No. 985-2015

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

BRIEF FOR RESPONDENT

TEAM 11

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QUESTIONS PRESENTED

1. Whether Tourovia Correctional Center's prison policy prohibiting night services to members of the Islamic faith violates RLUIPA.
2. Whether Tourovia Correctional Center's prison policy reserving the right to remove an inmate from a religious diet or fast, due to evidence of backsliding, violates RLUIPA.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the order of The United States Court of Appeals for the Twelfth Circuit vacating summary judgment. Such judgment was entered on June 1, 2015. The Petition for Writ of Certiorari was granted on July 1, 2015. This Court has jurisdiction to hear an appeal of decision of The United States Court of Appeals for the Twelfth Circuit pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Siheem Kelly is an inmate at Tourovia Correctional Center (hereinafter TCC), a maximum security prison. R. 3. Mr. Kelly was convicted of several drug trafficking charges and one count of aggravated robbery. *Id.* Two years after Mr. Kelly arrived at TCC, he changed his religious affiliation from no religion to membership with the Nation of Islam (hereinafter "the Nation" or "NOI"). *Id.* The Nation is a minority religious group of the prison population at TCC, and constitutes less than 1 percent of the general prison population. *Id.* Currently, this translates to seven members at TCC. *Id.* The members of the Nation are known to travel together throughout the prison, and as a result, the prison must monitor them to ensure they are not engaging in illicit or gang activity. *Id.* The members of the Nation are required to pray five times a day, dawn, early afternoon, late afternoon, sunset, and late evening. *Id.* As for the prayer environment, "adherents must wash themselves and their clothes . . . and secure a clean surface on which to kneel as face Mecca." R. at 4. While most adherents claim to require a very clean and solemn environment, it is not a mandate required by the Nation. *Id.* Additionally, outside of Ramadan, the religion does not mandate that members pray together. While it may be preferred by some members, congregational prayer service is by no means mandated by *The Holy Qu'ran*. R. at 4, 5.

While TCC is willing to accommodate an inmate's desire to pursue their religious practice, they are only able to do so to the extent that such practice is consistent with agency security, safety, order, and rehabilitation concerns. R. at 4, 6. Due to recent prison policy, namely Tourovia Directive #98, the Nation's prayer-times are limited to three times a day outside of the cell, and twice a day inside the cell. R. at 4. The prison policy, as reflected in Tourovia Directive #98, was enacted as a response to a recent discovery that during prayer

services, the service volunteer was relaying gang orders from incarcerated members to gang affiliated individuals outside of the prison's walls. R. at 4, 25. Furthermore, several members attending night prayer services also attempted to disregard security policy, regarding the last in-cell daily evening headcount, by staying in their prayer rooms longer than authorized. R. at 4. As a response to such blatant disregard of prison policy, TCC banned the use of all prison volunteers and of all nightly services. *Id.* Such a ban was necessary to ensure that inmates of all religious groups were back in their cells promptly at 8:30 P.M. for the final headcount, which is necessary for both prison security and safety. *Id.*

As a further result of the policy, no services may be held if no official chaplain is available. R. 4. In practice, this means that prayer services may be held during a chaplain's hours of operation, which are only during the three designated prayer times: before the meaning meal at 8:00 A.M, before the afternoon meal at 1:00 P.M., and before the evening meal at 7:30 P.M. R. at 4, 24. Religious groups of all faiths are subjected to the three designated prayer times. R. at 4. TCC allows all offenders to worship according to their faith preference in their cells using the allowed items such as sacred texts and devotional items. R. at 6.

Despite Tourovia Directive #98, Mr. Kelly maintains that he is entitled to additional worship accommodations, namely, five rather than three separate services, outside of his cell, with other members of the Nation. R. at 5. Such additional services would be conducted away from non Nation members and with a Chaplain of NOI religious affiliation. *Id.* Although the policy bans the option to petition for prayer series at night with a prison service volunteer, Mr. Kelly filed a written prayer service request for an additional congregational nightly prayer service after the last meal at 7:00 P.M. R. at 5. The request was denied by Saul Abreu, Director of TCC's Chaplaincy Department, due to the prison policy prohibiting all inmates from going

anywhere before the final head count. *Id.* Abreu also indicated to Mr. Kelly that the three daily prayer services already provided were adequate to fulfill the Nation's prayer requirement, and that they could pray at all other times in their cells. R. at 5.

Mr. Kelly responded to the denial of his request by filling two grievances, both making blanket assertions that praying in his cell was distracting and disrespectful to his religion. The first complained of his cellmate's behavior during prayer, while the second complained of the presence of a toilet. *Id.* Following the denial of these two grievances, Mr. Kelly filed a formal grievance with the prison that essentially asserted the same complaints, and made the same requests for a nightly congregational service for himself and members in the Nation. *Id.* Referring to TCC policy, Warden Kane Echols informed Mr. Kelly that his request was in violation of the policy and that his allegations regarding his cell mate were not proven and therefore, could not be verified. R. at 5, 6.

In addition to Tourovia Directive #98, regulating religious services, the prison also maintains control over the requests and administration of religious diets, as reflected in Tourovia Directive #99. R. at 6, 26. Religious diet requests "shall be accommodated to the extent practicable within the constraints of the Tourovia Correctional Center's a) security considerations, b) budgetary or administrative considerations, and c) the orderly operation of the institution. R. at 26. However, if "an inmate gives prison administration adequate reason to believe that the religious alternative diet is not being adhered to, Tourovia Correctional Center reserves the right to revoke religious alternative diet privileges. . . ." R. at 26. Adequate reasons to believe that a religious diet is not being adhered to would be if an inmate is found to bully any other inmate for their food, or if an inmate is caught breaking their respective religious diets. *Id.*

at 6. Furthermore, if any violence or threat of violence is connected to any member of a faith group, the prison may suspend the inmate's freedom to attend religious services. *Id.*

Pursuant to Tourovia Directive #98 and #99, Mr. Kelly was barred from attending religious services for one-month and was removed from his special diet program. R. at 6. TCC took such action because of a sum of evidence as follows: a report from Mr. Kelly's cellmate that Mr. Kelly threatened him with violence if he did not provide Kelly with his dinner, which was meatloaf, and a discovery of meatloaf hidden under Mr. Kelly's mattress. *Id.* Mr. Kelly's cellmate attested to being threatened by Mr. Kelly for meatloaf dinner, and gave a written statement. R. at 7. Mr. Kelly's actions raised serious questions about his religious sincerity, and based on TCC policy, Warden Echols had no choice but to remove Mr. Kelly from the program.

SUMMARY OF THE ARGUMENT

Tourovia Correctional Center's prayer policy, as reflected in Tourovia Directive #98, is not a violation of the petitioner's First Amendment rights as reflected in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Petitioner, Mr. Siheem Kelly, has not met his burden in proving that such policies substantially burden his religious exercise, and has only offered conclusory allegations regarding how the policy has affected his ability to practice. Furthermore, Tourovia Directive #98, in relevant part, is necessary for the orderly administration of TCC and serves the interests of prison safety, security, and efficiency. The policy does not prohibit night services only to members of the Nation, but to all offenders incarcerated. Therefore, Mr. Kelly cannot claim that his freedom of religious exercise is substantially burdened when he is being deprived of a benefit that is not conferred to the general prison population. The policy allows Mr. Kelly more than a reasonable opportunity to comply with the requirements of the Nation–allowing him to participate in communal prayer three times daily,

during the designated prayer times. Furthermore, the policy places no restriction on Mr. Kelly's ability to practice his faith in his cell. Prohibiting night services to members of the Nation is not only consistent with Tourovia Directive #98, but is the only viable method that can surely serve the interests of highest order in a prison setting–safety and security.

Additionally, Tourovia Correctional Center's prison policy reserving the right to remove an inmate from a religious diet or fast, due to evidence of backsliding, as reflected in Tourovia Directive #99, is not a violation of the petitioner's First Amendment rights as reflected in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). TCC's decision to remove Mr. Kelly from the religious diet was not a substantial burden to his religious exercise because, evidently, his religious beliefs were not sincerely held. This is a factual determination that is apparent from the evidence of this petitioner's backsliding. Not only is there sworn testimony in the record that Mr. Kelly threatened his cell mate for his meat loaf dinner, but meat loaf was also found under Mr. Kelly's mattress following subsequent investigation. If Mr. Kelly was sincere about his religious beliefs that a Halal diet is required by his religion, he would not violate the diet by his own volition. Furthermore, should the court find a sincerely held belief, TCC still did not place a substantial burden on Mr. Kelly's ability to exercise his religion because the diet was revoked based on his own actions and voluntary choice to violate the diet. TCC has a legitimate interest in providing special diets to only those inmates who demonstrate a sincere religious belief that such practice is required. It is the obligation of prison officials to ensure that their programs are efficiently run, and that they remain consistent with budget constraints. A prisoner who violates the terms of his religious diet is a threat to these penological interests, and removal from the program is the only means of preserving such interests.

Therefore, this Court should affirm the decision of the Court of Appeals for the Twelfth Circuit in finding that RLUIPA has not been violated by either Tourovia Directive #98 or #99.

ARGUMENT

I. TOUROVIA CORRECTIONAL CENTER'S PRISON POLICY PROHIBITING NIGHT SERVICES, AS REFLECTED IN TOUROVIA DIRECTIVE #98, DOES NOT VIOLATE RLUIPA.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) mandates 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 the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person–(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-1(a). In order to satisfy the first half of this statutory standard, the plaintiff must demonstrate that the government practice complained of imposes a "substantial burden" on his religious exercise. If the plaintiff establishes this, the burden transfers to the government to establish that the burdensome practice is in furtherance of a compelling governmental interest and is the least restrictive means of furthering that interest. 42 U.S.C. §2000cc-2(b); *Adkins v. Kaspar*, 393 F.3d 559, 567 (5th Cir. 2004). RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. §2000cc-2(b). For purposes of this brief, it is not contested that religious prayer is in fact "religious exercise" as defined by statute.

A. The Prison Policy Prohibiting Night Services Does Not Place a Substantial Burden on Petitioner's Ability to Exercise His Religion.

The statutory text of RLUIPA does not define "substantial burden," and therefore, looking to the legislative history of the statute is instructive in determining original intent and

interpretation, which states "[substantial burden] as used in the Act should be interpreted by reference to Supreme Court jurisprudence." 146 Cong. Rec. S7776 (July 27, 2000). Relying on such jurisprudence, the circuits have constructed definitions of "substantial burden" which are instructive here. A government action or regulation creates a "substantial burden" on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violates his religious beliefs." *Adkins*, 393 F.3d at 570. The effect of a government action or regulation is significant when it either (1) influences the adherent to act in away that violates his religious beliefs, or (2) forces the adherent to choose between, on the one hand, enjoying some generally available, not-trivial benefit, and on the other hand, following his religious beliefs. *Adkins*, 393 F.3d at 570; *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board of the Indiana Employment Security Division*, 450 U.S. 707 (1981). A substantial burden is "one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable." *Williams v. Dart*, 2011 U.S. Dist. LEXIS 116993 *12 (N.D. Ill. 2011) (quoting *Civil Liberties for Urban Believers v. City of Chi.*, 342 F.3d 752, 761 (7th Cir. 2003).

A government action or regulation does *not* rise to the level of a substantial burden on religious exercise if it merely prevents the adherent from either enjoying some benefit that is not otherwise generally available or acting in a way that is not otherwise generally allowed. *Adkins*, 393 F.3d at 570; *See Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988). Furthermore, a mere inconvenience to one's religious practice is not a substantial burden. A substantial burden is one that pressures an adherent to violate his or her beliefs or abandon one of the precepts of his religion. *Smith v. Allen*, 502 F.3d 1255, 1278 (11th Cir. 2007); *Smith v. United States Cong.*, 2015 U.S. Dist. LEXIS 27818, 1, 235 (D.C. Vir. 2015).

In *Adkins v. Kaspar*, Adkins was incarcerated and claimed a violation of RLUIPA when he and other members of his faith were denied the right to assemble and hold religious services on their own. *Adkins*, 393 F.3d at 562–63. Prison policy made it so religious sessions could only be held when a trained volunteer was available. *Id.* at 563. The policy was based on a concern that "some things that were going on" were "inmate driven." *Id.* The court held that the requirement of an outside volunteer did not place a substantial burden on Adkins religious exercise. *Id.* at 571. The court based their conclusion on the fact that Adkins was prevented from congregating due to the lack of qualified outside volunteers available to go to the prison on the days of worship, and not from some rule or regulation that directly prohibits such gatherings. *Id.*

In *Jihad v. Fabian*, inmate Jihad argued his right to practice his religion, under RLUIPA, was violated by the limited number of Islamic services offered, namely two per week. *Jihad v. Fabian*, 680 F. Supp. 2d 1021, 1026 (D. Minn. 2010). Furthermore, Jihad's beliefs prohibited him from praying in a room with a toilet and required him to pray five times a day. *Id.* at 1027. Considering the burden the prison policy would have on Jihad's sincerely held religious beliefs, the prison policy was subjected to strict scrutiny. *Id.* Not only did the court conclude that two Islamic services per week afforded Jihad a reasonable opportunity to practice his faith, but also that "the safety of prison inmates and staff would be jeopardized by the increased movement of prisoners if inmates were allowed to leave their cells five times a day to pray." *Id.*

In *Williams v. Dart*, Williams was an inmate who described one of the essential practices of being a Muslim as praying to Allah five times a day, while facing east, after washing his hands, feet, arms, and legs. *Williams*, 2011 U.S. Dist. LEXIS 116993, *3. During the time of William's incarceration, only one communal Muslim prayer service was held, due to lack of

volunteers. *Id.* Prison policy allowed communal Muslim services only when an outside volunteer is available to lead the service. *Id.* at *12. However, Inmates were allowed to meditate in his cell at any time, and although William's cell was dirty, he "still got down there and . . . still prayed to Allah." *Id.* at *4. The court held that the policy did not render worship "effectively impractical" for Williams because although he went without communal services, he was able to pray and keep the Koran in his cell. *Id.* at *12–*13.

In *Van Wyhe v. Reisch*, the court concluded that while a prison must permit a "reasonable opportunity for an inmate to engage in religious activities" they "need not provide unlimited opportunities." *Van Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009). In that case, an inmate requested an additional weekly meeting time for religious studies, claiming that the three hours allotted was inadequate. *Id.* The court reasoned that the time allotted provided a reasonable opportunity for inmates to exercise their religious freedom, and an inmate must offer evidence that the time allotted for religious celebration "significantly inhibits or constrains their conduct or expression . . . or denies them reasonable opportunities to engage in those activities that are fundamental to their religion" in order to find a substantial burden. *Id.* at 657.

In *Graham v. Mahmood*, a religious group's access to meeting rooms is governed by a policy that "allows any recognized group to meet at least once per week and authorizes more frequent meetings if an outside volunteer registers with prison officials an agrees to conduct meetings at the prison." *Graham v. Mahmood*, 2008 U.S. LEXIS 33954, *1, *50 (S.D.N.Y 2008). Graham, an inmate, became dissatisfied with his access to the meeting rooms, claiming that the members of his faith should be able to congregate in a prison meeting room more than once per week. *Id.* at *3, *41. The court concluded that Graham had not met his burden in proving the regulation poses a substantial burden on his ability to practice his religion, noting "a

plaintiff must demonstrate that the government's action pressure him to commit an act forbidden by his religion or prevents him from engaging in conduct or having religious experience mandated by his faith. In addition, this interference must be more than an inconvenience . . . ." *Id.* at 49 (quoting *Muhammad v. New York City Dep't of Corr.*, 904 F. Supp. 161, 189 (S.D.N.Y 1995). The court reasoned that a desire for greater access to prison facilities is, in reality, a demand to exercise his rights with the level of freedom he might enjoy were he not in jail. *Graham*, 2008 U.S. LEXIS 33954 at *50. Furthermore, the denial of Graham's request does not constrain plaintiff's ability to remain a devout follower as his faith, as he is still able to participate in weekly classes with other members of his faith, in addition to being able to practice his beliefs on his own. *Id.* at *43, *50.

Similar to the policy in *Adkins* that only allowed religious sessions when a trained volunteer was available, the religious service policy in this case requires an official Chaplain to be in attendance at any and all communal worship services. R. 4; *Adkins*, 393 F.3d at 563. The court in that case found no substantial burden, reasoning that Adkins was not prevented from congregating due to a regulation, but instead because of lack of volunteers available. *Adkins*, 393 F.3d at 571. This case requires similar reasoning because the policy prohibiting night services in this case is based on the unavailability of an official Chaplain during that time period. R. 4. The time of the requested service, 8:00 P.M., falls outside of the Chaplain's working hours, and therefore cannot be accommodated. R. 4–5. Therefore, as the *Adkins* court determined on similar facts, a substantial burden does not exist where a faith group is unable to receive communal worship due to lack supervision mandated by prison policy. *Adkins*, 393 F.3d at 571.

Similar to the policy in *Jihad*, the religious service policy in this case, Tourovia Directive #98, allows Mr. Kelly to observe religious service at pre-designated times. R. 24–25; *Jihad*, 680

F. Supp. 2d at 1026. Similar to the inmate in *Jihad*, Mr. Kelly also is requesting additional time outside of his cell for religious practice, claiming the time allotted by prison policy is inadequate. R. 5–6; *Jihad*, 680 F. Supp. 2d at 1025. Although the inmate's ability to attend religious services, namely twice per week, is less than the ability of Mr. Kelly to attend the Nation's services, namely three times per day, the court in that case concluded that the time allotted was enough to afford a reasonable opportunity for an inmate to practice their faith, and found the policy did not substantially burden religious practice. R. 4, 24–25; *Jihad*, 680 F. Supp. 2d at 1027. Therefore, since the restriction on communal service in this case is less than the restriction in that case, the only conclusion warranted would be a finding of no substantial burden.

Furthermore, the inmate in *Jihad* noted that his sincerely held religious beliefs prohibit him from praying in a room with a toilet and require him to pray five time a day, both similar to claims made in this case by Mr. Kelly. R. 3–5, *Jihad*, 680 F. Supp. 2d at 1027. While the court briefly discussed how the policy could cause a substantial burden to *Jihad*, the interests offered for the restriction on prayer service–prison security, safety, and order–justified the burden imposed. *Jihad*, 680 F. Supp. 2d at 1027. Because of the similar interests of the policy in this case, the courts conclusion in that case, holding that the prison's compelling interest in safety and security would be jeopardized by the increased movement of prisoners if inmates were allowed to leave their cells five times a day to pray, is instructive and warrants a similar conclusion here. R. 25; *Jihad*, 680 F. Supp. 2d at 1027.

The practices of the Nation are similar to the practices mentioned by the inmate in *Williams*–praying to Allah five times a day, facing Mecca, and maintaining a clean environment for prayer. R. 4; *Williams*, 2011 U.S. Dist. LEXIS 116993 at *3. However, Williams did not receive the ability to receive communal prayer service three times a day like inmate Kelly in this

case. R. 4; *Williams*, 2011 U.S. Dist. LEXIS 116993 at *3. Although the inmate in that case only received one communal prayer service during his four months of incarceration, that court held worship was not "effectively impractical" because he had the opportunity to pray in his cell. *Williams*, 2011 U.S. Dist. LEXIS 116993 at *12. Like the inmate in *Williams*, Mr. Kelly is also able to pray in his cell. Applying the logic of the court in Williams, the combination of Mr. Kelly's ability to attend communal worship three times daily with his ability to pray in the cell does not render worship "effectively impractical" and therefore, as the court held in Williams, there exists no substantial burden on Mr. Kelly's religious exercise.

Similar to the inmate in *Van Wyhe*, Mr. Kelly is allotted adequate opportunity to fulfill the Nation's prayer requirements. R. 5; *Van Wyhe*, 581 F.3d at 657. Because Mr. Kelly is offered adequate opportunity to fulfill the nations prayer requirements, this case warrants similar reasoning to *Van Wyhe*, in which the court stated "where an inmate was permitted three hours of group worship time, the denial of one extra hour per week did not substantially burden the inmate's religious exercise." R. 5; *Van Wyhe*, 581 F.3d at 657. Furthermore, the time allotted to Mr. Kelly in this case, namely three time daily, far exceeds the amount of time allotted to the inmate in that case, namely three hours weekly, and therefore the denial of Mr. Kelly's request for additional nightly prayer, which is in direct conflict with Tourovia Directive #98, does not deny petitioner a reasonably opportunity to engage in religious practice.

Similar to the request of the inmate in *Graham*, petitioner claims that a lack of opportunity to congregate, resulting from the prison policy, is a substantial burden to his religious practice. R. 6; *Graham*, 2008 U.S. LEXIS 33954 at *3. However, applying the reasoning from the court in that case, Mr. Kelly's ability to remain a devout member and follower of the Nation is not inhibited or constrained by the denial of an additional prayer

service. The desire to have greater access to prison facilities, as addressed in *Graham*, is to demand accommodations similar to those who are not incarcerated. *Graham*, 2008 U.S. LEXIS 33954 at *3. Furthermore, Mr. Kelly is still able to attend the other three prayer services provided every day and therefore while it may not be ideal for Mr. Kelly to pray in his cell two times a day, it is nothing more than a mere inconvenience. R. 4–5; *Graham*, 2008 U.S. LEXIS 33954 at *3.

B. The Prison Policy Prohibiting Night Services Satisfies Strict Scrutiny.

Despite petitioner's failure to meet his burden in proving TCC's policy prohibiting night services substantially burdens his religious exercise, the policy is justified because it satisfies strict scrutiny. Not only are the compelling interests of prison security and inmate safety dutiful served by such, but restricting nightly prayer service is the least restrictive means of ensuring those ends are secured.

1. Prison Security and Inmate Safety Are Compelling Governmental Interests.

In applying the compelling interest standard, "context matters." *Grutter v. Bollinger*, 539 U.S. 306, 327 (2003); *Cutter v. Wilkinson*, 544 U.S. 709, 722–23 (2005). Lawmakers anticipated that courts would apply the "compelling governmental 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." *Vega v. Lantz*, 2009 U.S. Dist. LEXIS 88550 *1, *29–*30 (D.C. Conn. 2009) (quoting S. Rep. No. 103-111, at 10 (1993)). Of these concerns, security deserves "particular sensitivity." *Cutter*, 544 U.S. at 722. RLUIPA is not meant to "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Vega*, 2009 U.S. Dist. LEXIS 88550 at *29 (quoting *Cutter*, 544 U.S. at 722).

RLUIPA "permits safety and security–which are undisputedly compelling state interest–to outweigh an inmate's claim to a religious accommodation." *Cutter*, 544 U.S. at 717 (quoting *Gerhardt v. Lazaroff*, 221 F. Supp. 2d 827, 848 (S.D. Ohio 2001). As Justice Ginsburg stated in her decision in Supreme Court case *Cutter*, "[s]hould inmate requests for religious accommodations become excessive, impose unjustified burdens on other institutionalized persons, or jeopardize the effective functioning of an institution, the facility would be free to resist the imposition . . . ." *Cutter*, 544 U.S. at 726.

In *Vega v. Lantz*, an inmate alleged that the prison policy requiring that collective religious activity be "conducted and supervised by a [d]epartment authorized [c]haplain or religious volunteer . . . " impermissibly prevented him from engaging in daily congregate prayer five times daily, as required by his religion. *Vega v. Lantz*, 2009 U.S. Dist. LEXIS 88550 at *6, *33. While there was a weekly chaplain-led prayer service, it was frequently cancelled due to the unavailability of a chaplain or volunteer to oversee it. *Id.* at *7. Evidence was presented that congregate prayer "would critically interfere with daily operation" because supervising daily prayer services would place staffing burdens on the prison. *Id.* at *33. Even if they could staff some of the services, permitting such an accommodation would endanger security by creating a perception of favoritism . . . because Muslim inmates would be out of their cells more frequently than other inmates. *Id.* The court reasoned that "RLUIPA does not require officials to make the burdensome alterations to prison scheduling and facility use that the plaintiff seeks, particularly in light of the security concerns the the defendant's identify." *Id.* at 38. Therefore, the court held that the policy supported the penological interests of prison security, controlling costs and maintaining workable administrative procedures, and was the least restrictive means of furthering such interests. *Id.* at *30, *33–*34.

In *Phillips v. Ayers*, a prison policy was imposed restricting the use of chapels, and specified that "religious services may be held only . . . [w]ith staff providing direct and constant supervision, or . . . [w]ith approved volunteers leading service with custody staff providing intermittent supervision." *Phillips v. Ayers*, 2011 U.S. Dist. LEXIS 100461, *1, *8 (D.C Cal. 2011). As a result of this policy, petitioner claims he was denied the right to group worship. *Id.* at *20. Despite such a burden on petitioner's religious exercise, the court concluded that the policy was justified by the institution's compelling interest in prison safety and security. *Id.* at *28–*29. The restrictions on the use of prison chapels were based on specific security threats such as the discovery of "unlawful activities in the prisons' chapels" and "weapons concealed in some of the chapels." *Id.* at *28. Due to such security threats, group prayer services could only be permitted under the circumstances laid out in the policy. *Id.* at *25. Further accommodation would have burdened prison staff and compromised the safety and security of the prison. *Id.*

In *McRoy v. Cook County Dep't of Corrections*, inmate McRoy alleged the prison was restricting his opportunities to practice his faith when the prison officials cancelled services for Muslim inmates and limited the number of services that Muslim inmates could attend each week. *McRoy v. Cook County Dep't of Corr.*, 366 F. Supp. 2d 667, 667 (N.D. Ill. 2005). While Muslim services were scheduled regularly, they were often cancelled because of the shortage of volunteers, staff, and division lockdowns. *Id.* at 669–70. Division lockdowns were a security measure taken by prison officials in which they try to identify possible security breaches and search for illegal weapons and substances. *Id.* at 670. While the inmate alleged the prison's security interests were baseless, relying on the fact that there had not been any altercation during any religious service in the past two years, the court disagreed with such reasoning, stating "prison officials need not wait for a problem to arise before taking steps to minimize security

risks." *Id.* at 675 (quoting *Hadi v. Horn*, 830 F.2d 779, 785 (7th Cir. 1987)). The court noted that the judiciary is "in no position to disregard the prison officials' expertise in operating the institutions under their control and in identifying legitimate security concerns" and referred to the United States Supreme Court reasoning that "'responsible prison officials must be permitted to take reasonable steps to forestall a threat' before the threat is actualized" *McRoy*, 366 F. Supp at 676 (quoting *Jones v. N.C. Prisoners' Labor Union. Inc.*, 433 U.S. 119, 132–133 (1977).

Similar to the prison policy in *Vega*, TCC's religious service policy controls when offenders may receive communal religious service, and is justified by the same compelling interests offered in this case–security and safety. R. 4, 24; Vega, 2009 U.S. Dist. LEXIS 88550 at *6. The court in *Vega* looked to the penological interests asserted by the prison in establishing their policy, which are the same interests asserted here, and concluded that they were compelling. As the court reasoned in *Vega*, with such compelling interests at stake, individualized exemptions would place an administrative burden on the prison staff in supervising services–but more importantly would also threaten prison security and morale because some prisoners would be receiving a benefit that is not available to the rest of the prison population. 2009 U.S. Dist. LEXIS 88550 at *33. Therefore, because similar interests are at stake in this case, and because petitioner is requesting a similar accommodation that he be allowed a benefit of an additional service not conferred to the rest of the prison population, the court's reasoning in *Vega* case should be applied in this case. R. 4, 24; Vega, 2009 U.S. Dist. LEXIS 88550 at *6.

Similar to the policy in *Phillips v. Ayers*, the religious service policy in this case was enacted as a response to specific security threats. R. 4; *Phillips*, 2011 U.S. Dist. LEXIS 100461 at *28. Like the Warden in *Phillips*, the prison personnel at TCC were suspicious of the

occurrence of gang activity during prayer service, and in the interest of prison security and inmate safety, responded by restricting prayer service outside of the designated times laid out in Tourovia Directive #98. R. 4, 24, 26; *Phillips*, 2011 U.S. Dist. LEXIS 100461 at *28–*29. In this case, the petitioner's requested accommodation of an additional prayer service cannot be accommodated consistent with the interests of prison security and inmate safety because the requested time of 8:00 P.M. is outside of the official Chaplain's hours of operation, and supervision of religious services by an official chaplain is mandated by Tourovia Directive #98. R. 4–5, 24–25. Applying the reasoning of the court in *Phillips*, further accommodation would have burdened prison personnel at TCC and compromised safety and security of the prison. *Phillips*, 2011 U.S. Dist. LEXIS 100461 at *25. Furthermore, similar to the policy in *Phillips*, Tourovia Directive #98 is a neutral policy, applying to offenders of all faith groups and prohibits all activity outside of the cell after the last head count, not just religious activity. R. 25. Phillips, 2011 U.S. Dist. LEXIS 100461 at *24.

The rationale used in *McRoy* is instructive here because like the precautions taken by prison officials in that case, the precautions taken in this case were based in the interest of security and safety of the prison. R. 4,6; 366 F. Supp. at 670. As the court deferred to the judgment of prison officials' expertise in that case, this court should do the same in this case because the prayer policy restricting night services was put into place for legitimate security reasons, namely the need to protect against illicit gang activity that had been occurring during religious services at TCC. R. 4; *McRoy*, 366 F. Supp. 2d at 662, 676. Therefore, the fact that there is no obvious present threat facing TCC is not enough to deem an interest in security baseless. *McRoy*, 366 F. Supp. 2d at 675. A lack of a threat does not prohibit prison officials from having a restriction on communal prayer services at particular times–because such

restriction is supported by legitimate security concerns–and as the court held in *McRoy*, it is not the job of the judiciary to prohibit prison personnel from carrying out policies they have implemented based on their expertise. R. 4; *McRoy*, 366 F. Supp. 2d at 676.

2. Prohibiting Night Services Is The Least Restrictive Means of Furthering the Compelling Interests of Prison Security of Safety.

Having established the asserted compelling interest here as prison security, prison safety, and good order of the facility, it must be established that the means used to further such compelling interests are the least restrictive. "RLUIPA asks only whether efficacious less restrictive measures actually exist, not whether the defendant considered alternatives to its policy." *Knight v. Thompson*, 797 F.3d 934, 946–47 (11th Cir. 2015). While some circuits have required prison administrators to demonstrate they "have actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice," these courts are reading a requirement into the statute that does not exist and "such a requirement would be irreconcilable with the well-established principle, recognized by the Supreme Court and RFRA's legislative history, that prison administrators must be accorded due deference in creating regulations and policies directed at the maintenance of prison safety and security." *Hamilton v. Schriro*, 74 F.3d 1545, 1556 (8th Cir. 1996); 146. Con. Rec. S7775 (July 27, 2000); *See Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005).

In fact, "the prisoner must demonstrate what, if any, less restrictive means remain unexplored. It would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong. . . ." *Hamilton*, 74 F.3d at 1556. Here, the petitioner has not identified or proposed any less restrictive, viable alternatives that could adequately serve the compelling interests of prison security and safety, but

has instead offered conclusory arguments that the correctional facility should assume those risks. *Id.* at 946. The RLUIPA places upon the correctional facility no such duty. *Id.*

In *Newby v. Quarterman*, the court found there was a substantial burden on an inmate's right to exercise his religion when communal religious ceremonies were held only once every eighteen months. *Newby v. Quarterman*, 325 Fed. Appx. 345, 350 (5th Cir. 2009). The reason behind such lack of communal ceremonies was "the total lack of approved volunteers to conduct meetings." *Id.* The policy requiring volunteers to conduct communal ceremonies was said to be the least restrictive means of of furthering the interests of security and safety. *Id.* at 351. However, there was evidence that other faith groups regularly engaged in communal worship without an approved volunteer. *Id.* at 352. Such evidence is illustrative that security and safety considered identified by the prison can be met through less restrictive alternatives. *Id.* Unlike the policy in *Newby*, the religious service policy at TCC is a generally applicable policy–to which every offender in the facility is subjected to. *See* Tourovia Directive #98. Additionally, because there is no evidence illustrating that the policy is applied disparately, there is no reasonable basis to conclude that the policy is not the least restrictive method.

Furthermore, not only has petitioner failed to come forth with evidence suggesting disparate treatment, but Mr. Kelly also failed to suggest any other viable suggestions. Therefore, because there is no evidence that other alternatives exist, there is no requirement to demonstrate that less restrictive means that were attempted and subsequently rejected prior to the implementation of the current regulation, as some courts such as *Warsoldier* suggest is standard practice. *See Warsoldier*, 418 F.3d at 999. The record contains no indication or suggestion that the policy was exaggerated or unwarranted, but instead, is wholly supported by the concern of security, which is in turn supported by the discovery of illicit gang activity at TCC. R. 4.

II. THE PRISON POLICY ON RELIGIOUS DIETS, AS REFLECTED IN TOUROVIA DIRECTIVE #99, PROPERLY RESERVES THE RIGHT TO REMOVE AN IMATE FROM A RELIGIOUS DIET DUE TO BACKSLIDING AND DOES NOT VIOLATE RLUIPA.

In order for a belief to be substantially burdened, that belief must be sincerely held. *Moussazadeh v. Tex. Dep't of Crim. Justice*, 703 F.3d 781, 790 (5th Cir. 2012). Therefore, the first question this Court must consider is whether Mr. Kelly is sincere in his religious belief that he requires a religious diet.

A. The Removal of Petitioner From His Diet Was Not A Substantial Burden to His Religious Practice Because His Religious Belief Is Not Sincerely Held.

Determining whether or not a religious belief is sincerely held is a question of fact that must be made on a case-by-case basis. *United States v. Seeger*, 380 U.S. 163, 185 (1965). When making this determination the court should not be deciding the "truth of a belief" but they should be deciding if that belief is "truly held." *Id.* Although "backsliding" or nonobservance of a religious practice is not dispositive, it is evidence of a prisoner's religious insincerity. *Lute v. Johnson*, 2012 U.S. Dist. LEXIS 36179 *1, *18–*19 (D.C. Idaho 2012). In fact, "such evidence is particularly relevant where the prisoner's own actions directly contradict the core of his claim." *Id.* at *19.

In *Moussazadeh,* the defendant's religious sincerity was called into question and had to be determined as a threshold issue. 703 F.3d at 791–92. The court found that Moussazadeh's religious belief was sincere, and based their decision on the following considerations. *Id.* The court first found the fact that Moussazadeh provided "that he was born and raised Jewish and has always kept a kosher household" was persuasive in proving his religious sincerity. *Id.* The court also considered that he had consistently requested and ate kosher meals even when they were "'distasteful' compared to the standard prison fare." *Id.* at 792. The last two items that the court

found persuasive were: (1) he showed that he had been harassed based on his "adherence to his religious beliefs," and (2) in the "seven years of litigation, [the prison] had never questioned Moussazadeh's sincerity." *Id.*

In *Seegar,* the court was called to decide whether or not Seegar would qualify as a conscientious objector to the Universal Military Training and Service Act. 380 U.S. at 164. In that case, the court considered the sincerity of Seegar's religious beliefs. *Id.* at 185–87. The Supreme Court stated: "[t]he Court of Appeals also found that there was no question of the applicant's sincerity. He was a product of a devout Roman Catholic home; he was a close student of Quaker beliefs from which he said 'much of [his] thought is derived'; he approved of their opposition to war in any form; he devoted his spare hours to the American Friends Service Committee and was assigned to hospital duty." *Id.* at 186–87. By the facts given in that case, the court was able to decide that the beliefs held by Seegar were sincere.

In *Moussazadeh*, the court found that the beliefs of *Moussazadeh* were sincere because of the weight of the evidence presented, which included the fact that he was raised in a Jewish household, he had always stuck to his kosher diet, he had been harassed for sticking to his religious beliefs, and the prison had never questioned the sincerity of his beliefs. 703 F.3d at 791–92. *Moussazadeh* is distinguishable from this case because many of the facts that court found persuasive in determining sincerity are not as persuasive in this case. *Id.*; R. 20. In this case, Mr. Kelly converted to the Nation of Islam after two years of being in Tourovia Correctional Center and did so without any history of this being his religious belief. R. 3. Because of his sudden conversion, he was placed "on a watch-list of inmates who might potentially assume religious identities to cloak illicit conduct and assimilate into drug activity." R. 7. Other "motivation[s] for inmates feigning sincere religious beliefs" include "added

fellowship and rest days on special holidays that non-acknowledged religious members may not receive" and "special foods not afforded to other, non-vegetarian inmates." R. 20. Kelly's cellmate also "reported to a superintendent that Kelly was threatening him with violence if he did not provide Kelly with his dinner, which was meatloaf." R. 6. Furthermore, prison offícals discovered meatloaf hidden under Mr. Kelly's mattress during a subsequent search of his cell. R. 6. Therefore, when comparing Mr. Kelly to the inmate in *Moussazadeh*, it becomes apparent that Mr. Kelly lacks many of the facts found to be persuasive in a finding of true sincerity. For example, there is evidence in the record that Kelly did not stick to his diet, unlike Moussazadeh. 703 F.3d at 792; R. 5. Also, unlike the inmate in *Moussazadeh,* the correctional center in this case questioned Mr. Kelly's sincerity from the time that he converted to the Nation of Islam, since he originally professed he had no religious beliefs to the center for two years prior. 703 F.3d at 792; R. 6, 20.

The court in *Seegar* considered similar things as the court in *Moussazadeh.* 380 U.S. at 185–87; 703 F.3d at 791–92. The court in *Seegar* found that "there was no question of the applicant's sincerity. He was a product of a devout Roman Catholic home; he was a close student of Quaker beliefs from which he said 'much of [his] thought is derived'; he approved of their opposition to war in any form; he devoted his spare hours to the American Friends Service Committee and was assigned to hospital duty." 380 U.S. at 186–87. Here, there is no evidence that Kelly came from a Muslim household, or any other evidence suggesting where his religious belief derived from. R. 3–5. Unlike, the defendant in Seegar, there is no additional evidence in this case suggesting Mr. Kelly devoted his spare time practicing the beliefs of his faith–except for the facts that he was harassed about his beliefs and stuck to them, and that he was advocating for more services together as a religion. R. 3–5.

While the petitioner will argue *Reed v. Faulkner*, should apply in this case, this court should not find this argument persuasive. *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988). *Reed* states "the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere." *Id.* at 963. However, this court should be wary in applying this case because the rule established in *Reed* is limited in that it only establishes the extent to which the court should rely on evidence of backsliding in determining insincerity. *Id.* Here, the fact that Kelly was found backsliding on his diet is only some evidence contributing to TCC's determination that he was insincere in his religious beliefs. R. 20. While it is only some evidence, it is particularly persuasive evidence because it is "the prisoner's own actions [that] directly contradict the core of his claim." *Lute*, 2012 U.S. Dist. LEXIS 36179 at *19.

The facts presented in this case and evidence of sincerity fall short of what has been established to be necessary in a finding of sincerity as explored above. Taking this into consideration, in addition to the lower court's statement that "[h]ere the diet program did absolutely nothing to force Kelly's hand into threatening other inmates to give him their dinner. Kelly's choices were his own." R. 20. This court should find that Kelly's religious beliefs were not sincerely held and therefore the removal from his religious diet is not in violation of RLUIPA.

B. The Removal of Petitioner From His Diet, Due To Evidence of Backsliding, Is The Least Restrictive Means To Further The Compelling Interests Of Security, Administrative Efficiency, and Orderly Operation of the Institution.

Should this Court determine that Mr. Kelly's religious belief was substantially burdened, despite the evidence of his backsliding, the dietary policy reserving the right to remove an inmate caught backsliding on their diet is justified as it passes strict scrutiny. As laid out in Tourovia Directive #99, religious dietary requests "shall be accommodated to the extent practicable, within

the constraints of the Tourovia Correctional Center's a) security considerations, b) budgetary or administrative considerations, and c) the orderly operation of the institution." R. 26.

In *Borkholder v. Lemmon*, inmate Borkholder was property revoked from his diet when he voluntary ceased to follow the terms of his diet plan. *Borkholder v. Lemmon*, 983 F. Supp. 2d 1013, 1016 (D.C. Ind. 2013). The prison in that case had a similar policy to the prison in this case, and reserved the right to revoke an inmate's diet if the inmate "abuses or misuse the privilege by voluntarily consuming the self-prohibited foods." *Id.* at 1019. This is similar to the policy in this case because Tourovia Directive #99 also reserves the right to remove an inmate from their diet if it is determined that they were violating its terms. *See* Tourovia Directive #99. The court's reasoning in *Borkholder* is instructive, where it was held "such a policy is legitimately geared toward weeding out prisoner diet request that are insincere and are made simply to play gamed with prison staff." Here, the evidence that Mr. Kelly voluntarily violated his diet is offered by a cellmate, who gave a sworn statement relating to the incidents of violation, and prison personnel who discovered meatloaf under Mr. Kelly's mattress. Applying the reasoning in *Borkholder*, this court should find that the prisons policy reserving the right to remove Mr. Kelly from his diet, due to evidence of backsliding, is legitimately geared toward determining sincerity and properly allocating resources.

As illustrated above, respondent's need not come forward with evidence to prove the least restrictive means are those currently implemented. Respondent need not demonstrate that alternative means were attempted because the petitioner has failed to state any viable alternative methods of achieving the compelling interests addressed in the policy. *See* Tourovia Directive #99. Prison officials do not have to set up and ten shoot down every conceivable alternative method of accommodating the claimant's . . . complaint." *Nance v. Miser*, 2015 U.S. Dist.

LEXIS 79136, *1, *33 (D.C. Az. 2015). Mr. Kelly was removed from his religious diet when he violated it by his own volition. Such violation did not prohibit him from attending religious services–but he was, however, prohibited from attending religious service due the violent threats made to his cellmate.

CONCLUSION

Based on the foregoing, this Court should affirm the decision of the Twelfth Circuit that the prison's policies prohibiting night services and reserving the tight to remove an inmate from a religious diet, due to evidence of backsliding, do not violate RLUIPA. Both of the prison policies, Tourovia Directive #98 and #99 do not substantially burden the ability of Mr. Kelly to freely exercise his religion. Additionally, each policy satisfies strict scrutiny analysis by contributing to prison security, safety, and administrative order in the least restrictive means possible.