IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

No. 472-2015

SIHEEM KELLY,

Petitioner,

v.

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

Respondent,

ON CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES FROM THE TWELFTH CIRCUIT COURT OF APPEALS

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

I. Whether Tourovia Correctional Center's policy prohibiting nightly congregational prayer services to members of the Nation of Islam violates RLUIPA?

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

JURISDICTIONAL STATEMENT

The United Stated Court of Appeals for the Twelfth Circuit filed its opinion on June 1, 2015. The underlying action arose under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and 28 U.S.C. § 1331 granted the district court's jurisdiction. The jurisdiction of this Court to review the judgment of the Twelfth Circuit Court of Appeals is invoked under 28 U.S.C. § 1254(1). This Court granted certiorari.

STATEMENT OF THE CASE

Two years after arriving at Tourovia Correctional Center ("TCC"), Siheem Kelly ("Kelly") found salvation and converted to the Nation of Islam ("NOI"). Record ("R") at 3. Kelly meticulously followed prison protocol to change his religious affiliation and request his last name be changed to Mohammed. R. at 3. After receiving written approval from the Warden, Kelly became an acknowledged NOI member eligible for prayer services and religious diet. R. at 3.

In accordance with their religious faith, TCC's NOI members participate in a strict vegetarian diet, also known as Halal. R. at 3. While NOI is a minority religion constituting less than one percent of TCC's prison population, NOI has seven acknowledged members eligible for prayer services and religious diet. R. at 3. Though TCC closely monitors NOI members for illicit activity, current members are model prison citizens maintaining satisfactory behavioral standards and no record of violence within the prison. R. at 3.

NOI religious canons requiring members to pray five times per day prompted Kelly's request for religious accommodation. *Id.* Prayer times are obligatory, and must occur at (1) dawn, (2) early afternoon, (3) late afternoon, (4) sunset, and (5) late evening. R. at 4. Additionally, NOI practitioners must pray facing Mecca in a clean and solemn environment, wash themselves and their clothes the best they can, and secure a clean surface on which to kneel. R. at 4. Once commencing prayer, NOI members must not be interrupted for any reason. R. at 4.

Before August 1998, TCC allowed nightly prayer services conducted by prison volunteers. R. at 4. Yet, that summer members of Christian and Sunni religious groups allegedly engaged in inappropriate behavior. R. at 4. Rather than punish the few individuals responsible,

TCC banned all prisoners from attending nightly prayer services. R. at 4. Subsequently, if an official chaplain was not available, no prisoner could attend prayer service. R. at 4. Since chaplains only worked till 7:30 P.M., TCC's new policy permanently banned NOI members from practicing their mandatory evening prayer. R. at 4. Interestingly however, TCC already allows chaplains to conduct services after 7:30 P.M. on two occasions: (1) if the prisoner is near death or (2) the prisoner is unable to attend prayer services due to illness or physical incapability. R. at 4. If an NOI member is not near death or physically incapacitated, performing mandatory prayer after the evening meal outside their cells results in harsh punishment: solitary confinement. R. at 4.

To determine whether religious groups receive their requested prayer services, TCC considers demand, need, staff availability, and prison resources. *Id.* Regardless, TCC limits so called "counter-majoritarian" religions to only one prayer service a day, while majoritarian religions receive three. R. at 4.

In February 2013, Kelly petitioned TCC to change the overly restrictive prayer policies that prevented NOI members from practicing their mandatory evening prayer. R. at 5. Speaking on behalf of all NOI members at TCC, Kelly lobbied for an additional nightly prayer service after the last meal at 7:00 P.M., but to conclude before the final head count at 8:30 P.M. R. at 5. Citing prison policy prohibiting inmates from being anywhere other than their cells before final head count, TCC summarily denied Kelly's request. R. at 5. Yet, Tourovia Directive #98 does not prohibt inmates from being anywhere other than their cells before final head count. R. at 25. In fact, Tourovia Directive #98 actually allows prayer service prior to the final headcount at 8:30 P.M. R. at 25.

Additionally, TCC officials stated the three prayer services already provided were adequate to fulfill NOI's prayer requirements and, in any event, Kelly could pray in his cell in the presence of a toilet. R. at 5. In an attempt at conciliation, Kelly expressed willingness to compromise for at least one additional service in which to conduct his last two prayers of the day with NOI members. R. at 5. He additionally requested that the prayer service be conducted away from non-NOI inmates and with a chaplain of NOI religious affiliation. *Id.* TCC simply ignored Kelly's requests. R. at 5.

Undeterred, Kelly filed a grievance with TCC personnel explaining that he could no longer pray in his cell because his cellmate relentlessly ridiculed him and engaged in lewd behavior during Kelly's solemn prayers. R. at 5. Though NOI members regularly experienced such ridicule and distraction while performing prayers in their cells, TCC, again, swiftly denied Kelly's request. R. at 5. TCC's premised its denial on Kelly's inability to provide concrete proof of his cellmate's inappropriate conduct. R. at 5.

Kelly then filed a second grievance stating that forcing him to pray in the same room as a toilet was a direct violation of NOI dogma that prayers be conducted in a clean and solemn environment. R. at 5. As expected, Kelly's second grievance was promptly denied. R. at 5. Nonetheless, Kelly continued his quest for religious expression by filing a formal grievance with TCC's warden explicitly quoting versus from the *Holy Qur'an* explaining why nightly prayer was obligatory. R. at 5. The warden denied Kelly's request claiming that the nightly prayer violated prison policy and that Kelly failed to prove his cellmates alleged actions. R. at 5. Rather than accommodate Kelly's request, Warden Nichols simply suggested Kelly "request a transfer out of his cell to see if a new cellmate would be more respectful of his personal prayer time." R. at 6.

Hoping to solve this moral crisis, Kelly took Warden Nichols' advice to request a cell change. R. at 6. Yet, two weeks after Kelly's formal grievance, Kelly's new roommate alleged Kelly threatened him with violence if he failed to give Kelly his meatloaf dinner. R. at 6. TCC claimed that pursuant to Tourovia Directive #99, if an inmate bullies another inmate for their food or is caught breaking their respective religious diets, it may permanently remove the prisoner's religious diet. R. at 6. Yet, without concrete evidence to substantiate the cellmate's accusations, prison officials nonetheless permanently removed Kelly's religiously prescribed vegetarian diet. R. at 6. Prison officials claimed their actions were justified because meatloaf was found under Kelly's mattress. R. at 6. Though prison officials refused to act when Kelly lacked evidence to prove his cellmate regularly ridiculed him, TCC hastily removed Kelly's religious diet, and prevented him from attending prayer services for a month as punishment for the allegations. R. at 6. Although Kelly adamantly denied threatening his cellmate or violating his religious diet, his denials fell on deaf ears. R. at 6.

Rather than ingesting meat in direct violation of his religious beliefs, Kelly refused to eat. R. at 6. After only two days of Kelly's hunger strike, TCC officials forcibly tube-fed him. R. at 6. Unable to bear the pain and humiliation of force-feeding, and seeing no other options, Kelly begrudgingly ended his hunger strike and complied with eating very food that violated his religious beliefs. R. at 6.

PROCEDURAL HISTORY

After exhausting his administrative remedies, Kelly filed the underlying Complaint in the United States District Court for the Eastern District of Tourovia. R. at 2. Kelly petitioned the court for declaratory and injunctive relief, arguing TCC violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA") on two grounds. R. at 2. First, Kelly argued TCC

violated RLUIPA by denying his request for a nightly congregational service after the evening meal, but before final head count; second, that TCC wrongfully removed his religious diet program, forcing him to disobey NOI's dietary laws. R. at 2. TCC moved for summary judgment, alleging that, as a matter of law, Kelly failed to prove that his religious rights were substantially burdened, on both counts. R. at 2. The court, however, disagreed holding no dispute of material fact existed that TCC substantially burdened Kelly's religious exercise. R. at 15.

TCC appealed the district court's decision to the United States Court of Appeals for the Twelfth Circuit. R. at 16. The Twelfth Circuit reversed the district court's holding that TCC's prohibition of nightly prayer and its removal of Kelly's religious diet violated RLUIPA. R. at 16. Accordingly, the Court of Appeals vacated the district court's judgment as a matter of law. R. at 22. Kelly appealed to the Supreme Court of the United States. *Id.* This Court granted certiorari. R. at 22–23.

SUMMARY OF THE ARGUMENT

TCC's denial of Kelly's nightly prayer service and religious diet blatantly violated RLUIPA. First, TCC does not, because it cannot, craft a single argument that Kelly's actions were not sincere religious beliefs. Specifically, after TCC summarily denied Kelly's request for nightly prayer service, Kelly tried and tried again until exhausting all administrative remedies. Further, after TCC wrongfully removed Kelly from his religious diet, he stopped eating altogether rather than violate his religious beliefs. That Kelly would go to such lengths to vindicate his religious beliefs is incontrovertible proof his religious beliefs are sincere.

Second, TCC substantially burdened Kelly's religious exercise on both issues. Specifically, prison policies that force adherents to "chose" between one's religious beliefs and punishment constitutes a substantial burden. Here, TCC provided Kelly with three "viable"

options, each worse than the last: (1) pray in his cell under the threat his cellmate will mock him or use the toilet while Kelly undertook his solemn vows; (2) violate prison policy and be confined to solitary confinement; or worst of all, (3) violate his God's commandments. Thus, by forcing Kelly to "chose" between solitary confinement and following his religious beliefs, TCC substantially burdened Kelly's religious exercise.

Additionally, TCC required Kelly to choose between following his religious diet or enduring violent force-feeding. TCC's revocation presented Kelly with an impermissible choice—stop eating so as to not violate his religious diet or endure force-feeding against his will. Further, while the record is silent regarding what TCC force-fed Kelly, presumably, the force-feeding did not comply with Kelly's strict vegetarian diet. Thus, forcing Kelly to ingest food, in plain violation of his religious diet, substantially burdened his religious exercise.

Third, TCC failed to carry the onerous burden of proving its draconian policy was the least restrictive means of achieving a *compelling* government interest. TCC failed to provide any evidence supporting its conclusory statements that allowing prisoners to meet for prayer after dinner, but before final head count, would somehow endanger security. Given that NOI members are model prison citizens, their unblemished record severely undercuts TCC's claims that nightly prayer service and religious diet would somehow jeopardize prison security. Additionally, while controlling costs may be a compelling interest in limited circumstances, TCC failed to provide any evidence that requiring chaplains to stay an additional hour would create costs so substantial that TCC could not afford them.

Regarding Kelly's diet, TCC failed to present even a modicum of proof establishing how Kelly's religious diet would create violence or undermine prison security. Given that TCC provided NOI inmates with vegetarian meals for years without any incident of violence, TCC's

broad claims in security are severely undermined. Further, TCC's generalized concern that reinstating Kelly's diet will open the floodgates of inmates feigning religion to obtain "benefits" does not establish a compelling interest. Without any evidence that reinstating Kelly's diet will endanger security or cause hordes of inmates to feign religion, TCC fails to establish a compelling interest.

Finally, prison officials must set forth detailed evidence identifying precise failings in alternative courses of action to meet RLUIPA's exacting standards. Here, TCC failed to provide any evidence that it considered and rejected potentially less restrictive alternatives of achieving its objective. For instance, TCC banned nightly prayer for all inmates after the alleged inappropriate conduct of a few bad actors. Rather than punishing the few individuals responsible, TCC employed the nuclear option of permanently banning nightly prayer for all inmates. Yet, TCC failed to articulate why simply punishing the responsible actors was not the least restrictive means in achieving its objective. Further, TCC's own written policy permits prayer prior to 8:30 P.M., thus prohibiting Kelly and NOI members from conducting evening prayer prior to final head count cannot possibly be the least restrictive means of achieving its compelling interest. If the least restrictive means is one that does not sweep more broadly than necessary to promote the government's interest, then TCC's conduct surely does not qualify.

Further, TCC's permanent removal of Kelly's religious diet swept more broadly than necessary. In fact, TCC never bothered to explore or reject a single alternative, summarily deciding to employ the harshest option of permanently revoking Kelly's diet. At a minimum, an incremental punishment scheme, rather than permanent ban, would have been a less restrictive means of achieving its objective. TCC never looked beyond its own restrictive policy, and thus failed to meet the demanding least restrictive means test.

ARGUMENT

TCC's denial of both the nightly congregational service and religious diet substantially burdened Kelly's religious exercise and thereby violated RLUIPA. The desire among inmates to engage in religious exercise is widespread throughout the United States: about half of all inmates attend religious services at least six times per month. *See* Thomas O'Connor & Michael Perreyclear, *Prison Religion in Action and Its Influence on Offender Rehabilitation*, 35 J. OFFENDER REHAB. 11, 28 (2002). Accordingly, Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA") to protect the religious rights of prisoners. *See* 42 U.S.C. § 2000cc-1(a)(1). Under RLUIPA, "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government carries the heavy burden of establishing the restriction is "the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). In passing RLUIPA, Congress intended to eradicate "frivolous or arbitrary" barriers impeding institutionalized persons' religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 716 (2005). TCC's policies epitomize the very conduct Congress intended to root out.

To prevail under RLUIPA, Kelly must demonstrate (1) he engaged in sincere religious exercise, and (2) TCC's policies substantially burdened his religious exercise. *Smith v. Allen*, 502 F.3d 1255, 1276 (11th Cir. 2007); *see also Thiry v. Carlson*, 78 F.3d 1491, 1494–95 (10th Cir. 1996). After establishing a substantial burden, TCC then bears the heavy burden of demonstrating the challenged policy is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000cc-1(a), 2000cc-2(b). Since TCC failed to meet this onerous burden, this Court should reverse the Twelfth Circuit's decision and reinstate the trial court's judgment as a matter of law in Siheem Kelly's favor.

I. KELLY'S REQUEST FOR NIGHTLY PRAYER SERVICE AND RELIGIOUS DIET ARE BOTH SINCERE RELIGIOUS EXERCISES AND THUS PROTECTED UNDER RLUIPA.

Under RLUIPA, "[a]ny exercise of religion, whether or not compelled by, or central to, a system of religious belief" constitutes "religious exercise." 42 U.S.C. § 2000cc-5(7)(A). Religious exercise includes not only beliefs but "the performance of...[p]hysical acts [such as] assembling with others for a worship service…." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990); *see also Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) (defining prayer as a "quintessential religious practice"). While an inmate need not prove the contested practice is compelled by or even central to his religion, he must show that the belief giving rise to that practice is sincere. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). Further, courts afford great deference to an inmate's declaration and should not second-guess these inward beliefs as sincerity is determined by the significance of the belief to the adherent. *Shaheed-Muhammad v. Dipaolo*, 393 F. Supp. 2d 99, 110 (D. Mass. 2001).

A. Kelly's Unwavering Quest for Nightly Congregational Prayer Unquestionably Establishes the Sincerity of His Religious Beliefs.

RLUIPA protects any religious exercise, so long as evidence exists that an adherent's beliefs are sincere. 42 U.S.C. § 2000cc-5(7)(A). Here, Kelly's conduct unquestionably proves the sincerity of his beliefs. First, after TCC eliminated the evening prayer service, Kelly organized his fellow NOI members and relentlessly petitioned prison officials for nightly congregational prayer. As the district court aptly noted, "[i]nsincere inmates might not take the initiative to challenge the prison administration with this type of demand." R. at 10. Second, Kelly was the only NOI member to file a grievance with the prison. R. at 10. Accordingly, the fact that he was the only NOI member to persistently petition TCC for relief shows not only that he cared deeply,

but that he took a leadership role with matters related to his faith. Further, after his requests were summarily denied, Kelly tried and tried again until exhausting all administrative remedies. Indeed, TCC cannot craft a single argument that Kelly's request for nightly prayer were not sincerely held religious exercises.

B. A Single Unfounded Allegation of "Backsliding" Cannot Negate the Sincerity of Kelly's Religious Beliefs.

No one is perfect, and a single alleged infraction cannot negate the sincerity of Kelly's religious beliefs. *See Kuperman v. Warden, N.H. State Prison*, 2009 WL 4042760, at *5 (D.N.H. Nov. 20, 2009). Prison officials cannot prove insincerity by simply pointing to a single instance that failed to conform to the adherent's religion. *See Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 714 (1981). For example, in *Borkholder v. Lemmon*, the prison terminated the inmates religious diet for "voluntarily eating self-prohibited foods." 983 F. Supp. 2d 1013, 1019 (N.D. Ind. 2013). Prison officials justified their actions by claiming Borkholder violated his vegetarian religious diet by purchasing chicken-flavored ramen noodles—even though Borkholder never ate the flavor packet. *Id.* at 1017–18. The court held that a single discarded flavor packed could not serve as "conclusive evidence that his beliefs are insincere." *Id.* at 1019.

Here, TCC cannot seriously claim Kelly's beliefs are insincere because of a single unfounded allegation of "backsliding." Merely pointing to a single piece of meatloaf that Kelly unwaveringly denied was his is insufficient to establish insincerity. In fact, TCC officials never witnessed Kelly break his religious diet, and lacked any evidence the meatloaf in question was his. Regardless, even if the meatloaf belonged to Kelly, isolated infractions are insufficient to disprove an inmate's sincerity. As further evidence of Kelly's sincerity, after TCC wrongfully removed Kelly from his religious diet, rather than violate his religious beliefs, he stopped eating altogether. That Kelly would go to such lengths is irrefutable proof his beliefs are sincere. Thus,

TCC cannot seriously argue that a man who would rather starve than violate his religious beliefs is not sincere.

II. TCC'S DENIAL OF BOTH THE NIGHLY PRAYER SERVICE AND RELIGIOUS DIET SUBSTANTIALLY BURDENED KELLY'S RELIGIOUS EXERCISE.

While RLUIPA itself does not define "substantial burden," this Court held that forcing an inmate to "engage in conduct that seriously violates [his] religious beliefs" constitutes a substantial burden. *Holt*, 135 S. Ct. at 862 (quoting *Burwell v. Hobby Lobby Stores, Inc*., 134 S. Ct. 2751, 2775 (2014)). In fact, a substantial burden need not actually force a litigant to change his practices; a violation may occur "where the state … denies [an important benefit] because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005) (quoting *Thomas*, 450 U.S. at 717–18).

A. TCC's Denial Of Nightly Congregational Prayer Substantially Burdened Kelly's Religious Exercise.

By denying Kelly's reasonable requests for nightly congregational prayer, TCC forced Kelly to engage in conduct that seriously violated his religious beliefs. *See Holt*, 135 S. Ct. at 862. TCC further substantially burden Kelly's religious exercise by placing substantial pressure on him to modify his behavior and thereby violate his religious beliefs. *See Warsoldier*, 418 F.3d at 995 (holding that requiring a Native American inmate cut his hair was a substantial burden); *see also Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007) (holding that prison's 10-book limitation substantially pressured the plaintiff to violate his beliefs).

1. Forcing Kelly to chose between punishment and following his religious beliefs substantially burdened his religious exercise.

Prison policies that force adherents to "chose" between following one's religious beliefs and punishment creates a substantial burden. For example, in *Holt*, a Muslim prisoner challenged the prison's grooming policy as denying his reasonable religious accommodation. 135 S. Ct at 856. The challenged policy prevented Holt from growing more than a half-inch beard. *Id.* at 857. This Court held that *any* threat of "serious disciplinary action" in response to following one's religious beliefs constitutes pressure to conform. *Id.* at 862. In no uncertain terms, this Court held that "[b]ecause the grooming policy puts petitioner to this choice, it substantially burdens his religious exercise." *Id.*

Additionally, in *Warsoldier*, prison regulations restricted inmate hair length to three inches. 418 F.3d at 992. Warsoldier's religious belief, however, required that hair only be cut "upon the death of a close relative." *Id.* The prison argued its policy did not substantially burden Warsoldier's religious exercise because he was not "forced" to cut his hair. *Id.* at 992, 996. Rather, the prison graciously gave Warsoldier a choice between two options: (1) cut his hair, or (2) remain confined in his cell, work additional hours, receive less time credits, less recreation time, fewer privileges, expulsion from vocational classes, and less money to spend at the prison store. *Id.* The Ninth Circuit easily rejected this Hobson's Choice, holding that punishments which coerce prisoners to forgo their religious beliefs represent a substantial burden. *Id.* at 996.

Here, TCC's threat of solitary confinement substantially burdened Kelly's religious exercise. As in both *Holt* and *Warsoldier*, TCC threated Kelly with severe "serious disciplinary action" should he disobey prison policy by praying outside his cell. *See Holt*, 135 S. Ct at 862. TCC provided Kelly with three "viable" options, each worse than the last: (1) pray in his cell

under the threat his cellmate will mock him or use the toilet while Kelly undertook his solemn vows; (2) violate prison policy and be confined to solitary confinement; or worst of all, (3) violate his God's commandments. Therefore, because TCC's threatened Kelly with serious disciplinary action should he decide to follow his religious beliefs, TCC substantially burdened Kelly's religious exercise.

2. By denying accommodations already allowed under Tourovia Directive #98, TCC substantially burdened Kelly's religious exercise.

A governmental action or regulation does not rise to the level of a substantial burden on religious freedom if it merely prevents the adherent from either enjoying some benefit that is *not otherwise generally available* or prevents the adherent from acting in a way that is not otherwise generally allowed. *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (emphasis added). Additionally, in "[p]roperly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries… and they must be satisfied that the Act's prescriptions are and will be administered neutrally among different faiths." *Cutter*, 544 U.S. at 720.

Here, TCC substantially burdened Kelly's religious exercise by denying accommodations already allowed under Tourovia Directive #98. In applying the above rule, the Twelfth Circuit noted that "Kelly, if granted a nightly congregational prayer, will certainly be granted the benefit of an extra service, **exemption from the final count, and the unprecedented perk of having a different routine from other inmates.** R. at 17. (emphasis added). In its application, the Twelfth Circuit erroneously misstated the facts to make Kelly's predicament fit neatly within the rule. First, at no point did Kelly request an exemption from the final headcount. It is uncontested that Kelly petitioned TCC for an additional nightly prayer service *after* the last meal at 7:00

P.M., **but to conclude before the final head count at 8:30 P.M.** R. at 5. While TCC claims its policy prevents any inmate from going anywhere other than their cell after the evening meal at 7:00 P.M., Tourovia Directive #98 does not support that proposition. R. at 25. In fact, Directive #98 states "[p]rayer services shall not be allowed *after* the last inmate head count at 8:30 P.M." R. at 25 (emphasis added). Thus, in direct contrast to TCC claims and the Twelfth Circuit's findings, Kelly did not seek an exception from the final head count. On the contrary, Kelly simply requested TCC follow its own written policy permitting prayer prior to the 8:30 P.M. final headcount.

Second, Kelly's requested nightly prayer was in no way an "unprecedented perk." While the Twelfth Circuit claimed "[t]his additional prayer service, if not granted to all faiths, would create danger of violence between religious group members…." R. at 18. TCC failed to provide any evidence to support this claim. In fact, TCC's policy already allows majoritarian religions the perk of **three** congregational prayer times, while its draconian policy limits "counter-majoritarian" religions to one. R. at 4. Yet, the additional prayer services, though not granted to all faiths, has not resulted in the predicted violence between religious groups. That TCC already provides perks to certain religions without a single instance of violence severely undercuts the Twelfth Circuit's findings. Thus, Kelly's request was not a "unprecedented perk" and denying Kelly's request established a substantial burden.

3. Kelly's ability to pray in his cell is irrelevant to whether denying nightly prayer service substantially burdened Kelly's religious exercise.

Unlike the First Amendment, RLUIPA protects more than the right to practice one's faith; it protects the right to engage in specific, meaningful acts of religious expression in the absence of a compelling reason to limit the expression. *Meyer v. Teslik*, 411 F. Supp. 2d 983, 989

(W.D. Wis. 2006). Under *Turner v. Safley*, the availability of alternative forms of expression become relevant only after prison officials articulate a legitimate governmental interest in limiting or prohibiting otherwise protected conduct. 482 U.S. 78, 90 (1987). As the court in *Beerheide v. Suthers* explained:

> It is one thing to curtail various ways of expressing belief, for which alternative ways of expressing belief may be found. It is another thing to require a believer to defile himself, according to the believer's conscience, by doing something that is completely forbidden by the believer's religion.

286 F.3d 1179, 1192 (10th Cir. 2002).

That alternative means of practicing one's faith are available is irrelevant to determining whether TCC's policy substantially burdens Kelly's religious exercise. For example, in *Meyer*, the prison prohibited the plaintiff from attending Native American religious services. 411 F. Supp. 2d at 989. The prison argued the denial did not substantially burden the plaintiff's religious exercise because he was free to pray in his cell. *Id.* The court held plaintiff's ability to pray in his cell was irrelevant to the question of whether denying his attendance at Native American religious services substantially burdened his religious exercise. *Id.*

Here, that Kelly could potentially pray in his cell before a toilet is irrelevant to whether denying nightly prayer substantially burdened his religious exercise. While petitioning TCC for relief, Kelly explained that "praying in a cell where a toilet was only a few feet away was a disgrace to Allah's preference that he pray in a clean and solemn environment with other members of his faith." R. at 5. Like in *Meyer*, that Kelly had an "alternative" means of praying is completely irrelevant to whether TCC substantially burdened his religious exercise. Further, while the Twelfth Circuit implied that Kelly's refusal to pray before a toilet was not "central to"

NOI dogma, RLUIPA expressly states that "[a]ny exercise of religion, whether or not compelled by, or central to, a system of religious belief" constitutes "religious exercise." 42 U.S.C. § 2000cc-5(7)(A). Accordingly, the fact that Kelly could arguably pray before an unsanitary toilet is not, by itself, justification for forbidding nightly congregational prayer services.

B. TCC's Permanent Removal of Kelly's Religious Diet After a Single Unsubstantiated Allegation of Backsliding Substantially Burdened Kelly's Religious Exercise.

Courts consistently hold that refusing to provide religious diets to sincere believers cannot withstand RLUIPA's scrutiny. *See, e.g.*, *Shakur v. Schiriro*, 514 F.3d 878 (9th Cir. 2008); *see also Nelson v. Miller*, 570 F.3d 868 (7th Cir. 2009) (holding that prison's denial of vegetarian diet on Fridays substantially burdened the inmate's religious exercise); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (holding that excluding prisoner from special Ramadan meals is a substantial burden); *Madison v. Riter*, 240 F. Supp. 2d 566, 569 (W.D. Va. 2003) (holding denial of kosher diet mandated by prisoner's religion substantially burdened his religious exercise).

1. By forcing Kelly to contravene his religious beliefs, TCC substantially burdened his religious exercise.

Prison policies that force inmates to "chose" between following their religious diets or force-feeding create a substantial burden. *See Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1317 (10th Cir. 2010). For example, in *Abdulhasseb*, prison officials' refused plaintiff's request for a Halal diet, essentially requiring him to either eat food that violated his religious tenets, or starve. *Id.* at 1316–17. The court held that the prison's "failure to provide a halal diet either prevents Abdulhaseeb's religious exercise, or, at the least, places substantial pressure on Abdulhaseeb not to engage in his religious exercise…." *Id.* at 1317.

Additionally, physically forcing an inmate to violate his religious diet constitutes a substantial burden. For example, in *Holland v. Goord*, the court held "there can be no debate" that directly ordering an inmate to drink water, in plain violation of his Ramadan fast, substantially burdened his religious exercise. 758 F.3d 215, 221–22 (2014). Though officials argued a urine sample necessitated the command to drink water, the court held forcing an inmate to "act in contravention of his beliefs" was a substantial burden. *Id.*

Here, TCC required Kelly to choose between following his religious diet or enduring violent force-feeding. Like *Abdulhasseb*, TCC's revocation presented Kelly with an impermissible choice: face starvation while refusing to violate his religious diet or endure excruciatingly painful force-feeding. Rather than allowing Kelly to decide his fate, TCC officials made the choice for him and forcefully fed him against his will. R. at 6. Accordingly, like *Abdulhasseb*, TCC's policy either prevented Kelly's religious exercise altogether, or, at the least, substantially burdened it.

Furthermore, TCC physically forced Kelly to violate his religious diet. While the record is silent regarding what TCC force-fed Kelly, presumably, the force-feeding did not comply with Kelly's strict vegetarian diet. Like *Holland*, "there can be no debate" that forcing Kelly to ingest food, in plain violation of his religious diet, substantially burdened his religious exercise. Though TCC may argue it force-fed Kelly to save him from starvation, one simply cannot starve after only two days without food. Thus, forcing Kelly to act in direct contravention of his beliefs substantially burdened his religious exercise.

2. TCC's threat of force-feeding pressured Kelly to violate his religious beliefs and thereby substantially burdened his religious exercise.

Even if a prison does not physically force an inmate to violate his religious diet, a substantial burden may still exist. For example, in *Shakur v. Schiriro*, the court rejected the prison's argument that a substantial burden did not exist because the prison "d[id] not require or encourage [Shakur] to eat non-Halal meat." 514 F.3d at 888. Notwithstanding the prison's proffered justification, the court held "[t]he extent to which the prison's policies pressured Shakur to betray his religious beliefs is another factual dispute to be resolved by the district court" on remand. *Id.* at 888–89. Thus, even without physically forcing an inmate to violate his religious diet, pressuring him to do so is a substantial burden.

Here, even if TCC did not require or encourage Kelly to eat meat in violation of his religious belief (though Kelly's adamantly denies this ever occurred), the threat of force-feeding substantially burdened his religious exercise. Like *Shakur*, that TCC did not force Kelly to violate his own beliefs does not somehow negate the substantial burden placed on Kelly's religious exercise. Kelly was only *accused* of violating prison policy, and TCC lacked any concrete proof to substantiate his cellmate's allegations. Further, TCC's threat of force-feeding substantially pressured Kelly to violate his beliefs by requiring him to eat meat, or be subjected to violent force-feeding. Thus, even without physically forcing Kelly to violate his religious diet, the threat of force-feeding established a substantial burden.

III. TCC FAILED TO ARTICULATE A COMPELLING INTEREST THAT SATIFIES RLUIPA'S EXACTING STANDARDS.

Once an inmate demonstrates a prison policy substantially burdens his religious exercise, prison officials then bear the onerous burden of proving its policy is the least restrictive means of achieving a *compelling* government interest. *E.g., Holt*, 135 S. Ct. at 863 (citing 42 U.S.C. § 2000cc–1(a)) (emphasis added). Prison policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations, however, are not *compelling* interests and thus do not satisfy RLUIPA's rigorous requirements. 146 CONG. REC. S7774–75 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA)). Additionally, courts must analyze an asserted compelling interest in light of the specific circumstances available at the prison. *Koger v. Bryan*, 523 F. 3d 789, 800 (7th Cir. 2008). In other words, a prison must put forth specific facts supporting the reasoning behind the challenged policy. Thus, because RLUIPA requires a "more focused inquiry" into a policy's impact on a particular person, reliance on "broadly formulated interes[ts]" is insufficient. *See Holt*, 135 S. Ct. at 863.

While courts recognize a variety of compelling interests, conclusory statements regarding a proffered compelling interests do not satisfy RLUIPA. These interests include stanching the flow of contraband, *Holt*, 135 S. Ct. at 863; maintaining prison security, *Spratt v. R.I. Dep't Of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007); maintaining order, discipline, and safety, *see Cutter*, 544 U.S. at 721–24; and controlling costs, *Luckette v. Lewis*, 883 F.Supp 471, 480 (D. Ariz. 1995). Yet, regardless of the compelling interest a prison identifies, unquestioned deference to prison official's expertise "does not justify the abdication of the responsibility, conferred by Congress, to apply RLUIPA's rigorous standard." *Holt*, 135 S. Ct. at 864. Thus, prisons must do more than offer conclusory statements to establish a legitimate compelling interest.

A. TCC's Stated Interests in Prohibiting Nightly Congregational Prayer Services Are Premised on Nothing More than Speculation and Exaggerated Fears and Thus Do Not Satisfy RLUIPA's Rigorous Standards.

1. Without more, merely claiming an interest in "security" is insufficient to satisfy RLUIPA.

Kelly anticipates TCC will argue that prison administrators must be accorded deference regarding prison security, but RLUIPA does not permit such unquestioned deference. Merely claiming a compelling interest in security, without more, falls short of RLUIPA's demanding standards. For example, in *Murphy v. Mo. Dept. of Corr.*, a prisoner brought an RLUIPA claim alleging the denial of privileges given to other religious groups. 372 F.3d 979, 982 (8th Cir. 2004). As expected, the prison claimed a compelling interest in security. The *Murphy* court held, however, that while prisons generally have a compelling interest in security, the prison cannot simply assert a security concern—they must prove a security concern—to meet RLUIPA's exacting standards. *Id.* at 988. In other words, prison officials must do more than offer conclusory statements premised on speculation, exaggerated fears, or post-hoc rationalizations to establish a compelling interest. *See id.* at 989. Thus, TCC cannot outmaneuver RLUIPA by merely stating the obvious: that prisons have an interest in security.

Additionally, by failing to provide any evidence supporting the challenged policy, TCC failed to establish a compelling interest. For example, in *Spratt*, the prison put forth only a single affidavit to support the proposition that inmate preaching was detrimental to prison security. 482 F.3d at 40. The court noted the affidavit did not discuss any studies or research that inmate preachers were harmful to prison security. *Id.* The affidavit also failed to cite any past instances where inmates in religious leadership positions endangered security. *Id.* Further, the court noted that the plaintiff's seven-year unblemished track record severely cast doubt on the link between

plaintiff's activities and institutional security. Accordingly, the court held that without concrete proof the request would hamper prison security, it would not "rubber stamp or mechanically accept the judgments of prison administrators." *Id.* (quoting *Lovelace*, 472 F.3d at 190).

Here, TCC offers nothing more than conclusory statements that they have a compelling interest in security. First, as in *Spratt*, TCC did not provide a single study that allowing prisoners to meet for prayer after dinner, but before final head count, would endanger security. Second, because NOI members are model prison citizens without a single record of violence within the prison, their unblemished record severely cast doubt on TCC's claims that nightly prayer service would jeopardize prison security. TCC's denial of nightly congregational services is therefore premised on nothing more than fears unsupported by facts. R. at 3. Consequently, without any proof that allowing the nightly prayer would threaten prison security, this Court cannot "rubber stamp or mechanically accept the judgments of prison administrators." *See Lovelace*, 472 F.3d at 190.

2. Though controlling costs is arguably a compelling interest, allowing nightly congregational prayer would not create costs so substantial that TCC could not afford them.

Controlling costs is compelling interest only if the additional costs are so substantial that the institution cannot afford them. *Luckette*, 883 F.Supp at 480. In fact, RLUIPA explicitly states that a prison may be required "to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." 42 U.S.C. § 2000cc–3(c); *see also Cutter*, 544 U.S. at 723 (discussing "consideration of costs and limited resources"); *Holt*, 135 S. Ct. at 866 (discussing a hypothetical compelling interest in "cost control or program administration").

Further, unfounded claims of added costs are insufficient to establish a compelling interest. For example, in *Shakur*, the prison failed to provide Shakur with a diet that conformed to his religious beliefs. 514 F.3d at 881–82. Prison officials refused, citing costs. *Id.* at 889. Specifically, the prisons provided an affidavit that it would cost $1.5 million annually to provide the requested diet to all Muslim inmates. *Id.* The Ninth Circuit, however, noted the affidavit failed to offer any description of the financial analysis supporting its conclusion. *Id.* at 889–90. Because of its conclusory and unfounded nature, the court held that without more, the affidavit was insufficient to conclude the policy was in furtherance of a compelling government interest. *Id.*

Here, not only are the added costs in providing nightly prayer negligible, but TCC's unfounded claims of added costs are insufficient to establish a compelling interest. First, TCC chaplains are already required to work until 7:30 P.M. R. at 24. While the record is silent regarding chaplain salaries, requiring chaplains to stay an additional hour would be a negligible expense. Further, like *Shakur*, TCC failed to provide any evidence that requiring chaplains to stay an additional hour would create costs so substantial that TCC could not afford them. Second, TCC chaplains are already required to work after 7:30 P.M. if (1) the prisoner is either near death or (2) **the prisoner is unable to attend prayer services due to illness or physical incapability.** R. at 24. It follows logically that if Kelly were permanently incapacitated he would receive chaplain services after the evening meal—every single day. In other words, TCC already anticipates—and likely budgets for—the possibility that chaplains could work after 7:30 P.M. every day. Thus, TCC cannot, in good faith, argue permitting nightly prayer would add substantial expense.

B. TCC's Supposed Interests in Permanently Removing Kelly's Religious Diet Are Purely Speculative and Thus Fail RLUIPA's Rigorous Standards.

Under RLUIPA, "prison officials cannot simply use the words 'security' and 'safety' and expect that their conduct will be permissible." *Singh v. Goord*, 520 F.Supp 2d 487, 499 (S.D.N.Y. 2007). Instead, officials must specifically explain how granting or denying religious meal accommodations would cause violence or undermine prison security. *Id.*

1. Merely claiming an interest in security, without more, does not somehow establish a compelling interest.

Unsupported claims that meal favoritism could create security problems is not a valid compelling interest. *See Wisconsin v. Yode*r, 406 U.S. 205, 224 (1972). Providing religious diets cannot possibly implicate any security concerns. *Luckette*, 883 F.Supp at 481. Additionally, without any evidence that religious diets cause safety or security concerns, courts regularly dismiss speculative such "security risks" as not sufficiently compelling interests. *Toler v. Leople*, 2008 WL 926533, *3 (E.D. Mo. Apr. 3, 2008). Thus, absent evidence that fulfilling religious diet accommodations endanger prison security, merely asserting a security interest does not somehow create a compelling interest.

Here, TCC failed to present any evidence that Kelly's religious diet would undermine prison security. TCC cannot simply hide behind magic words like "threats," "safety," or "security" and expect its draconian policies will meet RLUIPA's standards. Given that TCC provided NOI members vegetarian meals for years without any instance of violence, TCC's security claims are severely undercut. R. at 3. Therefore, without any evidence that Kelly's religious diet would create security concerns, TCC's unsubstantiated security risk are too attenuated to create a compelling interest.

2. Without any evidence that reinstating Kelly's religious diet would "open the floodgates," TCC cannot establish a compelling interest.

Merely claiming that accommodating Kelly's religious diet would open the floodgates, without supporting evidence, does not create a compelling interest. Even if reinstating Kelly's religious diet somehow opened the floodgates to similar requests, under RLUIPA, prisons are obligated to consider those requests. *Love v. Reed*, 216 F.3d 682, 691 (8th Cir. 2000). Nonetheless, this Court already doubts that dietary accommodations could ever be interpreted by other prisoners as a luxury that would open the floodgates. *See e.g.*, *Cutter*, 544 U.S. at 709 n.10. In fact, the Eighth Circuit similarly dispatched an argument that providing an inmate with a peanut butter and bread diet would "open a floodgate of similar requests." *Love*, 216 F.3d at 691. Hence, unsubstantiated claims that reinstating Kelly's diet would open the floodgates does not create a compelling interests.

Here, TCC's generalized concern that reinstating Kelly's diet will open the floodgates of inmates feigning religion to obtain "benefits" does not establish a compelling interest. First, even if fulfilling Kelly's religious diet motivated other inmates to make similar requests, RLUIPA provides a straightforward mechanism to judge and reject insincere requests. Second, as this Court already noted, its doubtful that vegetarian accommodations could ever be interpreted by other prisoners as a luxury that would open the floodgates. Thus, without any evidence that reinstating Kelly's diet will cause hordes of inmates to feign religion, TCC fails to establish a compelling interest.

IV. BY FAILING TO CONSIDER AND REJECT LESS RESTRICTIVE ALTERNATIVES OF ACHIEVING ITS OBJECTIVE, TCC FAILED TO SATISFY RLUIPA'S RIGOROUS STANDARDS.

A least restrictive means is one that does not sweep "more broadly than necessary to promote the government's interest." *Casey v. City of Newport*, 308 F.3d 106, 114 (1st Cir. 2002).

The least restrictive means standard is exceptionally demanding. *Hobby Lobby*, 134 S. Ct. at 2780. It requires the government show that it lacks other "means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Id.* In other words, if a less restrictive means exists through which the Government may achieve its goal, the Government must use it. *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 815 (2000). Accordingly, by failing to consider and reject other means of achieving its objective, TCC failed to meet its burden. *See Spratt*, 482 F.3d at 41.

A. TCC Utterly Failed to Consider And Reject Potentially Less Restrictive Means Of Achieving Its "Compelling" Interest.

TCC failed to prove they "actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier*, 418 F.3d at 999. Specifically, prison officials must set forth detailed evidence identifying precise failings in alternative courses of action. *Id.* at 1000. Although RLUIPA does not "require prison administrators to refute every conceivable option..., their rejection [of competing alternatives] should generally be accompanied by some measure of explanation." *Spratt*, 482 F.3d at 41 n.1. Accordingly, TCC must not only explain why they denied the exemption, but prove that denying the exemption was the least restrictive means of furthering its compelling interest.

Here, TCC failed to provide any evidence that it considered and rejected potentially less restrictive alternatives that would achieve its objective. Notably, TCC banned nightly prayer for all inmates after the alleged inappropriate conduct of a few bad actors. R. at 4. Rather than punishing the few individuals responsible, TCC employed the nuclear option of banning nightly prayer for all inmates. Yet, TCC failed to articulate why simply punishing the responsible actors was not the least restrictive means in achieving its objective. If the least restrictive means is one

that does not sweep more broadly than necessary to promote the government's interest, then surely banning nightly prayer all together does not qualify. Thus, TCC attempts to circumvent RLUIPA without providing any evidence it considered the simplest and least restrictive means available.

Additionally, TCC failed to prove how prohibiting prayer after the evening meal, but before final head count at 8:30 P.M. was the least restrictive means of achieving its compelling interest. TCC claims its policy prevents any inmate from going anywhere other than their cell after the evening meal at 7:00 P.M. R. at 5. Yet, Tourovia Directive #98 states "[p]rayer services shall not be allowed after the last inmate head count at 8:30 P.M." R. at 24. Indeed, TCC's own written policy permits prayer prior to 8:30 P.M., thus prohibiting Kelly from conducting evening prayer prior to final head count cannot possibly be the least restrictive means of achieving its compelling interest. TCC does nothing more but offer this Court conclusory statements premised on speculation, exaggerated fears, or post-hoc rationalizations. Therefore, because TCC failed to provide any evidence that banning nightly prayer before final headcount was the least restrictive means, it failed to meet RLUIPA's demanding standards.

B. TCC Puts Forth No Evidence Permanently Withdrawing Kelly's Religious Diet Was the Least Restrictive Means of Achieve its Alleged Interests.

TCC's policy to permanently remove Kelly from his religious diet swept more broadly than necessary, thus failing RLUIPA's least restrictive means test. *Casey*, 308 F.3d at 114. While a prison need not refute every conceivable alternative, prisons must put forth evidence of considered and rejected alternatives to satisfy RLUIPA. *Spratt*, 482 F.3d at 41 n.11. For example, in *Murphy*, officials cited possible prison riots as a compelling interest to deny an inmate's religious exercise. 372 F.3d at 982. Because officials failed to present any evidence the

policy was the "least restrictive means necessary to preserve its security interest," the court held the prison failed to establish its policy was the least restrictive means. *Id.* at 989. Thus, permanently removing an inmate's religious diet without considering less restrictive alternatives defies a prison's duty under RLUIPA. *Warsoldier*, 418 F.3d at 999.

Here, permanently removing Kelly's religious diet after a single alleged infraction cannot possibly be the least restrictive means of achieving TCC's interest. Specifically, Tourovia Directive #99 permits permanent revocation of diet privileges if an inmate gives officials "adequate reason" to believe he has not followed his religious diet. R. at 26. Yet, permanently removing Kelly's religious diet based on a single *alleged* infraction cannot possibly be an "adequate reason" nor the least restrictive means. For example, in *Kuperman*, prison policy required automatic suspension if an inmate consumed or possessed food in violation of his religious diet. *Kuperman*, 2009 WL 4042760, *2. The court, however, held the prison may not suspend dietary privileges "based on isolated dietary violations." *Id.* at *14. Rather than automatic suspension, the court noted that a possible less restrictive means would require an inmate's first three diet infractions be punishable by counseling. *Id.* Further, an inmate's privileges could be entirely revoked only after four violations within a two-year period. *Id.* Thus, an incremental punishment program is a less restrictive means of achieving TCC's interest.

Here, TCC simply failed to employ, or even consider, less restrictive means of achieving its interests. Assuming TCC even stated a compelling interest, it could have achieved its objective with an incremental punishment program. Indeed, TCC put forth no evidence it even considered the efficacy of an incremental punishment program, or other potentially less restrictive means. Like *Kuperman*, TCC cannot permanently revoke Kelly's religious diet premised solely on a single unsubstantiated infraction. At a minimum, RLUIPA required TCC

consider the effectiveness of an incremental punishment program and provide this Court sufficient reasons for rejecting it. Since TCC failed to even consider the efficacy of less restrictive alternatives, TCC failed to carry the onerous burden of proving the challenged policy was the less restrictive means of accomplishing its interests.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the United States Court of Appeals for the Twelfth Circuit and reinstate the trial court's judgment as a matter of law in Siheem Kelly's favor.

Respectfully submitted,
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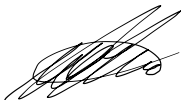
APENDIX I

CERTIFICATION FORM

We hereby certify that the Petitioner's brief of Team 14 is the work product solely of the undersigned and that the undersigned has not received any faculty or other assistance, except as provided for by the Competition Rules, in connection with the preparation of this brief.

Michael Valiente,  3/5/2016

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Mackenzie Warren Mackenzie Warren 3/5/2016

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