No. 985-2015

IN THE

SUPREME COURT of the UNITED STATES

SIHEEM KELLY,
PETITIONER

-against-

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

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

BRIEF FOR PETITIONER

TEAM 10

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QUESTIONS PRESENTED

1. Does Tourovia Correctional Center's prohibition of all evening prayer services violate RLUIPA when the policy serves no compelling interest, yet forces inmates to disrespect their religion and precludes minority faith groups from partaking in religious exercise?

2. Does Tourovia Correctional Center's policy permitting the removal of both religious diet and prayer services privileges violate RLUIPA when it forces an inmate to abandon major pillars of his faith without any direct evidence of backsliding?

JURISDICTIONAL STATEMENT

The opinion of the Court of Appeals for the Twelfth Circuit was entered on June 1, 2015. (R. 16-22.) A timely petition for writ of certiorari was granted on July 1, 2015. (R. 23.) This Court has jurisdiction under 28 U.S.C.A. § 1254(1).

STATEMENT OF THE CASE

Statement of the Facts

In 2000, Siheem Kelly ("Kelly") was convicted of drug-trafficking charges and one count of aggravated robbery and subsequently became an inmate at Tourovia Correctional Center under the care of Respondents Echols and Abreu (collectively referred to as "TCC"). (R. 3.) Two years later, Kelly filed the required "Declaration of Religious Preference Form" mandated by TCC for inmates seeking to partake in religious services and dietary restrictions to become a member of the Nation of Islam ("the Nation"). (R. 3.) According to TCC's policy, an inmate becomes an acknowledged member of a religious group when he files such form with TCC and the Warden offers his written approval. (R. 3.) The Nation is a subgroup of the Sunni Muslim religion, and its membership at TCC has never exceeded more than ten. (R. 3.) There are currently seven members of the Nation at TCC, none of whom have any record or history of violence within the prison. (R. 3.)

Prayer Services

In 1998, two years prior to the enactment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and Kelly's arrival at TCC, the prison constricted its religious service policy. (R. 4.) TCC discovered that a prison service volunteer was relaying gang messages on behalf of members of the Christian community, and some Sunni Muslims and Christians would miss the final 8:30 p.m. headcount because they stayed in their prayer rooms too late. (R. 4.) In response, TCC banned all nightly services and all prison volunteers from conducting religious services. (R. 4.) Under the current policy, no services may be held in the absence of an official Chaplain. (R. 4.) For Catholic, Protestant, Muslim, and Jewish inmates, TCC staffs three services per day, while counter-majoritarian groups may only meet once a day. (R. 4.) However, an

exception exists for when an inmate is (a) sick or near death, or (b) unable to attend prayer services due to illness or physical incapability. (R. 4.) In such cases, the Chaplain is authorized to work outside the regularly scheduled times. (R. 4.) If an inmate is caught outside of his cell by the final head count, he will be placed in solitary confinement as punishment. (R. 4.)

TCC's considerations in determining whether to grant a prayer service request are: demand, need, staff availability, and prison resources. (R. 4.) In addition, Tourovia Directive #98 ("Directive #98") states that it seeks to accommodate practices that are "deemed essential by the governing body of that religion." (R. 25.) Another mandate of this policy is that there "must be sufficient offender interest (10 or more designated faith group members.)" (R.25.) In fact, a "faith group" is defined as having "10 or more acknowledged members."

The Nation, a recognized religion at TCC, requires its adherents to pray five times a day according to *Salat*, the Arabic prayer guide. (R. 3.) The "Obligatory and Traditional Prayers," are to occur at: 1) Dawn, 2) Early Afternoon, 3) Late Afternoon, 4) Sunset, and 5) Late Evening. (R. 3-4.) Cleanliness and solemnity are required during these prayers, and the adherent should not be interrupted in any way once he has commenced praying. (R. 4.) In February of 2013, Kelly filed a written prayer request on behalf of all of the members of the Nation for an additional prayer time after the last meal at 7:00 p.m. (R. 5.) This prayer service would take place at 8:00 p.m., prior to the final head count at 8:30 p.m. (R. 5.) TCC denied this request because prison policy requires inmates to go straight from the final meal to their cells. (R. 5.) Respondent 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." (R. 5.)

Kelly attends all prayer services, but pursuant to his religion, he wishes to have five rather than three services. (R. 5.) Accordingly, Kelly verbally stated to Abreu that he would

compromise for at least one additional prayer service with a Chaplain affiliated with the Nation. (R. 5.) Abreu never responded to Kelly's request. (R. 5.) Kelly then filed two grievances asserting that he was no longer able to pray in his room as his cellmate, who was distracting and disrespectful to his religion. (R. 5.) Kelly explained that his cellmate intentionally ridiculed him and engaged in lewd behavior when Kelly knelt to pray. (R. 5.) Kelly stated in the second grievance that praying in his cell, with a toilet just a few feet away, is a disgrace to Allah's preference that prayers occur in a clean and solemn environment. (R. 5.) TCC denied both of these grievances. (R. 5.) Kelly then filed a formal complaint containing the same claims stated in his previous grievances. (R. 5.) Warden Echols responded by stating that this request was contrary to prison policy, the actions of Kelly's cellmate could not be verified, and that Kelly's best option would be to request a transfer of cells. (R. 5-6.)

Special Diet Program

TCC's policy states that it will punish any inmate if there is evidence of any misconduct regarding the inmate's daily meals or religious diet. (R. 4.) Specifically, Tourovia Directive #99 ("Directive #99") provides that if an inmate gives prison officials an "adequate reason" to believe that the inmate is not adhering to his religious diet, TCC reserves the right to remove the inmate from such diet. (R. 6.) Further, if any threat of violence is connected to any member of a faith group, TCC may preclude the inmate from attending religious services for any amount of time TCC chooses. (R. 6.)

Members of the Nation participate in a strict vegetarian diet called Halal, and they fast for the month of Ramadan along with two other special holidays recognized by the Nation. (R. 3.) Two weeks after TCC denied Kelly's formal grievance detailing his prayer service concerns, Kelly's new cellmate alleged that Kelly threatened him with violence if he did not provide Kelly

with his meatloaf dinner. (R. 6.) TCC officials later discovered meatloaf wrapped in a napkin under Kelly's mattress. (R. 6.) No one saw Kelly eat meatloaf. (R. 6.) No one saw Kelly place meatloaf under his bed. (R. 6.) Without any evidence besides Kelly's cellmate's allegations, and despite Kelly's adamant denials, TCC removed Kelly from the vegetarian diet program and revoked his prayer service privileges. (R. 6.)

In response to his removal from the religious diet, Kelly began a hunger strike and refused to eat anything from the standard menu options at TCC. (R. 6.) After Kelly persisted with the strike for two days, TCC employees forced Kelly to undergo tube-feeding. (R. 6.) When Kelly could no longer bear the pain and invasiveness caused by the tube-feedings, he unwillingly acquiesced and began eating the food provided to the general TCC population. (R. 6.)

Procedural History

Ultimately, Kelly filed a complaint in the Federal District Court of Tourovia for the Twelfth Circuit. (R. 6.) In his complaint, Kelly challenged TCC's policies regarding prayer services and diet programs. (R. 6.) Kelly argued that the two policies violated his First Amendment Rights under RLUIPA. Specifically, Kelly averred that, under RLUIPA, he and fellow members of the Nation were entitled to additional evening congregational prayer, outside of their cells and away from the presence of bathroom appliances or people who are not members of the Nation. (R. 6.) Kelly also stated that TCC's decision to revoke his religious diet had compelled him to violate his religious beliefs. (R.6.)

In its answer, TCC stated that it allows all members to worship according to their faith, so long as doing so is consistent with agency security, safety, order, and rehabilitation concerns. (R. 6.) TCC stated that the approval of all religious services is based on demand, need, and prison resources. (R. 6.) TCC alleged that because the additional prayer services would impose

heightened staffing burdens, its denial of Kelly's request was proper under RLUIPA. (R. 6.) In support of this, TCC provided a single affidavit attested to by the Director of the Chaplaincy Department, Abreu. (R. 6-7.) The affidavit, which is not part of the record on appeal, included an addendum with TCC's documented cost containment stratagems. (R. 7.) TCC stated that Kelly failed to meet his burden of proof. (R. 7.) TCC stated that "the Nation lacked the demand necessary to support an additional group meeting." (R. 7.)

TCC conceded that it had removed Kelly from the vegetarian diet program consistent with its policy. (R. 8.) TCC stated that Kelly's conversion to the Nation after two years placed him on a "watch-list" of inmates that may assume religious identities to conduct illicit activities. (R. 7.) TCC provided a written statement from Kelly's former cellmate stating that he had been threatened by Kelly for his meatloaf dinner, which raised questions about Kelly's religious sincerity. (R. 7.) TCC, as such, asserted that its removal of Kelly from his religious diet did not compel Kelly to violate his beliefs. (R. 7.)

SUMMARY OF THE ARGUMENT

TCC's policies regarding prayer services and diet-removal violate RLUIPA. Congress enacted RLUIPA in 2000 in response to Supreme Court decisions that diminished the religious rights of inmates in state institutions. RLUIPA, therefore, ensures that such inmates are afforded the freedom of religious exercise consistent with the United States Constitution. In order for a government to substantially burden the religious exercise of an inmate, the government must demonstrate (1) that it had a compelling governmental interest and (2) that the challenged policy is the least restrictive means of achieving that interest. 42 U.S.C § 2000cc-1(a).

I. TCC's policy imposing a blanket ban on all evening prayer services violates RLUIPA. Kelly has satisfied his burden by demonstrating that TCC's policy barring evening prayer

substantially burdens his religious exercise. First, he has established that engaging in nightly prayer services constitutes a religious exercise under the broad definition provided by RLUIPA. Secondly, as a result of TCC's stringent policy, Kelly is forced to disrespect his religion by conducting his "Obligatory and Traditional Prayers" under unsanitary conditions and in the presence of a hostile cellmate. Moreover, the policy impermissibly prioritizes the needs of majoritarian religions over those shared by only a small number of inmates by adopting an unduly restrictive definition of "faith group" and requiring "sufficient offender interest" in order to staff a Chaplain. By consistently denying his requests for evening prayer services, TCC has substantially burdened Kelly's religious exercise.

Third, TCC failed to demonstrate that imposing such a burden is in furtherance of a compelling governmental interest. Though TCC generally alluded to prison security, cost, and staffing as its alleged interests, it failed to demonstrate that these interests are compelling. Instead, TCC offered only "generalized" and "exaggerated" fears which do not aptly demonstrate security concerns. Its purported goal of cost containment is similarly inadequate, as it is alleged only through an unsubstantiated affidavit, which is not even provided as evidence to this Court. TCC's final "staffing" concern is negated by the fact that the prison already provides exceptions to the general policy of allowing only three prayer services per day. TCC further ignores the fact that a Nation-affiliated Chaplain would likely consider an evening prayer service part of his "regular hours."

Finally, even if this Court finds that TCC's prison policy furthers a compelling governmental interest, its blanket ban on all evening services is not the least restrictive means of achieving this end. Under RLUIPA, the government must show that it considered and rejected other less restrictive measures. Here, TCC has not even attempted to demonstrate that it has

considered the efficacy of any policy other than its current policy. Therefore, TCC's policy banning evening prayer services violates RLUIPA.

II. TCC's policy reserving the right to revoke an inmate's religious diet after evidence of backsliding violates RLUIPA. TCC has substantially burdened Kelly's religious exercise by removing him from his religious diet when, in fact, Kelly was not physically seen breaking his diet. First, Kelly has successfully demonstrated that participating in a religious diet constitutes a religious exercise under RLUIPA's broad definition. Secondly, TCC has substantially burdened Kelly's religious exercise because removing Kelly from his religious diet precluded him from fulfilling a major tenet of his faith. TCC's diet-removal policy further burdened Kelly's religious exercise because it also precluded him from participating in prayer services for a full month as punishment for violating his religious diet. Importantly, TCC officials conceded that they did not physically see Kelly breaking his religious diet. As such, Kelly has successfully demonstrated that TCC has substantially burdened his religious exercise by removing him from his diet, thus compelling him to violate his religious beliefs.

Third, TCC has failed to establish that its diet-removal policy serves a compelling governmental interest. TCC indicated that its policy was motivated by cost concerns. TCC, however, failed to demonstrate that its purported interest in costs was, in fact, compelling. Merely asserting that it has security and cost concerns is insufficient to establish a compelling interest under RLUIPA's strict framework. Further, TCC's affidavit and addendum including cost containment stratagems was attested to by the Director of the Chaplaincy Department and not someone qualified in food services or procurement. As such, TCC has failed to demonstrate that its diet-removal policy furthers a compelling governmental interest.

Finally, even if this Court were to find that TCC has demonstrated a compelling interest, TCC has failed to prove that its diet-removal policy is the least restrictive means of furthering that interest. In order to successfully demonstrate this, TCC would have had to show that it had considered and rejected other, less-restrictive means before adopting its current policy. TCC did not allege that it had considered even one alternative policy regarding its diet-removal procedures. As such, TCC's policy reserving the right to remove an inmate from his religious diet violates RLUIPA. This Honorable Court should, therefore, reverse the Court of Appeals for the Twelfth Circuit and find that TCC's challenged policies violate RLUIPA.

ARGUMENT

I. TCC'S POLICY PROHIBITING ALL EVENING PRAYER SERVICES VIOLATES RLUIPA.

TCC's policy prohibiting night services to members of the Nation violates RLUIPA for three reasons. First, it presents an unduly restrictive definition as to what constitutes a religious exercise. Secondly, it places a substantial burden on the religious exercise of affected inmates by (a) forcing them to conduct evening prayer services under unsanitary and hostile conditions and (b) by precluding small religious groups from religious services. Thirdly, TCC's policy does not survive strict scrutiny. For the foregoing reasons, this Honorable Court should, therefore, reverse the Twelfth Circuit Court of Appeals' holding and instead find that TCC's policy prohibiting inmates from partaking in evening worship services violates RLUIPA.

A. Partaking In Evening Prayer Services Constitutes A Religious Exercise Under RLUIPA.

In 2000, Congress enacted RLUIPA in response to Supreme Court decisions that drastically reduced First Amendment protections. *See* Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc. In *Employment Division v. Smith*, the Supreme Court

replaced the "compelling government interest" standard that had been traditionally applied to First Amendment cases with that of a rational basis test. 494 U.S. 872, 890 (1990). The Court held that laws of general applicability that incidentally burden religious behavior do not offend the First Amendment. *Id*. In response, Congress passed the Religious Freedom Restoration Act ("RFRA") in 1993 to restore the strict scrutiny standard that the *Smith* court had jetted. *See* 42 U.S.C. §2000bb. When the Supreme Court subsequently invalidated RFRA as it applied to states and localities in *City of Boerne v. Flores*, Congress had to again state its intent more specifically. 521 U.S. 507, 532 (1997). RLUIPA, therefore, is Congress's second pronunciation of its explicit determination to protect the religious freedoms afforded by the First Amendment.

Effectuating this intent, Section 3 of RLUIPA states, "[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 is able to demonstrate that the burden is "in furtherance of a compelling government interest" and is "the least restrictive means of furthering that . . . interest." 42 U.S.C. §2000cc-1(a). To state a claim under RLUIPA, the plaintiff must first demonstrate that his religious exercise has been substantially burdened by the prison policy. *Id*. at § 2000cc-2(b). In order to do this, the plaintiff must show that the policy or practice "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *See Garner v. Kennedy*, 713 F.3d 237, 241 (5th Cir. 2013). The government must then demonstrate that the challenged policy is the least restrictive means of furthering a compelling government interest. *Id*.

The definitions under RLUIPA are intentionally broad. *See Greene v. Solano Cnty. Jail*, 513 F.3d 982, 986 (9th Cir. 2008). "Government" refers to 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). Additionally, RLUIPA's definition of religious exercise includes "any exercise of religion, whether or not compelled by, or central to, a system of belief." 42 U.S.C. § 2000cc-5(7)(A). "Congress mandated that this concept '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.'" *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015) (internal citations omitted). This definition includes "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). The Supreme Court has interpreted this language as barring inquiry into whether a particular belief or practice is "central" to an institutionalized person's religion. *Id.* at 715. Finally, "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 715-16 (1981).

Engaging in a prayer service squarely falls within this definition. Indeed, the Fifth Circuit Court of Appeals aptly classified prayer as a "quintessential religious practice." *See Karen B. Treen*, 653 F.2d 897, 901 (5th Cir. 1981). The "purpose" of TCC's "Religious Corporate Services" policy improperly requires that "inmates have the opportunity to participate in practices of their faith group . . . that are *deemed essential* by the governing body of that religion." (R. 25.) (emphasis added). Section 3 of RULIPA provides that a religious exercise need not be central to, or even compelled, by that religion. 42 U.S.C. § 2000cc-5(7)(A). As such, requiring that the practice be "deemed essential" violates RLUIPA. Because the practice of congregating to participate in evening prayer is clearly a religious practice, TCC is prohibited from inquiring into whether this practice is central to the inmates' beliefs. Similarly, the Court of Appeals alleging "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," is not material to Kelly's claim. (R. 19.) Kelly's religious exercise is not limited to what other Muslims may or may not "generally . . . need." *See Thomas*, 450 U.S. at 715-6. This Honorable Court should, therefore, affirm the Court of Appeal's holding that the evening prayer session constitutes a religious exercise under RLUIPA.

B. TCC's Evening Prayer Service Prohibition Substantially Burdens Kelly's Religious Exercise.

Under RLUIPA, the plaintiff must ultimately persuade the court that the prison has substantially burdened his religious exercise. 42 U.S.C. 2000cc- 2(b). As RLUIPA does not define "substantial burden," courts must use common tools of statutory interpretation, beginning with the plain language of the statute. *See Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994). A court may find that a substantial burden exists where the state actor determines whether to grant or deny "an important benefit" based on "conduct mandated by religious belief, thereby placing substantial pressure on an adherent to modify his behavior and violate his beliefs." *See Thomas*, 450 U.S. at 717-18. Further, "[a]lthough such compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Warsoldier v. Woodford*, 418 F.3d 989, 991 (9th Cir. 2005) (citing *Thomas*, 450 U.S. at 718); *see also Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006).

Here, TCC's policy barring evening prayer services places a substantial burden on the religious exercise of Kelly and the other members of the Nation for two reasons. First, it forces them to violate their religion by conducting evening prayer under unsanitary and hostile conditions. Secondly, the policy demands "sufficient offender interest." This Honorable Court should, therefore, reverse the Twelfth Circuit Court of Appeals' holding.

1. Precluding Evening Prayer Violates RLUIPA Because It Forces Members Of The Nation To Pray In Unsanitary And Hostile Conditions.

TCC places an absolute bar on Kelly's ability to fulfill his religious beliefs by forcing him to conduct "Obligatory and Traditional Prayers" under unsanitary conditions and in the presence of a cellmate who seeks only to harass and interrupt him. The Court of Appeals conveniently oversimplifies the requirements of evening prayer by stating that "the prayer ritual, at a minimum, requires that the inmate to stand, bend, kneel in a stationary location." (R. 19.) This statement ignores the mandates that the district court pointedly observed: "most adherents claim to require a very clean and solemn environment." (R. 4.) In fact, the Nation requires its adherents to wash themselves and their clothes before praying. (R. 4.) One cannot effectively argue that kneeling on the ground just feet away from a toilet and in the presence of a hostile cellmate satisfies this requirement. Further, Kelly communicated in his grievance that prayers in the cells were distracting and disrespectful to his religion. (R. 5.) Accordingly, group prayer with only members of the Nation is a necessity in order to avoid the interruptions that invariably come with the taunting and lewd acts of members' cellmates.

2. Requiring "Sufficient Offender Interest," And Restricting The Definition Of "Faith Group" Impermissibly Bars Members Of Counter-Majoritarian Religions From Exercising Their Rights.

"RLUIPA does not discriminate among bona fide faiths." *See Cutter v. Wilkinson*, 125 S. Ct. 2113, 2123 (2005). Furthermore, according to RLUIPA and the Establishment Clause, a court may not prioritize majoritarian over counter-majoritarian religions. *See Lindell v. McCallum*, 352 F.3d 1107, 1110 (7th Cir. 2003). Defining "faith group" as "10 or more acknowledged members of any faith" is a blatant violation of RLUIPA. (R. 24.) In addition, Directive #98 repeats that in order to secure a Chaplain, "there must be sufficient offender interest." (R. 25.) Whether a Chaplain guides a service attended by seven people or by twenty, the expense and effort in

coordinating the Chaplain's availability remains the same. Indeed, it would actually be simpler to accommodate a smaller group, as it is invariably easier to oversee and transport seven members of the Nation than a larger faith group. It is, therefore, impermissible for TCC to deny members of the Nation an additional prayer service because it "lacked the demand." (R. 7.)

C. TCC's Evening Prayer Service Prohibition Fails Under RLUIPA's Strict Scrutiny.

This Honorable Court should reverse the Twelfth Circuit Court of Appeals' holding because TCC has failed to establish that its policy survives strict scrutiny as required by RLUIPA. Because Kelly has shown that his religious exercise has been substantially burdened by TCC's policy, the burden shifts to TCC to demonstrate that its policy barring evening services is the "least restrictive means of furthering a compelling governmental interest." 42 U.S.C. 2000cc(a)(1)(B). Under RLUIPA, the strict scrutiny standard is "exceptionally demanding" and requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden; if a less restrictive means is available for the government to achieve its goals, the government must use it. *See Holt*, 135 S. Ct. 853, 864 (2015). Though TCC "indicated" that there were security and cost concerns, this, without more support, is not a compelling governmental interest. (R. 4-5.) TCC has also failed to assert that it tried or considered any less restrictive measures to effectuate its purported governmental interest.

1. <u>TCC Has Presented Virtually No Evidence Establishing A Compelling Interest In Burdening Kelly's Religious Exercise.</u>

"Prison policies 'grounded on mere speculation' are exactly the ones that motivated Congress to enact RLUIPA." 106 Cong. Rec. 16699 (2000) (quoting S. Rep. No. 103-111, 10 (1993)); *Holt*, 135 S. Ct. at 867 (2015) (J. Ginsburg, concurring). The "exaggerated fears" of prison officials do not constitute a compelling governmental interest. *See 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)).

In *Spratt*, the inmate brought suit under RLUIPA challenging the institution's policy that barred him from preaching to his fellow inmates. *Id*. In support of its policy, the Department of Corrections issued an affidavit explaining this practice was "dangerous because 'placing an inmate in a position of actual or perceived leadership before an inmate group threatens security, as it provides the perceived inmate leader with influence within the administration.'" *Id*. While the court was careful to acknowledge that safety and security within a prison are of utmost importance, it concluded that "merely stating a compelling interest does not fully satisfy [the prison's] burden on this element of RLUIPA." *Id*. at 39.

Likewise, the Court of Appeals for the Eighth Circuit held that a prison was required to *demonstrate* its security concern rather than merely assert it. *See Murphy v. Mo. Dept. of Corr.,* 372 F.3d 979, 988 (8th Cir. 2004). In that case, an inmate who belonged to the Christian Separatist Church brought a claim under RLUIPA, alleging that he was granted "solitary practitioner accommodation," but denied group worship. *Id*. at 982. The court stated that it "acknowledge[d] that [the prison] has a compelling interest in institutional security . . . [n]evertheless, it must do more than assert a security concern." *Id*. at 989. Offering mere "conclusory statements and post hac rationalizations for their conduct" is insufficient to demonstrate a compelling interest. *Id*. (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1554 (8th Cir. 1996)).

Merely asserting the interest in avoiding additional costs is similarly inadequate. RLUIPA explicitly states that it "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc-3. Congress, therefore, anticipated and rejected avoiding costs as a compelling governmental interest. In *Shakur v. Schriro*, the Ninth Circuit Court of Appeals rejected cost as a compelling

governmental interest. 514 F. 3d at 891. There, the court noted that the only evidence of additional cost was a declaration, which was attested to by the institution's "Pastoral Administrator," and not someone "specializ[ed]" in cost containment *Id*. at 889. Further, the institution did not describe its method of analyzing the additional cost and failed to provide such analysis as evidence. *Id*. As such, the *Shakur* court held the conclusory and tenuous findings of the declaration did not establish a compelling governmental interest. *See Id*. at 890.

Here, TCC has done little more than provide a general, unsubstantiated statement "attesting to the validity of the prison's reasons" for its prayer regulations. (R. 6.) Regarding security concerns, TCC maintains that nearly two decades ago, a "prison service volunteer" was relaying messages on behalf of a Christian gang and some members of the night prayer services missed the final headcount. (R. 4.) While prison security is of utmost concern, a total ban on evening prayer is unwarranted. TCC can remedy such concerns with the presence of a Chaplain and an officer to ensure that the inmates attending prayer services leave in time for the final head count. Moreover, these concerns do not implicate a single member of the Nation. In fact, "[n]one of the current members of the Nation at TCC have any record or history of violence within the prison." (R. 3.) Further, Kelly requested that the evening service occur at 8:00 p.m., a half hour prior to the final head count, indicating that he was cognizant and respectful of the final head count time. (R. 5.) The Court of Appeals also stated that a "blanket ban" on all evening services "was required to keep the peace in a dangerous and hostile environment" without ever explaining why allowing a small number of inmates in an evening prayer service would lead to any such hostility. (R. 21.) Accordingly, such "generalized" and "exaggerated" fears do not constitute a compelling governmental interest under RLUIPA.

Regarding cost concerns, the record indicates that TCC attached to its affidavit an "addendum with the prison's documented cost containment stratagems." (R. 7.) Like in *Shakur,* the Director of the Chaplaincy Department, not an official specializing in such accounting, was the only TCC official that attested to this "stratagem." (R. 6-7.) Also as in *Shakur*, neither the method of analysis nor the affidavit itself is provided as evidence in this court. *See* 514 F. 3d at 889. As such, simply alleging that some unreliable document exists without even providing it as evidence does not amount to a compelling governmental interest. TCC cannot expect this Court to adhere to one man's opinion when such individual is not a qualified expert. Indeed, though TCC may incur additional costs to provide evening prayer services, Congress has already rejected this notion as a compelling governmental interest. 42 U.S.C. § 2000cc-3.

Even if TCC alleged that accommodating members of the Nation would lead to more small groups petitioning for additional prayer services, this argument would fail. *See Gonzales*, 546 U.S. at 436. The Supreme Court has stated that simply implying that others may eventually wish to petition for the same benefit is "but another recitation" of the "classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.'" *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006); *see also Holt*, 135 S. Ct. at 866; *Sherbert v. Verner*, 374 U.S. 398, 409 (1963).

Finally, the Court of Appeals' reliance on *Hoevenaar v. Lazaroff* in support of TCC's claims is misplaced. 422 F. 3d 366 (6th Cir. 2005); (R. 21.) The court uses this case to explain that "Wardens generally defend broad rather than narrow prison policies" because of the problems "individualized exemptions" impose, such as causing "resentment among other inmates . . . and problems with enforcement of the regulations due to staff members' difficulty in

determining who is exempted and who is not." Id. at 371. Despite the fact that TCC did not even provide this argument itself, the instant case is factually distinguishable from *Hoevanaar*. There, the prison officials provided substantially more evidence on appeal than a single affidavit. *Id.* This Honorable Court should, therefore, hold that TCC has failed to articulate a compelling governmental interest as required under RLUIPA.

2. Even If TCC Maintains It Has A Compelling Interest, Its Blanket Policy Barring All Evening Prayer Is Overly Restrictive.

In order to justify substantially burdening an institutionalized person's religious exercise, the government must prove that this burden: "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that . . . interest." 42 USCS § 2000cc-1(a). This standard applies "even if the burden results from a rule of general applicability. *Id.* "Courts must hold prisons to their statutory burden, and they must not 'assume a plausible, less restrictive alternative would be ineffective.'" *See Holt*, 135 S. Ct. at 866 (quoting *United States v. Playboy Entertainment*, 529 U.S. 803, 824 (2000)). In other words, a prison cannot meet its burden of proving that a challenged policy is the least restrictive means unless it can demonstrate that it actually considered and rejected the efficacy of less restrictive measures. *See Shakur*, 514 F.3d at 889. Similarly, if a prison allows exceptions to the general policy for other reasons, it must demonstrate its inability to adopt the exception for inmate challenging the policy. *See Newby v. Quartermann*, 325 Fed. Appx. 345, 352 (5th Cir. 2009); *Mayfield v. Texas Dep't of Crim, Justice*, 529 F.3d 599, 613-15 (5th Cir. 2008).

Here, TCC's "blanket ban" on all evening services cannot survive this strict standard. The Court of Appeals even conceded that "the denial may seem under inclusive in that it applies only to NOI prisoners." Accordingly, it is not a defense that the substantial burden placed on Kelly results from a rule of general applicability. 42 U.S.C § 2000cc. TCC also makes no

attempt to show that, since RLUIPA was enacted, it has attempted any methods of promoting prison security and cost containment that are less restrictive as required under RLUIPA. *See Shakur*, at 889.

Additionally, the excuse that TCC offered in support of this claim—that Chaplains work "regular hours"—does not apply to the Nation, as it uniquely requires evening prayer. (R. 4.) It is thus much more likely that a Nation-affiliated Chaplain would be willing to conduct an evening prayer service at this time, or that late evening, would be considered his "regular hours." Alternatively, this prayer service could be conducted without the leadership of a Chaplain, as the presence of one prison staff member is sufficient to maintain order for this small group of men. The issue is that members of the Nation are unable to pray in their cells because of unsanitary conditions and hostile cellmates, not that they require guidance from a Chaplain. (R. 5.) Further TCC already allows two exceptions to the general prayer times: (1) when the prisoner is at or near death and (2) when the prison is unable to attend because of illness or physical incapacity. TCC has not even addressed how this exception cannot be extended to the present case.

The Court of Appeals also pointed out another alternative: "giving the Nation members the option to fund their own Chaplain and service." (R. 22.) Though the court was quick to dismiss this idea as consistent with the Fifth Circuit Court of Appeal's opinion in *Baranowski v. Hart*, the reasoning in that case is flawed. 486 F.3d 112, 145-66 (5th Cir. 2007). In holding that general assertions of "security concerns" were sufficient to survive strict scrutiny, the Fifth Circuit Court of Appeals improperly relied on *Turner v. Safley*, a case decided long before RLUIPA was enacted. 482 U.S. 78 (U.S. 1987). In *Turner*, the Supreme Court employed a rational basis or "deference" standard, instructing courts to "accord deference to the appropriate prison authorities." *Id*. at 85. This standard was abrogated first by RFRA, and most recently by

RLUIPA, and therefore is of no consequence to the instant case. *See Freeman v. Texas Dep't of Criminal Justice*, 369 F.3d 854, 858 (5th Cir. 2004) ("the RLUIPA standard poses a far greater challenge than does *Turner* to prison regulations that impinge on inmates' free exercise of religion"). This Court should therefore reverse and hold that TCC's policy regarding prohibiting night services violates RLUIPA.

II. TCC'S POLICY RESERVING THE RIGHT TO REMOVE AN INMATE FROM A RELIGIOUS DIET DUE TO EVIDENCE OF BACKSLIDING VIOLATES RLUIPA.

TCC's policy of revoking an inmate's religious diet program due to evidence of backsliding violates RLUIPA for two reasons. First, TCC's policy places a substantial burden on inmates because it precludes them from partaking in central tenets of their faith, such as fasting for religious holidays, without definitive proof that the inmate actually deviated from his religious diet. Secondly, TCC's policy of revoking an inmate's religious diet is not the least restrictive means of achieving a compelling governmental interest because TCC failed to demonstrate that it considered other, less restrictive methods. This Honorable Court should, therefore, reverse the Twelfth Circuit Court of Appeals' holding. Instead, this Court should find that TCC's removal of Kelly from his religious diet violated RLUIPA.

A. Participating In A Religious Diet Program Constitutes A Religious Exercise Under RLUIPA.

Under RLUIPA, maintaining a religious diet constitutes a religious exercise. RLUIPA provides that an institution cannot substantially burden religious exercise unless it "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. §2000cc. Unlike cases arising under the Free Exercise Clause of the First Amendment, this prohibition applies even where the burden on the prisoner "results from a rule of general applicability." *See Koger v. Bryan*, 523

F.3d 789, 796 (7th Cir. 2008). In establishing a claim under RLUIPA, the plaintiff bears the initial burden of showing (1) that he seeks to engage in an exercise of religion, and (2) that the challenged practice substantially burdens that exercise of religion. *Id.* If the plaintiff successfully demonstrates that his religious exercise was substantially burdened, the government then bears the burden on all other elements of the claim. 42 U.S.C. §2000cc-2(b).

RLUIPA defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of belief." 42 U.S.C. §2000cc-5(7)(A). RLUIPA further prohibits inquiry into whether a particular belief or practice is *central* to a prisoner's religion. *See Koger* 523 F.3d at 797 (emphasis added). RLUIPA, however, does allow inquiry into the sincerity of the prisoner's professed religiosity. *Id.* Several courts have found that participation in a religious diet program constitutes a religious exercise under RLUIPA. *See Koger*, 523 F.3d at 797; *see also Lovelace*, 472 F.3d at 187. For instance, the Seventh Circuit Court of Appeals held that an inmate refraining from eating meat in accordance with his religious beliefs was a religious exercise as defined by RLUIPA. *See Koger*, 523 F.3d at 797. In *Koger*, the inmate initially requested a non-meat diet even though his beliefs were not affiliated with any organized religion. *Id.* The court, however, pointedly observed that this, in itself, was not fatal to the inmate's claim. *Id.* The inmate also submitted a second request for accommodation of his religious exercise as a member of Ordo Templi Orientis group ("OTO"), which associated with the Thelemis religion. *Id.* With that request, he submitted paperwork from OTO stating that although the religion did not have specific dietary guidelines, each individual practitioner may include dietary restrictions as part of his or her personal, spiritual regimen. *Id.* As the court observed, this document paralleled the statutory definition of "religious exercise," in that there are no dietary restrictions "compelled by" or "central to" OTO. *Id.* As such, the Court found that the inmate's dietary

request fell squarely within the definition of religious exercise set forth by RLUIPA. *Id; see also Baranowski v. Hart*, 486 F.3d 112, 124 (5th Cir. 2007) (finding that keeping a kosher diet in accordance with religious beliefs qualifies as religious exercise under RLUIPA).

Here, members of the Nation participate in a strict vegetarian diet and fast for the month of Ramadan. (R. 3.) Kelly, similar to the inmate in *Koger*, desired to maintain a religious diet in order to effectively carry out his religious beliefs. (R. 3.) As such, maintaining a vegetarian diet in accordance with religious beliefs is a clearly established religious exercise under RLUIPA. This Honorable Court should, therefore, affirm the Twelfth Circuit Court of Appeals' finding that an inmate maintaining a religious diet in accordance with his religious beliefs constitutes religious exercise under RLUIPA.

B. Removing Kelly From His Religious Diet Program Substantially Burdened His Religious Exercise.

The Twelfth Circuit Court of Appeals improperly held that TCC's policy reserving the right to terminate an inmate's religious diet due to circumstantial evidence of backsliding did not substantially burden Kelly's religious exercise. Although RLUIPA does not define "substantial burden," RLUIPA's legislative history indicates that it is to be interpreted by reference to RFRA and First Amendment jurisprudence. *See Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 760 (7th Cir. 2003). Under RFRA, a substantial burden on religious exercise is one that "forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person's religious beliefs, or compels conduct or expression that is contrary to those beliefs." *See Mack v. O'Leary*, 80 F.3d 1175, 1179 (7th Cir. 1996). The Supreme Court has held that a substantial burden exists if it is one that "put[s] substantial pressure on an adherent to modify his behavior and to violate his

beliefs." *See Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981).

The Supreme Court has yet to decide the issue of whether the revocation of an inmate's special diet program due to evidence of backsliding constitutes a substantial burden on the inmate's religious exercise. Several circuit courts, however, have considered the issue, and are split as to whether a prison should or may terminate religious diets after an inmate backslides. *See Daly v. Davis*, 2009 WL 773880 (7th Cir. 2009); *see also Lovelace,* 472 F.3d 174. The Seventh Circuit Court of Appeals has held that a substantial burden on an inmate's religious exercise exists when the inmate is removed from a special diet program after breaking his fast merely one time. *See Lovelace*, 472 F.3d at 187. In *Lovelace*, the inmate was a member of the Nation who participated in the prison's Ramadan observance program, which accommodated both fasting and prayer requirements. *Id.* at 181. The inmate participated in the program for six days before he was removed from the "pass list" for allegedly breaking his fast. *Id.* As a result, the inmate was barred from the special meals for fast participants for the remainder of Ramadan, thereby barring him from observing Ramadan for twenty-four of its thirty days. *Id.* The court determined that the inmate's removal from the Ramadan observance pass list qualified as a substantial burden under RLUIPA. *Id.* at 187. The court reasoned that because the inmate was unable to fast, he was precluded from fulfilling one of the five pillars of Islam. *Id.* The court also noted that the inmate was further precluded from participating in the group prayer services because he deviated from his fast, thus demonstrating the significance of the burden on his religious exercise. *Id.* at 187-88.

In another case, a Rastafarian inmate sued prison officials for removing him from his vegetarian diet after someone observed him eating meat. *See Reed v. Faulkner*, 842 F.2d 960,

962 (7th Cir. 1988). The court in this case found that the inmate's backsliding did not constitute conclusive evidence as to the sincerity of his religious beliefs. *Id.* at 963. In making its determination, the court stated that "the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere." *Id.* The court went on to explain that forfeiting the rights of any inmate who is observed backsliding places prison guards and fellow inmates in the role of "religious police." *Id.* Accordingly, the court reversed the lower court's decision and held that even though the inmate failed to adhere steadfastly to every tenet of his faith, that fact could not be considered *conclusive* evidence of his religious insincerity. *Id.* (emphasis added).

The Sixth Circuit has also addressed the issue of whether removing an inmate from a religious diet for possession of a non-compliant food item violates RLUIPA. *Colvin v. Caruso*, 605 F.3d 282, 296 (6th Cir. 2010). In *Colvin*, the inmate had been placed in a kosher-meal program. *Id.* at 286. The court in this case stated that a prison policy of removing an inmate from a religious diet program for mere possession of a non-compliant food item may be "overly restrictive of inmates' religious rights." *Id.* at 296. The court, however, ultimately did not decide the issue and stated that without further factual development, it could not definitively conclude that the prison's strict application of its meal policy to the inmate was constitutional. *Id.* at 297.

The instant case is strikingly similar to *Lovelace*. Kelly filed a "Declaration of Religious Preference Form" to change his religious affiliation from no religion to membership with the Nation, a requirement for inmates desiring to partake in dietary restrictions. (R. 3). Under TCC's policy, if an inmate is found bullying another inmate for his food or is caught breaking his respective religious diet, the prison reserves the unilateral right to remove such inmate from his diet program. (R. 6). Without any proof that Kelly was guilty of this, TCC revoked his diet program, thus forcing Kelly to defy his religious beliefs. (R. 6). Although prison officials found

meatloaf underneath Kelly's mattress, TCC officials did not allege that they "actually saw Kelly breaking his fast or eating meat." (R. 9.)

As was the case in *Lovelace*, Kelly *allegedly* broke his fast merely one time, evidenced only by unfounded allegations of his cellmate. (R. 6). The court in *Lovelace* found that removing the inmate from a religious diet for violating his fast one time constituted a substantial burden on the inmate's religious practice because it prevented him from adhering to one of the five pillars of Islam. Similarly, here, TCC officials removed Kelly from his religious diet, thus precluding him from exercising his religion in accordance with his sincerely held beliefs. TCC placed a substantial burden on Kelly's free exercise rights under RULIPA by imposing an unduly harsh punishment on Kelly for a single, unsubstantiated offense. By doing so, TCC essentially engaged in the same "religious policing" strategies employed by the prison officials in *Reed*.

Further, the Twelfth Circuit Court of Appeals' reliance on *Daly v. Davis* is misplaced; the inmate there was physically seen breaking his fast on more than one occasion. *See Daly v. Davis*, 2009 WL 773880, at *1 (7th Cir. Mar. 25, 2009). Again, TCC officials conceded that they did not "actually see" Kelly breaking his fast. (R. 6.) This Honorable Court should, therefore, reverse the Twelfth Circuit Court of Appeals' holding that TCC's revocation of Kelly's religious diet did not constitute a substantial burden on Kelly's religious exercise. Instead, this Honorable Court should follow the Seventh Circuit Court of Appeals' reasoning in *Lovelace* and *Colvin*, as those factual scenarios are strikingly similar to the situation in Kelly's case.

C. TCC's Policy Of Revoking An Inmate's Religious Diet Does Not Pass The Requisite Strict Scrutiny Analysis Under RLUIPA.

TCC has failed to establish that its policy of revoking Kelly's religious diet is the least restrictive means of achieving a compelling governmental interest. Because Kelly demonstrated that TCC's policy substantially burdened his religious exercise, the burden shifts to TCC. TCC,

therefore, must demonstrate that its policy of revoking an inmate's religious diet, when the inmate was not physically seen breaking the diet, is the "least restrictive means of furthering a compelling governmental interest." 42 U.S.C. 2000cc(a)(1)(B). Although TCC "indicated" that there were security and cost concerns supporting its policies, merely stating that such concerns exist does not amount to a compelling governmental interest. (R. 4-5.) Additionally, TCC failed to assert that it attempted or considered any less restrictive measures to effectuate its purported interest as required under RLUIPA. This Honorable Court should, therefore, reverse the Twelfth Circuit Court of Appeal's holding that TCC satisfied the requisite strict scrutiny test under RLUIPA.

1. <u>TCC Has Not Presented Any Evidence Establishing A Compelling Interest In Burdening Kelly's Religious Exercise.</u>

The Twelfth Circuit improperly held that TCC asserted a compelling governmental interest to justify its removal of Kelly from his religious diet program. Because Kelly has demonstrated that TCC unjustly placed a substantial burden on his religious exercise, TCC must demonstrate that its policy is the "least restrictive means of furthering a *compelling* governmental interest." *See* 42 U.S.C. 2000cc(a)(1)(B) (emphasis added). The Supreme Court has stated that while RLUIPA adopts a "compelling interest" standard, context matters in the application of such standard. *See Cutter*, 544 U.S. at 723. Courts should apply the compelling interest 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." *See Lovelace,* 472 F.3d at 189-90. Courts have indicated that of these aforementioned concerns, security deserves "particular sensitivity." *See Cutter*, 544 U.S. at 722. Courts, however, have held that a prison must do more than merely assert a security concern in order to demonstrate a

compelling interest for its policy. *See Murphy*, 372 F.3d at 982; *see also Lovelace*, 472 F.3d at 190.

In *Lovelaee*, the court found that the prison failed to demonstrate a compelling governmental interest. *See Lovelace*, 472 F.3d at 190. The court noted that the prison merely asserted a "legitimate interest in removing inmates from religious dietary programs where the inmate flouts prison rules reasonably established in order to accommodate the program." *Id.* The court further found that the prison failed to explain how this legitimate interest qualified as compelling, as the prison did not present any evidence regarding the policy's security or budget considerations. *Id*. *See also Murphy*, 372 F.3d at 988 (holding that while the prison had a compelling interest in institutional security, the prison was required to do more than merely state its security concern; the prison must *demonstrate* the security concern).

The Ninth Circuit Court of Appeals has addressed the issue of whether cost is a compelling governmental interest. *See Shakur*, 514 F. 3d at 891. In that case, the prison denied the inmate his religious diet, asserting that avoiding additional costs was a compelling governmental interest. *Id*. at 882. The only evidence of additional cost was a declaration, which was attested to by the institution's "Pastoral Administrator," not someone "specializing in food service or procurement." *Id*. at 889. Further, the prison neither described its method of analyzing the additional cost nor provided such analysis as evidence. *Id*. The court in *Shakur*, therefore, held that the declaration was insufficient to establish a compelling governmental interest. *Id*. at 890.

Here, TCC has failed to offer any support for the validity of its security or budget concerns regarding Kelly and other members of the Nation. In support of its security concerns, TCC merely mentioned facts regarding its prior policy, and such facts were based on events that

occurred nearly two decades ago. (R. 13-14). The only piece of evidence TCC produced in support of its decision to remove Kelly from his religious diet was a written statement of Kelly's cellmate who described Kelly's *alleged* threats. (R. 14). Kelly, however, has had no history of physical violence with inmates at TCC. (R. 14). Regarding TCC's alleged budgetary concerns, it has similarly failed to provide ample support. Here, as in *Shakur*, TCC's affidavit and "cost containment strategems" was attested to by the Director of the Chaplaincy Department and not someone in "food services or procurement." (R. 6-7.) This case is, therefore, strikingly similar to *Lovelace* and *Shakur*, where the prisons failed to articulate a compelling interest when they did not present any evidence regarding the policy's security or budget considerations. Accordingly, this Honorable Court should reverse the Twelfth Circuit Court of Appeals' finding that TCC asserted a compelling governmental interest and instead hold that TCC failed to present sufficient evidence to support either its security or budget concerns.

2. <u>Even If This Court Finds That TCC Provided A Compelling Governmental Interest To Support Its Policy, TCC Failed To Demonstrate That Revoking Kelly's Religious Diet Was The Least Restrictive Means Of Achieving Its Interest.</u>

TCC failed to meet its burden of proving that its policy of revoking an inmate's religious diet without evidence of backsliding is the least restrictive means of furthering a compelling governmental interest. Congress specifically stated in RLUIPA that the statute "shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of [RLUIPA] and the Constitution." 42 U.S.C. § 2000cc-3(g). Congress further requires TCC to demonstrate that its diet-removal policy "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a), § 2000cc-5(2). In order to demonstrate that its policy is the least restrictive means of achieving the prison's asserted interests, TCC's policy must be narrowly tailored to achieve the asserted interests. *See generally, Warsoldier*, 418 F.3d at 995. TCC must further demonstrate that alternative means of

achieving their interests were considered and deemed insufficient. *Id.* TCC's policy of removing an inmate from a religious diet after minor evidence of backsliding is far-reaching and unduly burdensome. Further, although prison security may be a compelling interest, not every restriction on an inmate's religious freedom effectively furthers that interest. As such, this Honorable Court should reverse the Twelfth Circuit Court of Appeal's finding that TCC met its burden of demonstrating that its policy is the least restrictive means of furthering a compelling governmental interest.

This Court should adopt the position taken by the Fourth Circuit Court of Appeals in *Lovelace*. There, the court found that the prison's diet-removal policy was too far-reaching, as it excluded inmates not only from their Ramadan meals, but it also precluded inmates from participating in Ramadan prayer services held before or after morning meals. *See Lovelace*, 472 F.3d at 191. In *Lovelace*, the policy directed prison officials to submit incident reports on any fast participant seen taking a meal tray during daylight hours. *Id.* at 182. The policy further provided that any inmate who violated the policy would be removed from the Ramadan observance pass list. *Id.* Consequently, such members would be precluded from participating in the fast, and further, the morning prayer sessions. *Id.* In deciding whether this policy was narrowly tailored, the court noted that to the extent that the policy prohibited both special meal and group prayer access, the policy was arguably not the least restrictive means of furthering the asserted governmental interest. *Id.* at 191. The court, as such, found that the prison did not demonstrate that its policy satisfied the "strict requirements" of RLUIPA. *Id.* at 191-92. *See also Shakur*, 514 F.3d at 890 (holding that conclusory assertions that denying an inmate his religious diet was the least restrictive means of furthering its interest in cost containment is insufficient to satisfy its burden).

Similarly, here, TCC failed meet its burden in proving that its policy was the least restrictive means of achieving a compelling governmental interest. TCC failed to demonstrate that it considered or rejected even one alternative method of implementing its policy before adopting the challenged practice it has in place. (R. 14.). TCC merely provided an affidavit attesting to the reasons for the diet policy with an addendum documenting TCC's cost containment stratagems. (R. 6-7). This, without evidence that TCC looked into other methods for achieving its governmental interest, is insufficient to satisfy RLUIPA. This Honorable Court should, therefore, reverse the Twelfth Circuit Court of Appeal's holding that TCC satisfied strict scrutiny because TCC did not adequately demonstrate that it explored or adopted less restrictive means to achieve its interests.

D. Public Policy Demands That Prison Officials Refrain From The Religious Policing Tactics Engaged In By TCC Through Its Diet-Removal Policy.

RLUIPA serves as a means to protect an inmate's ability to exercise his religion to its "maximum extent." *See* 42 U.S.C. § 2000cc-3(g). As the court stated in *Reed v. Faulkner*, "[i]t would be bizarre for prisons to undertake in effect to promote strict orthodoxy, by forfeiting the religious rights of any inmate observed backsliding, thus placing guards and fellow inmates in the role of religious police." 842 F.2d at 963. Terminating Kelly's religious diet merely because of Kelly's cellmate's allegations of violence is too harsh of a punishment and constitutes a substantial burden on Kelly's religious exercise. Further, it is important to note that Kelly was not physically observed breaking his fast; prison officials merely discovered meatloaf under Kelly's mattress. This, alone, does not constitute "backsliding," as it is possible that Kelly's cellmate placed the meatloaf under his mattress without Kelly's knowledge. Even in the event that prison officials observed an inmate backsliding, prison officials are not trained or qualified to engage in the policing of religion. As such, if this Honorable Court were to find that the tactics

engaged in by TCC are acceptable, it will only promote prison officials and other inmates to engage in the religious policing tactics that were not anticipated by Congress in enacting RLUIPA.

CONCLUSION

This Court should reverse the holding of the Twelfth Circuit Court of Appeals that TCC's prayer service and religious diet policies do not violate RLUIPA. TCC has substantially burdened Kelly's religious exercise in denying his requests for additional prayer services and revoking his religious diet. Further, TCC has failed to demonstrate that its policies are the least restrictive means of achieving a compelling governmental interest. TCC's religious prayer and diet policies directly conflict with Congress's intent in enacting RLUIPA. This Honorable Court should, therefore, hold that the challenged policies violate RLUIPA.