

IN THE SUPREME COURT OF THE UNITED STATES

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 appeal from the United States Court of Appeals for the Twelfth Circuit

BRIEF FOR THE PETITIONER

Team 1
Counsel for Petitioner

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QUESTIONS PRESENTED

- I. Whether a prison policy barring evening prayer services imposes a substantial burden on an inmate's religious exercise where his religion mandates evening prayer, and whether a complete ban on such services is the least restrictive means of furthering the prison's asserted interests.

- II. Whether the decision to remove an inmate from a religious diet after one unsubstantiated incident of backsliding imposes a substantial burden on the inmate's religious practice where he was compelled to consume meals that violate his religious beliefs and the prison did not show that removing the inmate from his religious diet is the least restrictive means of furthering the prison's stated interests.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals, vacating summary judgment for the petitioner, was entered on June 1, 2015. (R. at 22). The Petition for Writ of Certiorari was granted on July 1, 2015. (R. at 23). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner Siheem Kelly is an inmate in the Tourovia Correctional Center (TCC) and is an adherent of the Nation of Islam (the “Nation” or “NOI”), a minority religious group at the prison. (R. at 3).

A. The Proceedings Below

Mr. Kelly initiated this action against respondents in the United States District Court for the Eastern District of Tourovia, seeking declaratory and injunctive relief for violations of the Religious Land Use and Institutionalized Persons Act (“RLUIPA”). (R. at 2). The District Court denied respondents’ motion for summary judgment and found for Mr. Kelly on the grounds that refusing him a nightly prayer service and removing him from the vegetarian diet program substantially burdened his religious rights in violation of RLUIPA. (R. at 8-15).

The Twelfth Circuit reversed, holding that RLUIPA had not been violated. (R. at 22). The court determined that denial of the nightly congregational service and revocation of his diet program did not substantially burden petitioner’s exercise of religion. (R. at 17-20). The court also found that the prison policies employed by TCC were the least restrictive means of furthering their compelling interests. (R. at 21).

B. The Facts

Mr. Kelly is an inmate at TCC. (R. at 3). In 2002, two years after he arrived at the prison, he became a member of the Nation faith. *Id.* In addition to filing a “Declaration of Religious Preference Form” to change his religious affiliation, Kelly requested that his last name be

changed to “Mohammed” to reflect his new faith. *Id.* The Nation resembles traditional Sunni Islam. *Id.* For instance, the Nation believes that five daily prayers are mandatory: 1) Dawn, 2) Early Afternoon, 3) Late Afternoon, 4) Sunset and 5) *Late Evening* (emphasis added). (R. at 3-4). The *Salat*, or prayer guide, refers to these prayer times as “Obligatory and Traditional.” (R. at 3). Members of the Nation require a clean and solemn environment when they conduct their prayers, typically washing themselves and their clothes beforehand and avoiding interruptions during the prayer. (R. at 4). Communal prayer is preferred, although not mandatory, except on Friday evenings and during the holy month of Ramadan. *Id.* In addition to prayer, Nation members also engage in a strict vegetarian diet (or Halal) and fast during the month of Ramadan. (R. at 3).

The Nation is a minority religious group at TCC; there are currently seven acknowledged members, but the Nation has previously had as many as ten members. *Id.* Current Nation members do not have any history of violence or unsatisfactory behavior at TCC. *Id.* This may be attributed to the fact that they often travel as a group, thereby reducing the potential for them to be harassed by other inmates. *Id.*

In February 2013, Kelly, on behalf of the seven Nation members, filed a request for an additional congregational prayer service to be held during the evening. (R. at 5). At the time of the request, TCC only offered three prayer services. (R. at 4). Kelly requested an additional service after the last meal at 7:00 PM, but before the final head count at 8:30 PM. (R. at 5). Prior to 1998, TCC offered an evening prayer service led by a volunteer. (R. at 4). However, the prison banned this service and the use of volunteers after discovering that the volunteer was relaying gang-related information between the Christian inmates and individuals outside of the prison. *Id.* The evening service was also suspended because members of the Sunni Muslim and Christian groups disregarded security protocol by remaining in their prayer rooms during the nightly

headcount. *Id.* These incidents lead to the policy change reflected in Tourovia Directive #98. *Id.* The new policy requires an official chaplain to be present in order for religious services to be held. (R. at 25). It also states that any inmate that is not in his cell before the final headcount or that engages in any misconduct regarding ceremonial meals or the religious diet will be punished. *Id.*

Kelly's request for an evening prayer service was denied because of the policy against inmates leaving their cells before the final headcount. (R. at 5). In determining whether an inmate's request for additional prayer services will be granted, the prison considers demand, need, staff availability, and prison resources. (R. at 4). After Saul Abreu, Director of TCC's Chaplaincy Department, denied Kelly's request, Kelly filed two grievances. (R. at 5). One grievance outlined his inability to pray in his cell due to incidents where his non-NOI cellmate would ridicule him or engage in lewd behavior during his nightly prayer. *Id.* Other Nation members also found prayers in their cells to be distracting and disrespectful to the religion. *Id.* Kelly's other grievance stated that he could not pray in his cell due to the presence of a toilet merely a few feet away, violating Allah's preference for a clean and solemn environment. *Id.* Both grievances were denied, as was another formal grievance he filed with Warden Kane Echols. (R. at 5-6).

Shortly after the formal grievance with the Warden was denied, Kelly's cellmate, a new inmate at TCC, reported that Kelly made threats against him, saying he would perpetrate violence against him if he did not give Kelly his meatloaf dinner. (R. at 6). According to Tourovia Directive #99, any inmate found bullying another inmate for their food or breaking his respective religious diet may be removed from the religious diet program and may be suspended from attending religious services. *Id.* Prison officials did discover meatloaf wrapped in a napkin

under Kelly's mattress, but Kelly insisted that it was not his. *Id.* Moreover, there was no evidence proving Kelly committed any act of violence against his new cellmate. *Id.* Despite the lack of evidence against him, Kelly was removed from TCC's vegetarian diet program and was barred from attending any worship services for the next month. *Id.* In response to the removal from his religious diet, Kelly began a hunger strike. *Id.* After two days of the strike, prison employees began to forcibly tube-feed him. *Id.* As a result of the pain and invasiveness of the tube feeding, Kelly ended his strike and succumbed to eating the food provided to the general prison population. *Id.*

Kelly filed a complaint in the District Court of Tourovia challenging the validity of the prayer service and diet program policies under RLUIPA. *Id.* He argued he was denied the requisite number of prayer services to which he is entitled under RLUIPA and that by removing him from his religious diet, prison officials compelled him to violate his religious beliefs and practices. *Id.*

SUMMARY OF THE ARGUMENT

The Court of Appeals erred in vacating the grant of summary judgment for Mr. Kelly for the following reasons:

First, the Court of Appeals applied an overly narrow definition of "substantial burden" when it should have defined the term broadly in favor of protecting religious exercise. The prison policy banning an evening prayer service places a substantial burden on Mr. Kelly's religious exercise because it causes him to violate central tenants of his faith. In assessing whether the prison had a compelling interest and used the least restrictive means of furthering that interest, the Court of Appeals improperly placed the burden on Mr. Kelly to set forth less restrictive

alternatives. Irrespective of the Court of Appeals' improper interpretation of RLUIPA, the respondents failed to show that they considered and rejected alternative policies.

Second, the Court of Appeals incorrectly found that one incident of backsliding was sufficient evidence for prison officials to question Mr. Kelly's religious sincerity and remove him from his religious diet, even though there is substantial evidence to suggest Mr. Kelly's religious beliefs are sincere. The revocation of his religious diet places a substantial burden on Mr. Kelly's religious practice because, as with the policy banning the evening prayer service, it caused Mr. Kelly to violate a central tenant of his faith. The Court of Appeals improperly found that the prison's policy was the least restrictive means of furthering a compelling interest because the respondents failed to show that they considered and rejected less restrictive policies.

Thus, this Court should find in favor of Mr. Kelly and reverse the decision of the Court of Appeals.

ARGUMENT

The Court of Appeals erred in finding that the denial of a nightly congregational service and the revocation of Mr. Kelly's diet program did not violate RLUIPA. Section 3 of RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, . . . even if that burden results from a rule of general applicability," unless the burden "is in furtherance of a compelling government interest" and "is the least restrictive means of furthering that compelling government interest." Religious Land Use and Institutionalized Persons Act of 2000, § 3(a), 42 U.S.C. §2000cc-1(a) (2012). Here, respondents violated RLUIPA because: (1) prohibiting nightly prayer services places a substantial burden on Mr. Kelly's religious exercise; and (2) removing Mr. Kelly from his religious diet program also substantially burdens his religious exercise.

I. THE PRISON’S DENIAL OF AN EVENING PRAYER SERVICE VIOLATES RLUIPA WHERE IT SUBSTANTIALLY BURDENS MR. KELLY BY PREVENTING HIM FROM FULFILLING TENANTS OF HIS FAITH AND WHERE RESPONDENTS DID NOT MEET STRICT SCRUTINY.

The Court should reverse the Court of Appeals’ decision vacating summary judgment for Mr. Kelly because the respondents’ denial of an evening prayer service violated RLUIPA. To state a claim under RLUIPA, the plaintiff must first show that the governmental action in question substantially burdens the exercise of religion. *Id.* Second, once the plaintiff produces prima facie evidence to show a substantial burden, the burden shifts to the government to prove that the policy in question is the least restrictive means of furthering a compelling governmental interest. *Garner v. Kennedy*, 713 F.3d 237, 241 (5th Cir. 2013). Here, the Court of Appeals erred in applying both elements. In finding that the policy prohibiting a nightly prayer service did not substantially burden Mr. Kelly’s religious exercise, the court used an overly restrictive definition of substantial burden, and, regardless of the definition used, the court failed to properly consider the effect that the denial of nightly services had on Mr. Kelly’s religious exercise. Moreover, the respondents cannot show that the policy furthers a compelling interest and does so by the least restrictive means because they did not demonstrate that they considered and rejected alternative means of achieving their stated interests. Because the ban on evening prayer services violated RLUIPA, this Court should reverse the Court of Appeals’ ruling.

- A. The policy prohibiting a nightly prayer service substantially burdens Mr. Kelly’s religious exercise by preventing him from properly performing his evening prayer.

RLUIPA does not itself define what constitutes a “substantial burden” on religious exercise. However, RLUIPA expressly provides that it “shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.” 42 U.S.C. § 2000cc-3(g) (2012). Moreover, RLUIPA’s legislative history

suggests that courts should define “substantial burden” by reference to Supreme Court jurisprudence. This Court defined a substantial burden as a government action that pressures an adherent “to modify his behavior and to violate his beliefs.” *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981). Other courts have articulated mostly consistent definitions of a substantial burden, with minor variations in wording. *See, e.g., Murphy v. Mo. Dep’t of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) (finding a substantial burden where the government action “significantly inhibit[s] or constrain[s] conduct or expression that manifests some central tenet of a [person’s] individual [religious] beliefs”). Some courts, including the appeals court here, also defined substantial burden using the standard set forth in *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), where a Native American organization attempted to block construction of a road through sacred lands, arguing that it would substantially burden their faith. *Lyng* narrowed the broad reading of RLUIPA set forth in *Thomas* by excluding from the definition of substantial burden any “incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs.” *Id.* at 450-51.

In the present case, the Court of Appeals improperly rejected the District Court’s reading of RLUIPA as overly broad. Because RLUIPA requires the court to interpret it broadly in favor of protecting religious exercise, the Court of Appeals erred in applying the *Lyng* standard. The *Thomas* standard, on the other hand, is most protective of free exercise, and thus was properly applied by the District Court. *Lyng* is factually distinguishable from the case at hand as well, since it was brought under the Free Exercise Clause of the First Amendment (rather than RLUIPA) and concerned issues regarding land use (rather than the prison context). *Id.* at 441-42.

Thus, the Court of Appeals erred in applying the restrictive definition of substantial burden set forth in *Lyng*.

Regardless of the definition used, the Court of Appeals erred in finding no substantial burden because it failed to properly consider the effect that the denial of nightly services had on Mr. Kelly's religious exercise. Where the inmate is prevented from following the precepts of his religion, a substantial burden exists. In *Walker v. Beard*, 789 F.3d 1125, 1135 (9th Cir. 2015), where the inmate's religion forbade him from conducting religious rituals in the presence of non-Aryan individuals, subjecting him to the integrated cellmate policy amounted to a substantial burden on religious exercise. An inmate need not actually be forced to violate his religious beliefs; rather, for a violation of RLUIPA to occur there merely needs to be "substantial pressure on [the] adherent to modify his behavior and to violate his beliefs." *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005). The 9th Circuit has held that a substantial pressure arises when the inmate is threatened with punishment for refusing to abandon a religious exercise. *See Id.* at 996 (finding a substantial burden where an inmate was subjected to various punishments for refusing to comply with a prison grooming policy that violated his religious beliefs). Like the inmate in *Warsoldier*, Walker accepted punishment over having his religious exercise restrained. *Walker*, 789 F.3d at 1135.

Additionally, prohibiting inmates from engaging in communal worship can substantially burden their religious exercise. *See Murphy*, 372 F.3d at 982 (finding that the District Court improperly granted summary judgment where the inmate was denied group worship); *see Meyer v. Teslik*, 411 F.Supp.2d 983, 989 (W.D. Wis. 2006) (holding that prohibiting an inmate from attending group worship substantially burdened his religious exercise). In considering the inmate's prohibition from group services, the *Meyer* court noted that "[i]t is difficult to imagine a

burden more substantial than banning an individual from engaging in a specific religious practice.” *Meyer*, 411 F.Supp.2d at 989.

The denial of a nightly prayer service prevented Mr. Kelly from performing central tenants of his religion, including (1) maintaining a clean, solemn environment while conducting prayer; and (2) participating in communal prayer on Friday evenings. (R. at 4). According to the *Salat* of the Nation of Islam faith, there are five “obligatory and traditional” prayer times. (R. at 3-4). The prayer time relevant to this appeal is the late evening prayer. (R. at 4). Mr. Kelly is unable to perform his evening prayer in his cell because his non-NOI cellmate subjects him to ridicule and lewd behavior during the course of his prayer. (R. at 5). Moreover, there is a bathroom facility located directly in the cell, merely a few feet away from where Mr. Kelly prays. *Id.* These conditions are in conflict with the “very clean and solemn environment” that Nation members require while conducting prayer. (R. at 4). The Court of Appeals failed to consider this tenant of Mr. Kelly’s faith in assessing whether he was substantially burdened by the denial of a nightly service. As in *Walker*, the prison’s failure to accommodate Mr. Kelly’s religious needs amounts to a substantial burden on his religious beliefs.

In addition to burdening Mr. Kelly’s ability to pray in a clean, solemn environment, the denial of nightly prayer services also burdens another central tenant of the NOI faith—mandatory communal prayer on Friday evenings. (R. at 4). The Court of Appeals incorrectly stated that “[t]he only time that the Muslim faith seeks to make nightly congregational prayers mandatory is during the holy month of Ramadan.” (R. at 19). While communal prayer is mandated during Ramadan, it is also required *every* Friday evening. (R. at 4). Thus, the denial of nightly prayer services not only substantially burdens Mr. Kelly’s religious exercise, it prevents him from performing this tenant of his faith entirely. As the *Meyer* court found, there is no

burden more substantial than prohibiting Mr. Kelly from performing a specific religious practice required of him.

The present case is distinguishable from *Van Wyhe v. Reisch*, 581 F.3d 639, 657 (8th Cir. 2009), where the court found that a Jewish inmate's religious exercise was not substantially burdened when he was denied time for group study of the Hebrew language. In that case, the inmate asserted that his religion considers the study of Hebrew to be a "mikvah," or "good deed." Here, Mr. Kelly asserts that his religion *mandates* communal prayer on Friday evenings, and therefore the denial of group time imposes a substantial burden in this instance.

Mr. Kelly is also faced with a threat of punishment, in the form of solitary confinement, if he chooses to conduct his prayer outside of his cell without permission. (R. at 12). Thus, Mr. Kelly is effectively given two options: disobey prison policy and receive punishment or pray in an environment that undercuts the sanctity of prayer. *Id. Warsoldier* makes clear that placing pressure on the adherent to alter his beliefs through the threat of punishment amounts to a substantial burden, as described in *Thomas. Warsoldier*, 418 F.3d at 996.

Thus, the restriction on evening prayer services is a substantial burden on Mr. Kelly's religious exercise.

- B. Respondents did not establish that a blanket ban on nightly services is the least restrictive means to further their compelling interests.

Once the inmate demonstrates that the governmental action imposes a substantial burden on his religious exercise, the burden shifts to the State to prove that it had a compelling government interest, and that the action taken is the least restrictive means of furthering that compelling interest. 42 U.S.C. § 2000cc-1(a)(2) (2012).

The Tourovia Correctional Center has not shown that it has a compelling interest

To meet their burden of proof to show a compelling interest, respondents must first proffer an explanation for the challenged policy. *Smith v. Ozmint*, 578 F.3d 246, 252 (4th Cir. 2009). The legislative history of RLUIPA supports this requirement, stating that “inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet [RLUIPA’s] requirements.” *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) (joint statement of Sens. Hatch and Kennedy on RLUIPA)). Thus, in defending policy choices, the prison must do more than merely assert that it has a compelling government interest; rather, to satisfy RLUIPA it must support the asserted interest with “some basis.” *Murphy*, 372 F.3d at 988-89; *see also Smith*, 578 F.3d at 252 (finding that prison officials failed to offer adequate evidentiary support for their assertion that security concerns constituted a compelling governmental interest). While the lower courts correctly acknowledged that deference is given to prison officials in assessing their stated interests, the requirement for them to prove that their interest is in fact compelling is not incompatible with that deference. *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005). “Rather, before we can evaluate whether deference is due, we require that prison administrators explain in some detail what their judgment is.” *Spratt*, 482 F.3d at 42.

Respondents argue that security, personnel, and financial concerns for the prison, its inmates, and employees constitute compelling interests. (R. at 7). The respondents have not provided a sufficient basis for any of these asserted justifications, and therefore cannot meet their high burden of showing a compelling government interest.

First, there is no support for the concern over security. While respondents did provide an affidavit explaining the prison’s reasoning for its prayer policy, the prison’s concerns of safety

and security are not supported by the record. (R. at 6-7). Neither Mr. Kelly, nor any member of the Nation, has a history of violence at the prison. (R. at 3). Security concerns related to Nation members missing the nightly head-count are also unsubstantiated and speculative. Unlike the faith groups that participated in the previously offered nightly prayer service, there is no evidence to suggest that Nation members would remain in the prayer room longer than authorized, and therefore miss the final head-count. (R. at 4).

Second, the financial concerns are also unwarranted. The prison's policy that a Chaplain be present, rather than a volunteer, is unreasonable in this instance. While the respondents may cite to a prior instance of gang-related conduct that led to the creation of Tourovia Directive #98, that issue involved the Christian community and occurred over a decade ago. *Id.* Moreover, even if the respondents insist upon a Chaplain being present at the nightly prayer service, they have not presented sufficient evidence indicating that it would be financially unfeasible to retain a Chaplain for the nightly service. *See Rouser v. White*, 650 F. Supp.2d 1165, 1186 (E.D. Cal. 2009) (holding that while there was evidence of the stated budgetary restrictions, "it [fell] short of establishing that there is no genuine issue of material fact as to whether the policies and practices of which plaintiff complains served a compelling state interest"). Respondents' addendum provided to the District Court detailed the prison's "cost containment stratagems." (R. at 7). A desire to contain costs is not necessarily proof that the extra service is financially impracticable. Moreover, the fact that the prison was financially able to hold an additional prayer service in prior years undercuts the respondent's argument that it will create a financial burden in this instance.

Third, the concern over personnel is unfounded. No additional prison guards will be required to administer the nightly prayer. Nation members tend to move through the facility as a

group, therefore ensuring other inmates do not harass them. (R. at 3). Moreover, it does not appear that it was common practice for prison personnel to escort inmates to or from their prayer services in the past. (See R. at 4) (explaining that Christian and Sunni Muslims groups remained in their prayer rooms longer than authorized).

Thus, even given the deference afforded to prison officials, respondents cannot satisfy their burden to show that banning nightly prayer services furthers a compelling government interest.

The respondents did not use the least restrictive means to further their interests

Even if this Court finds a compelling government interest, the respondents did not employ the least restrictive means to achieve that interest. The least restrictive means standard is extremely demanding, requiring that “if a less restrictive means is available for the Government to achieve its goals, the Government must use it.” *United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 815 (2000). The prison cannot meet its burden to prove that it used the least restrictive means unless it can show that it considered and rejected alternative measures before adopting the policy at issue. *Warsoldier*, 418 F.3d at 999. Thus, the respondents must “demonstrate, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling government interest.” *Spratt*, 482 F.3d at 42 (quoting *O’Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003)).

Here, the Court of Appeals erred in determining that respondents met their burden of proving that the policy is the least restrictive means of furthering their interests for the following two reasons: (1) because the court improperly placed this burden on Mr. Kelly and (2) the respondents failed to present any alternatives to the policy. In articulating its reasoning for vacating the District Court decision, the Court of Appeals stated that “[s]ince 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.” (R. at 22). Requiring Mr. Kelly to identify less restrictive means is an improper reading of RLUIPA, which explicitly places the burden on the *government* to demonstrate that its policy is the least restrictive means. 42 U.S.C. § 2000cc-1(a)(2) (2012).

Moreover, in defending the blanket ban on nightly services, the respondents did not present any alternative measures that were considered and rejected. It is hard to conceive how a blanket ban on nightly services could be the least restrictive means to achieve the prison’s stated interests. If, as the respondents asserted in the record below, the Nation members’ presence at the final inmate head count is required as part of the security protocol, then the final count could take place upon the return of Nation members to their cells. The final count takes place at 8:30 PM, one hour before the evening meal at 7:30 PM. (R. at 24-25). If Nation members conducted their prayer during this hour, the TCC would not be forced to make special accommodations for the group. Moreover, it could retain the right, as it did with the Christian and Sunni Muslim groups, to discontinue the nightly prayer in the event any Nation member misses the final count. (R. at 4).

If financial concerns are deemed a compelling interest, the respondents still cannot show that they used the least restrictive means. While it may be financially burdensome to hire a Chaplain to attend the nightly service all seven days of the week, the respondents could have proposed a compromise of having the prayer service only on Friday evenings, when Mr. Kelly’s religion mandates communal prayer. (R. at 4). Respondents fail to explain why a limited evening prayer service schedule is not financially feasible. Another alternative is to forgo having a

Chaplain present. Instead, the Chaplain can prepare a pre-approved script for the inmates to follow during the evening prayer session, under the supervision of a prison staff member. *See Hummel v. Donahue*, No. 1:07-cv-1452-DFH-TAB, 2008 U.S. Dist. LEXIS 47534, at *17 (S.D. Ind. 2008).

The District Court suggested an even simpler approach than the options discussed above; the respondents could have grouped all Nation members in the same cells. (R. at 14). This would address Mr. Kelly's concerns about his disrespectful and lewd cellmate, and would impose no additional security, financial, or personnel concerns on the TCC.

Respondents made no attempt to demonstrate that the alternatives set forth above were actually considered and deemed insufficient, as required under *Warsoldier*. Thus, respondents are unable to meet their burden of proof under RLUIPA. 42 U.S.C. § 2000cc-2(b) (2012).

II. RESPONDENTS' REMOVAL OF MR. KELLY FROM HIS RELIGIOUS DIET AFTER ONE ALLEGATION OF BACKSLIDING VIOLATES RLUIPA WHERE IT COMPELLED MR. KELLY TO VIOLATE HIS RELIGIOUS BELIEFS AND WHERE RESPONDENTS' JUSTIFICATIONS FOR THE POLICY DO NOT SATISFY STRICT SCRUTINY.

The Court should reverse the Court of Appeals' decision because respondents violated RLUIPA when they removed Mr. Kelly from his religious diet program. This Court has found that where a policy puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, 450 U.S. at 718. In addition, "while the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Id*; *see also Bowen v. Roy*, 476 U.S. 693, 704 (1986) (finding that "a mere denial of a governmental benefit by a uniformly applicable statute does not constitute infringement of religious liberty" where no compulsion is involved). RLUIPA places the burden on the government to show that the policy in question is the least restrictive means of furthering a

compelling interest. 42 U.S.C. § 2000cc-1(a)(2). In the present case, Mr. Kelly has demonstrated that removal from his religious diet imposed a substantial burden on his ability to practice his religion where it compelled him to violate his religious beliefs. Furthermore, respondents have failed to demonstrate that the policy furthers a compelling government interest or that it is the least restrictive means of achieving a compelling interest. Because removing Mr. Kelly from his religious diet violated RLUIPA, the Court of Appeals' decision should be reversed.

- A. Tourovia Correctional Center's removal of Mr. Kelly from his religious diet compelled him to violate his religious beliefs and has therefore imposed a substantial burden on his religious exercise.

Prison officials are required to make accommodations for a prisoner's religious dietary restrictions. 28 C.F.R. § 548.20 (2015). In *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006), the plaintiff, a Nation member, was removed from the list of inmates permitted to have a special diet after he allegedly broke his fast one time, and the court found that removal from the diet imposed a substantial burden on his religious practice. The *Lovelace* court noted that removing the inmate from a religious diet based on the assumption that one episode of backsliding indicated his religious beliefs were insincere was improper, finding that "[a]n inmate's right to religious exercise is substantially burdened by a policy...that automatically assumes that lack of sincerity (or religiosity) with respect to one practice means lack of sincerity with respect to others." *Id.* at 188. Similarly, in *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988), the court found that reports of an inmate breaking his fast were "merely evidence of insincerity" and not "conclusive evidence of insincerity." In both *Lovelace* and *Reed*, the courts found that removal from a religious diet program, even with evidence of backsliding, was a substantial burden on the inmate's religious practice.

The present case is analogous to both *Lovelace* and *Reed*, where Mr. Kelly was removed from his religious diet as punishment for reports that he had threatened his cellmate for his non-

vegetarian meal and after prison officials found meatloaf hidden under his mattress. (R. at 6). Although Mr. Kelly denied making threats and that the hidden meatloaf belonged to him, respondents removed him from his religious diet without further evidence that his beliefs were insincere and without directly observing Mr. Kelly breaking his diet. *Id.* Respondents also believed Mr. Kelly's cellmate's claim that Mr. Kelly threatened him with violence even though there was no corroboration for this claim and Mr. Kelly exhibited no history of violence while at TCC. (R. at 3, 14). Moreover, the fact that Mr. Kelly went on a hunger strike after being removed from his diet demonstrates his sincere belief in adhering to his religious diet. (R. at 6). He ended his hunger strike only after he was forcibly tube-fed, a process which was both invasive and extremely painful. *Id.* Mr. Kelly's behavior following his removal from his religious diet demonstrates that the removal was a substantial burden on his religious exercise and that he attempted to refrain from violating his religious beliefs by all means possible.

Although the Court of Appeals relied on the reasoning of *Brown-El v. Harris*, 26 F.3d 68 (8th Cir. 1994), the present case is distinguishable. In *Brown-El*, prison officials observed the plaintiff breaking his religious fast by eating a daytime meal while in the infirmary, while in the case at hand no prison official has claimed to have seen Mr. Kelly eating food that was not part of his diet. *Id.* at 69. The *Brown-El* court found that prison officials had not forced the plaintiff to eat the daytime meal and therefore did not compel him to break his fast. *Id.* Here, Mr. Kelly was involuntarily removed from his religious diet after unsubstantiated allegations and has therefore been compelled by respondents to consume food that violates his religious beliefs.

Even if Mr. Kelly did consume the meatloaf and therefore broke his religious diet, removal from the diet still imposed a substantial burden on his religious exercise because he was removed after only one alleged infraction, and the punishment for this backsliding included

denying him access to religious services for one month. (R. at 6). This is analogous to *Lovelace*, where the court found that the plaintiff's inability to fast and attend religious services substantially burdened his religious exercise because as a result, the plaintiff "could not fulfill one of the five pillars or obligations of Islam." *Lovelace*, 472 F.3d at 187. Removing Mr. Kelly from his diet has similarly prevented him from fulfilling the requirements of his religion. The District Court properly found that removal from his religious diet was a substantial burden on Mr. Kelly's religious practice, especially where the punishment was based on only one inmate's written statement. (R. at 9).

The present case is also distinguishable from *Daly v. Davis*, No. 08-2046, 2009 U.S. App. LEXIS 6222, at *2 (7th Cir. 2009), where the court found the plaintiff's religious exercise was not substantially burdened where he was observed purchasing and eating non-kosher food and trading his kosher meal for a non-kosher tray. Prison officials observed the plaintiff in *Daly* breaking his fast on several occasions, while here Mr. Kelly is accused of breaking his fast only one time, and prison officials did not observe him actually eating the meatloaf. (R. at 6). Unlike in *Daly*, respondents have not shown an adequate justification for removing Mr. Kelly from his religious diet. In addition, Mr. Kelly has established removal from the diet imposed a substantial burden on his religious practice where he was compelled to eat regular prison meals after attempting a hunger strike, which resulted in him being forcibly tube-fed. This Court should adopt the rationale of the District Court, which found that removing an inmate from a religious diet based on "one small indiscretion" clearly places a substantial burden on his religious practices. (R. at 10).

B. Respondents have not shown that removing Mr. Kelly from his religious diet is the least restrictive means of furthering a compelling governmental interest.

Since Mr. Kelly is able to demonstrate that removal from his religious diet imposed a substantial burden on his religious practice, respondents have the burden to show that this policy meets strict scrutiny—that it is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. §2000cc-1(a) (2012). This Court has explained that “context matters” in the application of the standard. *Cutter*, 544 U.S. at 723. In addition, courts should apply the standard with “due deference to the experience and expertise of prison and jail administration in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.” *Id.* (quoting Sen. Rep. No. 103-111, at 10 (1993)).

Tourovia Directive #99 states that religious diet requests will 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.” (R. at 26). It further states that in the event that prison officials believe an inmate is backsliding, the institution “reserves the right to revoke religious alternative diet privileges for any designated period of time or revoke the privilege permanently.” *Id.* Even if the Court accepts the considerations mentioned in the directive as compelling governmental interests, respondents have not demonstrated that removing Mr. Kelly from his religious diet furthers these interests. Respondents merely cite the prison policy as justification for the removal and assert that the reports from Mr. Kelly’s cellmate gave them reason to question his religious sincerity. (R. at 7). Furthermore, respondents’ only asserted reason for removing Mr. Kelly from his diet program is that he violated his diet by his own choice, and therefore should be subjected to punishment. (R.

at 2, 7). As justification for this decision, respondents argue that Mr. Kelly's backsliding is evidence that his religious beliefs are not sincere. (R. at 7).

Even if this Court agrees with the Court of Appeals that sincerity should be a "significant factor to consider" when determining if an inmate should be permitted to have a special religious diet, respondents have not shown sufficient evidence to indicate Mr. Kelly was not sincere in his religious beliefs. (R. at 16). Respondents first contend that since Mr. Kelly was not a member of the Nation until two years after he became incarcerated, he was placed on a "watch-list of inmates who might potentially assume religious identities to cloak illicit conduct." (R. at 7). While respondents assert that Mr. Kelly's conversion is a justification for questioning his sincerity, this Court has previously found that "[t]he First Amendment protects the free exercise rights of [individuals] who adopt religious beliefs or convert from one faith to another" and that the timing of conversion is "immaterial to our determination that [the] free exercise rights have been burdened." *Hobbie v. Unemployment Appeals Com.*, 480 U.S. 136, 144 (1987). Based on this Court's prior rulings, Mr. Kelly's conversion to the Nation does not provide adequate justification for questioning his religious sincerity. Furthermore, there is no evidence that he has ever engaged in illicit conduct. As the District Court properly noted, "[m]any individuals genuinely find religion and spirituality after they are incarcerated." (R. at 10).

In addition, Mr. Kelly's actions throughout his incarceration at TCC support his contention that he is sincere about adhering to the requirements of his religion. His decision to file grievances on behalf of all Nation members with respect to the prayer requests demonstrates that he assumed a leadership role in the organization. (R. at 5, 10). Moreover, the fact that he decided to go on a hunger strike rather than eat food that did not adhere to his religious diet indicates that he took the Nation's dietary requirements very seriously. (R. at 6). Even if Mr.

Kelly did consume the meatloaf that was found under his mattress, that does not mean his beliefs are insincere. In *Reed*, the court found that “the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere.” *Reed*, 842 F.2d at 963. The allegation that he broke his diet on one occasion does not provide respondents with sufficient justification for questioning his religious sincerity as a whole. As the District Court noted, imperfection of an individual’s adherence to their faith “is not an indication of insincerity.” (R. at 10). Respondents have failed to provide any other indication that Mr. Kelly was not sincere in his beliefs, and therefore have not established a compelling interest in punishing his alleged behavior by removing him from his religious diet.

Even if respondents claim that the interests listed in Tourovia Directive #99 are the reason for removing Mr. Kelly from his diet rather than his perceived lack of sincerity, they have not established that those interests are compelling in this case. The present case is distinguishable from *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007), where the court found that prison officials did satisfy strict scrutiny where they denied an inmate access to a kosher diet because the prison’s budget was inadequate to cover the increased cost of providing kosher meals for a small number of inmates, and where the costs of the meal would come out of the general food budget for all inmates, inevitably jeopardizing the prison’s ability to provide “nutritionally appropriate” meals for other inmates. The court found that “the budgetary interests at stake cannot be achieved by any different or lesser means.” *Id.* at 126. In contrast, while budgetary concerns are listed among the interests in Tourovia Directive #99, respondents do not claim removing Mr. Kelly from his diet program is related to budgetary concerns, but rather admit it is punishment for his backsliding. (R. at 6). Respondents have also not demonstrated that removing Mr. Kelly from his religious diet furthers the interests of security or institutional order.

Respondents have therefore not shown that Tourovia Directive #99 furthers the compelling government interests mentioned in the policy itself.

Even if respondents were able to demonstrate that removing Mr. Kelly from his religious diet furthers compelling governmental interests, they have not shown this is the least restrictive means of achieving those interests. In *Shakur v. Schriro*, 514 F.3d 878, 889 (9th Cir. 2008), the court found that a prison “cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.” (quoting *Warsoldier*, 418 F.3d at 996). Here, respondents do not claim to have considered other means of furthering their interests, and fail to demonstrate how removing an inmate from a religious diet is the least restrictive means of furthering those interests. There are many other ways respondents could have punished Mr. Kelly for backsliding without removing him from his religious diet, such as conducting cell searches to ensure he was not hiding food that violated his religious beliefs. Respondents have therefore failed to meet their burden with respect to Tourovia Directive #99. The Court should reverse the ruling of the Court of Appeals and find that removing Mr. Kelly from his religious diet violated RLUIPA.

CONCLUSION

For the foregoing reasons, this Court should find in favor of Mr. Kelly and reverse the decision of the Court of Appeals.

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Respectfully submitted,

Team #1

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