering that interest. To satisfy the "least restrictive means" burden, the prison would have to show that it considered and rejected less restrictive measures because the less restrictive measures were not effective to serve the compelling interest at issue. *Wygant v. Jackson Bd. Of Educ.,* 476 U.S. 267, 280 n. 6 (1986).

This Court disagrees with the District Court's reliance on *Lovelace v. Lee,* 472 F.3d 174 (4th Cir. 2006). Instead the Eighth Circuit in *Brown-El v. Harris,* is the standard to be rightfully adopted. 26 F.3d 68 (8th Cir. 1994). In *Brown-El,* a Muslim prisoner was entitled to special meals after dark so he could observe Ramadan. *Id*. The prison policy stated that they could remove from the diet program those prisoners who ate meals during daytime, in violation of their own religious beliefs. *Id.* After the policy was implemented, Brown-El fought with a prison guard and was placed in the infirmary, where he voluntarily ate a daytime meal, in violation of his Ramadan fast. The prison removed him from the fasting program and Brown-El challenged this as a violation of his First Amendment rights. The Eighth Circuit rejected this claim, holding that "[t]he policy did not coerce worshippers into violating their religious beliefs, nor it compel them, by threat of sanction, to refrain from religiously motivated conduct." *Id.* at 70. The court set forth that removing accommodations when a prisoner fails to take advantage of them puts no pressure on the prisoner – the prisoner has chosen to remove himself or herself by conduct in rejecting the accommodation. *Id.* at 69. We are persuaded by the observations and holding of the *Brown-El* court and adopt its reasoning and holding.

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The prison policy at TCC, like the policy in Brown-El, is the least restrictive means for furthering the compelling government interest of prisons because it sets consequences in motion only for inmates who break the rules of their own accord. The policy does not compel inmates to violate their religious beliefs; they do so by choice and then must face the repercussions of that decision. We find that Kelly forced the prison to revoke his diet program benefits and, therefore, essentially removed himself from the program, by threatening other inmates for their food, an allegation which was later corroborated by the prison guards.

With respect to prison's denial of nightly congregational prayer services, that denial is also the least restrictive means for the institution to further its compelling interests, despite the fact that the denial may seem under inclusive in that it applies only to NOI prisoners. If the Warden were to change the prison policy for just seven members of the Nation, he would have to change the policy for larger, more prevalent groups like Sunni Muslims, Christians, and Jews at TCC. Here, a blanket ban on all services at night was required to keep the peace in a potentially dangerous and hostile environments such as a prison. Although it includes all religious groups, it is still the least restrictive way to ensure safety for all.

Wardens generally defend broad rather than narrow prison policies by stating that "individualized exemptions are problematic because they cause resentment among the other inmates, a copy cat effect, and problems with enforcement of the regulations due to

staff members' difficulties in determining who is exempted and who is not." *See Hoevanaar v. Lazaroff*, 422 F.3d 366, 371 (6th Cir. 2005). This would be exactly the case if TCC would employ the only less restrictive alternative available, which is allowing the nightly service just for the seven Nation members.

Another possible alternative would be giving the Nation members the option to fund their own Chaplain and service. This would also pose security concerns. This Court agrees with the reasoning in *Baranowski v. Hart*, 486 F.3d 112, 125-6 (5th Cir. 2007) where the court ultimately held that a prison needs to provide services to all inmates on an equal basis, and make accommodations financed by the prison whenever accommodations are warranted. The *Baranowski* court disallowed a particular prison group's purchase of optional items based on the rationale that prisoners should not be able to pay for services that benefit other inmates because "an inmate who buys things for other inmates could coerce that inmate to perform illicit or illegal acts, engage in blackmail, or otherwise jeopardize the security of the institution." *Id.* Thus, they found that the government's interests in this type of institutionalized setting could not be achieved by a different or less restrictive means. Since neither Kelly nor other courts have identified any less restrictive, viable means of dealing with the issues described in this case, we find that banning night congregational services is, indeed, the only way in which the prison can serve its compelling interests.

Conclusion

Because we find that the district court erred in finding that RLUIPA had been violated, we vacate summary judgment for the plaintiffs.

IN THE
UNITED STATES SUPREME COURT
No. 472-2015

SIHEEM KELLY,

-against-

KANE ECHOLS, Warden of Tourovia Correctional Center and SAUL ABREU, Director of the Tourovia Correctional Center Chaplaincy Department.

WRIT OF CERTIORARI

PLEASE TAKE NOTICE that the Petition for Writ of Certiorari is granted and limited to the following questions:

1. Whether Tourovia Correctional Center's prison policy prohibiting night services to members of the Islamic faith violates RLUIPA?

2. Whether Tourovia Correctional Center's prison policy reserving the right to remove an inmate from a religious diet or fast, due to evidence of backsliding, violates RLUIPA?

This matter will be heard during the October Term, 2015.

Dated: July 1, 2015
Washington, D.C.

/S/
By:_____
Clerk of the Supreme Court of the
United States of America
Washington D.C.

Sources

Tourovia Directive Definitions in relevant part

Definitions

"Faith Group" means 10 or more acknowledged members of any faith, whether it is majoritarian or counter-majoritarian.

"Chaplain" means a Facility staff member designated to with the responsibility to coordinate and oversee religious programs for the offender population and to advise the superintendent regarding religious programming.

"**Designated Prayer Times**" means the hours before each meal in which prayer services for the authorized religious members may conduct their congregational services in the room the prison administration so delineates.

a. Before the morning meal at 8:00 A.M.

b. Before the afternoon meal at 1:00 P.M.

c. Before the evening meal at 7:00 P.M.

Tourovia Directive #98 in relevant part

98. Religious Corporate Services

Purpose: to establish policy for the practice of faith groups and ensure that inmates have the opportunity to participate in practices of their faith group, individually or corporately as authorized, that are deemed essential by the governing body of that religion, limited only by a showing of threat to the safety of staff, inmates, or other person involved in such activity, or that the activity itself disrupts the security or good order in the facility. Religious based programs/observances shall be accommodated, within available space and time, unless an overriding compelling governmental interest exists.

1. Inmates who wish to participate in prayer services shall conduct any congregational service at the Designated Prayer Times.

    a. Requirement for a Chaplain. To protect the integrity and authenticity of the beliefs and practices of religious services and programs, a Chaplain must be available for the coordination, facilitation, and supervision of inmate services or programs and there must be sufficient offender interest (10 or more designated faith group members)

    b. Restrictions on Services. Due to security and administrative efficiency, no inmate is to leave their cells for any reason after the last inmate head count. Prayer services shall not be allowed after the last inmate head count at 8:30 P.M., daily.

After consultation, the facility chaplain may

a) limit the participation in a particular religious activity or practice (e.g. religious, work proscription, ceremonial meals, etc.) of offenders who are part of that religious group or
b) curtail the congregate interaction of groups involved in a given faith group as a group if
    - no specific faith group leader is involved to lead the ceremony; or
    - deemed a potential security risk to the safety and security of the facility.

Tourovia Directive #99 in relevant part

99. Religious Alternative Diets

Requirement of a Written Request. Inmates who wish to observe religious dietary laws shall provide a written request for a special diet to the Director of Chaplaincy Services along with their Declaration of Religious Preference Form. The requests shall be accommodated to the extent practicable within the constraints of the Tourovia Correctional Center's

a) security considerations

b) budgetary or administrative considerations, and

c) the orderly operation of the institution.

Backsliding from a Religious Diet. In the event that an inmate gives prison administration adequate reason to believe that the religious alternative diet is not being adhered to, Tourovia Correctional Center reserves the right to revoke religious alternative diet privileges for any designated period of time or revoke the privilege permanently.