In the Supreme Court of the United States

SIHEEM KELLY "MOHAMMED,"
PETITIONER,

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT
NO. 472-2015

BRIEF FOR THE PETITIONER

Team Number 15

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II. Did the Twelfth Circuit Court of Appeals incorrectly hold that Tourovia Correctional Center did not violate Mr. Mohammed's rights under RLUIPA by reserving the right to remove a prisoner from a religious diet or fast due to evidence of backsliding?

JURISDICTIONAL STATEMENT

This case asserts a claim pursuant to the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), 42 U.S.C. §§ 2000cc (2012). The Supreme Court of the United States has jurisdiction over the current appeal under 28 U.S.C. § 1254 (1) (2012). This Court granted Petitioner Writ of Certiorari on July 1, 2015.

STATEMENT OF THE CASE

Statement of the Facts

In 2000, the state imprisoned Siheem Kelly "Mohammed" at Tourovia Correctional Center ("TCC"). R. 3. In 2002, Mr. Kelly converted to the Nation of Islam ("NOI"), a subgroup of the Sunni sect of the Muslim faith. R. 3. NOI members are required to pray five times a day according to the *Salat*, an Islamic religious text. R. 3. NOI members also participate in a *halal* (or lawful) diet that prohibits the consumption of pork and other items deemed *haram* (or unlawful). R. 3-4. Mr. Mohammed has been a devout adherent to NOI tenets since his conversion nearly thirteen years ago. R. 4-5. Upon conversion, Mr. Mohammed took the surname "Mohammed" and submitted documentation requesting prison officials address him by his Muslim name. R. 3. Also upon conversion, Mr. Mohammed completed TCC's "Declaration of Religious Preference" form so he could attend Islamic religious services and adhere to his strict religious diet. R. 3. Mr. Mohammed attended every prayer service available to him and adhered to his religious diet until prison officials forced him to abandon these religious obligations. R. 5.

Mr. Mohammed's Requests for Nation of Islam Evening Prayer Services

Devout Muslims pray daily at five obligatory times—dawn, the early afternoon, the late afternoon, sunset, and the late evening. R. 3-4. The Muslim faith requires believers to conduct all daily prayers as a group during Ramadan and on Fridays. R. 4. Daily obligatory prayers require a clean and solemn environment that faces Mecca (east). R. 4-5. Twice a day, Muslim prisoners must pray alone inside their cells next to toilets and in the presence of non-Muslim cellmates who allegedly disrupt holy prayer with offensive remarks and lewd acts. R. 4-5.

TCC changed their religious service policy two years prior to Mr. Mohammed's imprisonment by banning the option to petition for prayer services at night with a prison service

volunteer. R. 4. This change is evidenced in TCC's Directive 99, where the policy disallows after the last prisoner head count at 8:30 P.M., daily. R. 25. Under Directive 99, Catholic, Protestant, Muslim, and Jewish inmates can meet at three services per day, whereas a counter-majoritarian group, NOI adherents may only meet once a day. R. 4. After TCC changed their policy, Mr. Mohammed he filed a written prayer service request where he asked for five rather than three separate daily services. R. 5-6. When TCC denied his request, Mr. Mohammed verbally requested one additional service to conduct his last two prayers of the day with his brothers, away from non-NOI inmates and with a Chaplain of NOI religious affiliation. R. 5. Mr. Mohammed received no response. R. 5. R. Mr. Mohammed then filed two grievances after the prayer service denial and then a formal grievance that included verses from *The Holy Qu'ran*. R. 5. This request was denied on the grounds that Mr. Mohammed had not proven that his cellmate actually engaged in disrespectful conduct. R.5. TCC denied each request, and ultimately advised Mr. Mohammed that any allegations about his to request a transfer out of his current cell to see if a new cellmate would be more respectful Mr. Mohammed's prayer time. R. 6.

Mr. Mohammed Accused of Violating His Religious Diet

A new cellmate was assigned to Mr. Mohammed. R. 6. The new cellmate reported that Mr. Mohammed threatened the cellmate with violence if he did not provide Mr. Mohammed with his dinner- meatloaf. R. 6. Upon immediate investigation, no evidence was found that supported the allegation. R. 6. TCC searched Mr. Mohammed's cell again, where they found meatloaf wrapped in a napkin under Mr. Mohammed's mattress. R. 6. Due to this discovery, TCC removed Mr. Mohammed from his halal diet and barred Mr. Mohammed from attending any worship services for one month as punishment for the alleged threats and alleged deviation from his religious diet. R. 6. After TCC removed Mr. Mohammed from his *halal* diet, Mr. Mohammed

refused to eat the prison's *haram* food options. R. 6. TCC responded by forcibly tube feeding Mr. Mohammed *haram* food. R. 6. The invasive and painful tube feeding forced Mr. Mohammed to end his strike and to eat *haram* food. R. 6.

Development of Mr. Mohammed's Lawsuit

Petitioner, Siheem Kelly "Mohammed" seeks declaratory and injunctive relief against Respondents Kane Echols, Warden of TCC, and Saul Abreu, Director of TCC's Chaplaincy Department, for violating his rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). R. 2. After plaintiff filed his case in the United States District Court for the Eastern District of Tourovia, defendants moved for summary judgment. R. 2-3. On March 7, 2015, the trial court denied defendant-respondents' motion, and instead granted summary judgment for Mr. Mohammed. R. 4. Defendant-respondents appealed. R. 16. On June 1, 2015, the United States Court of Appeals for the Twelfth Circuit vacated the trial court's summary judgment. R. 16, 22. Mr. Mohammed appealed. R. 23. This Court granted Certiorari on July 1, 2015. R. 23.

SUMMARY OF THE ARGUMENT

Prisoners lose many rights upon incarceration, but the constitutionally protected right to religious exercise is not checked at the prison door. RLUIPA was enacted to protect a prisoner's religious exercises from unnecessarily restrictive and substantially burdensome prison policies. TCC's prison policies cut against the purpose of RLUIPA by substantially burdening Mr. Mohammed's religious exercises in night services and adherence to his halal diet.

This Court should thus reverse the Twelfth Circuit's decision that held the Respondents did not violate RLUIPA because Mr. Mohammed successfully meets his burden of proving that TCC substantially burdened his religious exercise. Mr. Mohammed proves that 1) Mr.

Mohammed and his fellow NOI brothers have a sincerely held religious practice of praying as a group, and 2) TCC substantially burdened Mr. Mohammed's religious exercise in adhering to the NOI prayer requirements by denying Muslim inmates an additional prayer service to carry out their required daily prayers

Because Mr. Mohammed meets his burden, TCC bears the burden of persuasion to prove that any substantial burden on Mr. Mohammed's religious exercise is both in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. Although Tourovia Correctional Center has a compelling governmental interest when substantially burdening Mr. Mohammed's religious exercise, Tourovia Correctional Center fails to prove that the substantial burden is the least restrictive means of furthering that compelling governmental interest. Thus, this Court should reverse the decision of the Twelfth Circuit's decision.

This Court should reverse the Twelfth Circuit's decision that held the Respondents did not violate RLUIPA in revoking Mr. Mohammed's halal diet. Mr. Mohammed successfully meets his burden of by proving that 1) he is sincere in his belief that adhering to his halal diet as a practice of the Nation of Islam, and 2) TCC substantially burdened Mr. Mohammed's religious exercise in adhering to the halal diet by revoking his diet due to one allegation. TCC fails to bear their burden of persuasion because TCC fails to prove any compelling governmental interest in security, costs, and order when the prison revoked Mr. Mohammed's halal diet. Even if TCC has a compelling interest, it failed to employ or even to consider the least restrictive means of furthering that interest. Thus, this Court should reverse the decision of the Twelfth Circuit's decision.

ARGUMENT

Congress distinguished RLUIPA from traditional First Amendment jurisprudence in at least two ways. First, it expanded protection to include any religious exercise, including any exercise of religion, whether or not compelled by or central to, a system of religious belief. 42 U.S.C. § 2000cc-5(7)(A). Second, as opposed to the deferential rational basis standard, RLUIPA employs heightened protection for prisoners like Mr. Mohammed under a strict scrutiny standard. *See Washington v. Klem*, 497 F.3d 272, 277 (3d Cir. 2007)., RLUIPA requires the government to meet the much stricter standard in showing that any substantial burden imposed on religious exercise must be both in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. § 2000cc-1(a); *see id.* at § 2000cc-2(b).

RLUIPA, thus, applies to this case for two reasons. First, TCC is subject to RLUIPA because it is acting as an instrumentality of the State of Tourovia and, presumably, receives federal funds. *Id.* § 2000cc-5(4)(A). Second, it is uncontested that Mr. Mohammed's desire to participate in night services and to adhere to his halal diet meets RLUIPA's definition of "religious exercise." *See id.* § 2000cc-5(7)(A); *see Jova v. Smith*, 582 F.3d 410 (2d Cir. 2009); *see also Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1317 (10th Cir. 2010).

The argument below will show why TCC's prison policy prohibiting night services to members of NOI violates RLUIPA. Second, the argument below will show why TCC'S prison policy reserving the right to remove a prisoner from a religious diet or fast due to one alleged specific infraction also violates RLUIPA.

However, this case is improperly before this Court because it is not ripe for Supreme Court review. This Court holds that a case is not ripe for judicial review "until the scope of the

controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action . . . that harms or threatens to harm [the claimant]. *Lujan v. Nat'l Wildlife Federation*, 497 U.S. 871, 891 (1990). The ripeness rationale is a critical constitutional component and applicable to RLUIPA claims. *Muslim Cmty. Ass'n of Ann Arbor & Vicinity v. Pittsfield Charter Twp.*, 947 F. Supp. 2d 752, 756 (E.D. Mich. 2013). The Sixth Circuit explains that, for an RLUIPA case to be ripe for review, proceedings have to "reach[] some sort of an impasse and the position of the parties have been defined. [The court] does not want to encourage litigation that is likely to be resolved by further administrative action . . . ." *Grace Cmty. Church v. Lenox*, 544 F.3d 609, 615 (6th Cir. 2008; Bigelow v. Michigan Dep't of Natural Res., 970 F.2d 154, 158 (6th Cir. 1992) (quoting Bannum v. City of Louisville, 958 F.2d 1354, 1362–63 (6th. Cir. 1992)). In *Grace Cmty.*, the court held that the case was not ripe because there was no finality between the parties and that the factual record was incomplete. *Id*. at 616, 618.

This case is not ripe for review because, all factual components of the case have not been fleshed out, which creates an incomplete factual record as to the alleged harm. The parties here have not reached impasse as to whether Mr. Mohammed actually violated his religious diet. The record clearly indicates that the entire meatloaf was discovered under his mattress – uneaten. (R. 6). There are no facts which indicate that Mr. Mohammed actually ingested the meatloaf. This disagreement between the parties suggests that there is a question in fact which should be determined by a jury. This question left to be determined is whether, based on the evidence, if Mr. Mohammed violated a tenant of his faith or whether he is wrongfully being denied his religious accommodations because he never abandoned his faith. Therefore, this case is not ripe for judicial review and should be dismissed or remanded to the lower courts to determine the question in fact.

I. TOUROVIA CORRECTIONAL CENTER'S POLICY PROHIBITING NIGHT SERVICES TO MEMBERS OF THE NATION OF ISLAM VIOLATES RLUIPA.

This Court should reverse the Twelfth Circuit's decision and find that TCC violated RLUIPA by denying Mr. Mohammed and the members of the National of Islam from conducting group night services for three reasons. First, Mr. Mohammed holds a sincere religious belief that group night services is a requirement of his faith. Second, Mr. Mohammed meets his burden of demonstrating a prima facie claim that TCC substantially burdened his religious exercise. Third, TCC fails to bear the burden of persuasion to prove that any substantial burden on Mr. Mohammed's religious beliefs is both in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest.

A. Mr. Mohammed holds a sincerely held belief that group night services is a requirement of his faith.

Mr. Mohammed's belief that group services are a requirement of the NOI faith is sincere. TCC substantially burdened Mr. Mohammed's religious exercise when it revoked disallowed the group prayers.Sincerity of a belief is an initial matter in a RLUIPA claim- a religious belief *must* be sincerely held for it to be substantially burdened. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Moussazadeh*, 703 F.3d at 790-91; *see Abdulhaseeb*, 600 F.3d at 1312.

RLUIPA bars inquiry into whether a particular belief or practice is central to a person's religion, but not whether a practice constitutes an aspect of that religion. *Cutter v. Wilkinson*, 544 U.S. 709, 725 n. 13 (2005). Here, Mr. Mohammed sincerely believes that group night services is a requirement of Nation of Islam, even if TCC fails to understand this belief is central to the practice of NOI. This misunderstanding of NOI practices and requirements may be attributed to the fact that NOI is a minority group of TCC's prison population, constituting less than 1 percent of the general prison population. R. 3. Mr. Mohammed is one of the seven acknowledge members who regularly take advantage of the prayer services and diet programs. (R. 3).

In spite of TCC's misunderstanding, Mr. Mohammed proves that he is sincere in his beliefs that additional prayer services are NOI exercises. He has been a devout NOI adherent for at least thirteen years. See R. 3. After TCC changed their policy, Mr. Mohammed repeatedly insisted that that TCC's NOI populations requires five rather than three separate daily services. R. 5-6. Mr. Mohammed's sincerity is obvious, in that he acted as a liaison for the NOI group, he filed a written prayer service request, and currently attends all services. R. 4-5. When TCC denied his request, Mr. Mohammed did not abandon his sincere belief and even compromised with TCC by requesting *one* additional service to conduct his last two prayers of the day with his brothers, away from non-NOI inmates and with a Chaplain of NOI religious affiliation. R. 5. Mr. Mohammed's sincerity was further demonstrated when he filed two grievances after the prayer service denial and then a formal grievance that included verses from *The Holy Qu'ran*. R. 5. These actions are evidence of Mr. Mohammed's sincere belief that group night services is a requirement of his faith.

Mr. Mohammed's ability to engage in group worship is a religious exercise that RLUIPA protects. To impose outright bans on particular aspects of an inmate's religious exercise, is unsupported by the plain language of RLUIPA and the case law interpreting it. In *Cutter,* the Court noted that, "[T]he 'exercise of religion' often involves not only the belief and profession but the performance of ... physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine." 544 U.S. at 720, 125 S.Ct. 2113 (quoting *Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 878-82, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)); *Greene v. Solano Cty. Jail*, 513 F.3d 982, 987 (9th Cir. 2008); S*ee also Guru Nanak Sikh Soc'y of Yuba City v. County of Sutter,* 456 F.3d 978, 981 (9th Cir.2006) (defining the relevant religious exercise as the congregation's construction of a temple). Similarly,

the religious exercise at issue in Mr. Mohammed's lawsuit is not his ability to practice his religion as a whole, but his ability to engage in group worship. The type of group worship is the type of religious exercise that Congress intended to protect by adopting an expansive definition in RLUIPA.

B. Mr. Mohammed's religious exercise was substantially burdened when Tourovia Correctional Center denied group services to members of the Nation of Islam

TCC's denial of group services to NOI members constitutes a substantial burden on NOI's religious exercises. RLUIPA does not include a definition of "substantial burden" because the Act was not intended to create a new standard for the definition of "substantial burden." 146 Cong. Rec. S7774 (July 27, 2000). Instead, Congress urges that the term as used in the Act should be interpreted by reference to Supreme Court jurisprudence. 146 Cong. Rec. S7775 (July 27, 2000). "Substantial burden" has often been defined in the related context of the Free Exercise Clause.

Whether a particular governmental action substantially burdens religious exercise is an "inherently fact-based" inquiry, *Hankins v. Lyght*, 441 F.3d 96, 104 (2d Cir. 2006). RLUIPA is distinguished from RFRA and the First Amendment in that it expands the definition of religion to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." Id. (emphasis added). This expansive definition of religion requires the definition of "exercise of religion" to be given the same broad meaning to encompass the many diverse religious beliefs RLUIPA intends to protect. *Id*. It is imperative that this Court broadly interprets the meaning of substantial burden in accordance with the legislative intent and Supreme Court precedence. 42 U.S.C.A. § 2000cc-3(g).

Supreme Court free exercise jurisprudence indicates that a substantial burden exists when an adherent is forced to choose between following the precepts of their religion and violating their

religion to receive a benefit generally available. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *see Thomas v. Review Board of Indiana Employment Security Division*, 450 U.S. 707, 717-18 (1981). This Court clarified in *Lyng v. Northwest Indian Cemetery Protective Association* that the *Sherbert* and *Thomas* rulings do not imply that "incidental effects of government programs, which make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." 485 U.S. 439, 450-51 (1988).

1. Mr. Mohammed's religious exercise is substantially burdened under all "substantial burden" standards.

Definitions of "substantial burden" under RLUIPA vary among the circuits. Many courts of appeals have adopted some form of the *Sherbert*/*Thomas* formulation, thus creating several definitions with minor variations in wording. *See Washington*, 497 F.3d at 279. The Third Circuit has held that a substantial burden exists when 1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates versus abandoning one of the precepts of his religion in order to receive a benefit; or 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs. *Id.* at 280. The Second Circuit holds that whether a particular governmental action substantially burdens religious exercise is an "inherently fact-based" inquiry, *Hankins v. Lyght*, 441 F.3d 96, 104 (2d Cir. 2006). The Fourth, Fifth, and Seventh Circuits follow *Thomas* in holding that a substantial burden on religious exercise occurs the government puts substantial pressure on an adherent to modify his behavior and to violate his beliefs. *See Lovelace v. Reed*, 474 F.3d 174, 187 (4th Cir. 2006); *see Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004); *see Thompson v. Holm*, 809 F.3d 376, 379 (7th Cir. 2016). The Ninth Circuit also follows *Thomas* but adds an additional consideration- a substantial burden on religious exercise "must impose a

significantly great restriction or onus upon such exercise." *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005). All of these variations support a broad interpretation of the meaning of substantial burden. Thus, it is imperative that this Court broadly interprets the meaning of "substantial burden" in accordance with legislative intent and variances in case law.

In accordance with the relevant RLUIPA case law, a fact-based analysis, and a broad definition of "substantial burden" suggests the denial of Mr. Mohammed's group prayer request substantially burdens his religious exercise. In *Greene*, the Ninth Circuit found a jail's policy of prohibiting maximum security prisoner from attending group religious worship services substantially burdened his ability to exercise his religion, as required for ban to violate RLUIPA. 513 F.3d 982 (9th Cir. 2008). The court further held that an outright ban on a particular religious exercise is a substantial burden on that religious exercise, as required for the ban to violate the RLUIPA. *Id.*

Here, TCC's Directive 98 constitutes a significant burden on religious exercise for Mr. Mohammed and NOI adherents. Directive 98 "significantly hampers" Mr. Mohammed's religious practice. *Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007). Denying the group prayer is more than an inconvenience on religious exercise; the denial has significantly coerced Mr. Mohammed and his group members to conform their behavior and forego religious precepts of their faith. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). Group worship is essential and necessary to practice the Nation's faith and disallowing them to do so, coerces them into acting contrary to their religious beliefs. TCC pressured Mr. Mohammed and the entire congregation to refrain from religious exercise, i.e. evening group worship. A substantial burden was imposed upon Mr. Mohammed once he was forced to choose between violating a law (complying with the TCC policy) and violating his religious tenets. R. 2. The denial of Mr.

Mohammed's religious accommodation was more than just a mere inconvenience – the denial explicitly bans the religious exercise of the Nation by not permitting essential worship services.

While TCC may argue that the denial of evening prayer is not substantially burdensome because the prison permits the Nation to participate in a panoply of other religious practice, this is untrue. As noted, this Court does not require that group worship is a central tenet of the Nation faith of which Mr. Mohammed is a sincere adherent. *See Cutter*, 544 U.S. at 725 n. 13. As a matter of law, TCC's restrictive policies prevent the Mr. Mohammed from exercising fundamental religious beliefs and are substantially burdensome.

The argument that Mr. Mohammed's religious exercise in not substantially burdened because prison officials allow him to exercise his religion through other means is unfounded. This interpretation of RLUIPA's "substantial burden standard" would allow a prison to unilaterally determine the interchangeability of various religious practices of Mr. Mohammed's religion, despite their limited knowledge and familiarity with the NOI beliefs. This interpretation is inconsistent with RLUIPA's purpose of prohibiting frivolous or arbitrary rules restricting inmate religious practices. *See* S. Rep. No. 57775 (July 27, 2000). The existence of alternate expressions of the Nation does not obviate the centrality of the religious practices at issue in this case. *Blanken v. Ohio Dep't of Rehab. & Corr.*, 944 F. Supp. 1359, 1365-1366 (S.D. Ohio 1996) (rejecting defendant's claim that plaintiff was not substantially burdened based on the availability of other religious practices). Consequently, this Court should conclude that Mr. Mohammed has satisfied his prima facie burden of demonstrating that TCC's regulations of denying evening group prayer substantially burdens the practice of the Nation of Islam.

C. Mr. Mohammed's religious exercise was violated because the correctional facility did not use the least restrictive means for furthering their interest.

TCC's denial of Mr. Mohammed's religious accommodations were not the least restrictive means to further its compelling government interest. The record clearly indicates that Mr. Mohammed's requests were denied explicitly due to prison security concerns and administration restrictions. R.2. TCC has indicated that the prison's considerations in determining whether a group will have their requests for prayer services are: "demand, need, staff availability, and prison resources". R.2. Although prison officials may substantially burden a prisoner's ability to engage in religious exercise without violating the RLUIPA, they cannot justify restrictions on religious exercise by simply citing to the need to maintain order and security in a prison. *Evans v. Godinez,* 2014 IL App (4th) 130686, 21 N.E.3d 1280. The government's asserted compelling state interest must be real, not hypothetical and it must be serious. *Id.*

TCC's denial of Mr. Mohammed's religious accommodations were not the least restrictive means to further its compelling government interest. "The least-restrictive means standard is exceptionally demanding," and it requires the government to "sho[w] 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]." *Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2780 (2014). By failing to use the least restrictive means, any substantial burden this Court finds in regards to Mr. Mohammed's religious exercise is inexcusable under RLUIPA. Satisfying the least restrictive means test requires the government to prove that "no alternative forms of regulation would combat" its target without burdening religious exercise. *Sherbert,* 374 U.S. at 407. A policy fails this test when its aim could be achieved by narrower ordinances or policies that place less of a burden on religion. *See id.*

In *Greene,* the Ninth Circuit found that genuine issues of material fact existed as to whether a jail's policy of prohibiting group worship by maximum security prisoners was least restrictive

means of maintaining security, under RLUIPA. *Greene*, 513 F.3d at 989; *see* Fed. R. Civ. P. 56(c). The Ninth Circuit stressed that although a prison administrator is to be accorded deference with regard to prison security in an action under the RLUIPA, the administrator still must show that he or she actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice. *Greene*, 513 F.3d at 989.

Here, TCC fails to show that the prison actually considered less restrictive means in furthering their compelling governmental interests. This is evidenced in a number of ways. First, TCC does not employ the least restrictive means in its administration of prayer services. Although the Nation is a recognized religion at TCC that receives prayer services, it is disadvantaged because it is a counter-majoritarian group. While TCC provides three services per day for Catholic, Protestant, Muslim, and Jewish inmates, counter-majoritarian groups may only meet once a day R.4. Second, TCC is required to not merely explain why it denied Mr. Mohammed's group prayer request, but to *prove* that denying the exemption is the least restrictive means of furthering any compelling governmental interest. *Holt*, 135 S. Ct. at 864. Before implementing the policy and denying Mr. Mohammed's request, TCC never referenced any professional analyses, other prison policies, or surveys of alternative means before concluding the policy and the denial of Mr. Mohammed's request was the least restrictive means for preserving safety. Essentially, TCC never actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice. Despite the Respondents' claims that there are no other alternatives, similar prisons have implemented policies which allow prisoners to have group prayer during meal time, use outside volunteers, or ask current chaplains to volunteer. At the very least, a narrower policy could have been implemented at TCC that place less of a burden on religion, especially since

majority religions are already provided with three group meetings outside of their cells per day. R. 4.

The Twelfth Circuit stated that if TCC employed less restrictive alternatives "just for the seven Nation member," then making an individualized exemption could cause resentment among the other inmates, a copycat effect, and problems with regulation enforcement. R. 21-22. However, this reasoning is a prime example of the kind of argument this Court rejected this kind of argument that "[i]f I make an exception for you, I'll have to make one for everybody, so no exceptions." *Holt*, 135 S. Ct. at 866 (*quoting Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)). TCC has failed to employ the least restrictive means and has therefore, violated the religious exercise of Mr. Mohammed.

II. TOUROVIA CORRECTIONAL CENTER'S POLICY OF REMOVING PRISONERS FROM A RELIGIOUS DIET OR FAST DUE TO ONE ALLEGED INFRACTION VIOLATES RLUIPA.

This Court should reverse the Twelfth Circuit's decision and find that TCC violated RLUIPA by removing Mr. Mohammed from his halal diet due to one alleged specific infraction for two reasons. First, Mr. Mohammed meets his burden of demonstrating a prima facie claim that TCC substantially burdened his religious exercise by showing he is sincere in his religious beliefs and that TCC substantially burdened his religious exercise due to one allegation. Second, TCC fails to bear the burden of persuasion to prove that any substantial burden on Mr. Mohammed's religious beliefs is both in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest.

A. Mr. Mohammed meets his burden of proving a prima facie claim that Tourovia Correctional Center substantially burdened his religious exercise.

The first threshold question in applying RLUIPA is if a prisoner sincerely believes in their requested religious exercise. *See Moussazadeh,* 703 F.3d at 790. The second threshold question for applying RLUIPA is whether a state action places a substantial burden on a religious exercise. *See id.* Here, Mr. Mohammed's belief that adhering to his halal diet as a practice of the Nation of Islam is sincere. TCC substantially burdened Mr. Mohammed's religious exercise in adhering to the halal diet when it revoked his diet due to one allegation.

1. Mr. Mohammed's belief that adhering to his halal diet as a practice Nation of Islam is sincere.

Sincerity is an important consideration, but inquiries into sincerity must not run afoul of religious inquiry. *See Moussazadeh,* 703 F.3d at 792. Here, Mr. Mohammed shows his sincerity in his NOI beliefs as to his halal diet. In spite of a lapse in his religious diet, whether real or alleged, Mr. Mohammed is still sincere in his religious beliefs.

a. Mr. Mohammed shows his sincerity in his Nation of Islam beliefs about his halal diet.

Sincerity is easily established in this case. *See Moussazadeh,* 703 F.3d at 791. One need only to look to Mr. Mohammed's words and actions to determine that he is sincere in his NOI beliefs about his halal diet. *See id.* For example, the Fifth Circuit in *Moussazadeh* reviewed a prisoner's actions to determine if he was sincere in his belief that he should consume a kosher diet under Judaism. *Id.* at 785. There, the prisoner offered his statements in his grievances and complaints that he was born and raised Jewish and has always kept a kosher household, evidence that he requested kosher meals from several prison officials, his record of continuously eating kosher meals provided to him in the dining hall, and the fact that the prison never questioned his sincerity and even accommodated his kosher food diet by transferring him to units with kosher

food available *Id.* at 792. Here, Mr. Mohammed's actions demonstrate his sincerity in adhering to his halal diet.

At the outset, this case was brought forth on a summary judgment standard and the facts should have been reviewed in light most favorable to the non-moving party, which would be Mr. Mohammed. *See Moussazadeh*, 703 F.3d at 791. The facts of this case establish Mr. Mohammed's sincerity. Mr. Mohammed's words and actions certainly indicate his sincerity in his NOI beliefs as to his halal diet, just as the prisoner in *Moussazadeh* proved his sincerity, *id.* at 792. Upon conversion, Mr. Mohammed filed a "Declaration of Religious Preference Form," which is required for prisoners who wish to partake in a particular religious diet. R. 3. The record does not indicate that the meatloaf had been eaten. R. 6. Mr. Mohammed insistently denied that the meatloaf belonged to him, even to point of beginning a hunger strike, refusing to eat anything from TCC's standard menu. R. 6. He was willing to forego eating any food at all if it was not part of the halal diet. Mr. Mohammed only ended his strike after prison employees forcibly tube-fed Mr. Mohammed, a very invasive and painful experience. R. 6.

These actions and words speak to Mr. Mohammed's sincerely held beliefs concerning the halal diet, in that he only consumed the standard fare food after being forced to do through painful tube-feeding. The initial inquiry of sincerity under RLUIPA is thus satisfied. Just as the prison in *Moussazadeh* never questioned the prisoner's sincerity as evidenced by the prisoner's transfer to a unit with kosher food, *id.*, TCC moved Mr. Mohammed in with a new roommate, which establishes TCC's acknowledgement of Mohammed's sincerity. R. 6.

b. A lapse in a religious diet, alleged or real, does not indicate a lack of sincerity.

Whether real or alleged, a lapse in Mr. Mohammed's adherence to the halal diet does not establish insincerity. The Fifth Circuit's holding in *Moussazadeh* provides guidance as to a lapse

in religious diets. The *Moussazadeh* court noted that although the district court was correct in observing a prisoner's actions in purchasing non-kosher items on two occasions, that court incorrectly concluded that the purchases established insincerity as a matter of law. 703 F.3d. at 791. Rather, the Fifth Circuit found that a finding of sincerity does *not* require perfect adherence to beliefs expressed by the prisoner, and even the most sincere practitioner may stray from time to time. *Id.* at 791-92 (emphasis added).

The Fifth Circuit's holding is similar to the Seventh Circuit's holding in *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012). There, the Seventh Circuit held that a "sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backsliders, penitents, and prodigal sons?". Further, the Seventh Circuit in *Reed v. Faulkner* noted that the fact that a prisoner does not adhere steadfastly to every tenet of their faith does not mark the prisoner as insincere. 842 F.2d 960, 963 (7th Cir. 1988). In fact, the court noted that it would be bizarre for prisons to essentially promote strict orthodoxy by revoking the religious rights of any prisoner observed backsliding. *See id.* The Fifth Circuit echoes this same sentiment in finding that although the prisoner may have made the food purchases and strayed from the path of perfect adherence, this alone does not eviscerate his claim of sincerity. *Moussazadeh*, 703 F.3d. at 792. The same applies in this case.

No prison officials actually saw Mr. Mohammed breaking his fast or eating the meat; there was only a discovery of meatloaf. R. 9. Even if Mr. Mohammed consumed the meat, consumption on one occasion alone does not indicate a lack of sincerity concerning the halal diet. In fact, Mr. Mohammed converted to NOI in 2002 and has adhered to the diet for at least thirteen years. R. 3. The prisoner in *Moussazadeh* purchased several non-kosher items on two occasions, and yet the Fifth Circuit noted that this was not an indication of insincerity. Here, Mr. Mohammed has not

consumed food that runs contrary to his halal diet- the meatloaf was merely found under his mattress in a subsequent search that occurred after the initial search following his cellmate's allegations. R. 6. This is in no way establishes a bright-line test where sincerity should be based on the number of infractions or allegations. Rather, this Court should consider the Fifth and Seventh Circuits' formulations that sincerity does not equate to perfection.

2. Tourovia Correctional Center substantially burdened Mr. Mohammed's religious exercise in adhering to the halal diet by revoking his diet due to one allegation.

A prison's refusal to provide religious diets to sincere believers cannot withstand RLUIPA's strict scrutiny standard. *Kuperman v. Warden*, 2009 U.S. Dist. LEXIS 108576, *15 (D.N.H. Feb. 19, 2014); *see Thompson*, 809 F.3d at 380; *see also Abdulhaseeb*, 600 F.3d at 1317(stating that more than one court has held the lack of a halal diet to be a substantial burden on a Muslim's religious exercise). However, courts of appeals are divided on the question of whether a prison's policy of suspending religious diets in the face of backsliding imposes a substantial burden on a prisoner's religious exercise. *Id.* at *18. This Court should resolve this circuit split and find that a prison substantially burdens a prisoner's religious exercise when they revoke a prisoner's religious diet, even if a prisoner lapses in their religious exercise.

Two circuits hold that prisons *must* continue to accommodate those prisoners who lapse in their religious practices. *Lovelace*, 474 F.3d at 183; *see Moussazadeh*, 703 F.3d at 791 (emphasis added). One circuit expressed concern that a prison's denial of religious meals violates RLUIPA. See *Colvin v. Caruso*, 605 F.3d 282, 296 (6th Cir. 2010)(where the Sixth Circuit noted in dicta that a prison's policy of removing a prisoner from their religious diet for mere possession of a non-compliant food item may be overly restrictive of a prisoner's religious rights). These cases contrast with the Seventh and Eighth Circuits. These circuits hold that prisons should not continue

to accommodate prisoners who lapse in their religious practices if the prisoner *voluntarily* departs from his religious diet. *Brown-El v. Harris*, 26 F.3d 68, 69-70 (8th Cir. 1994); *Daly v. Davis*, 2009 U.S. LEXIS 622, *5, slip op. (7th Cir. Mar. 25, 2009)(emphasis added). One circuit affirmed a prison's denial of religious meals because of policy violations. Likewise, in *Contant v. Lowe*, the Third Circuit upheld a prisoner's removal from his religious diet because he failed to comply with the prison policy by eating and purchasing non-kosher food items. 450 Fed. Appx. 187, 190 (3d Cir. 2011).

This Court should hold that prisons *must* continue to accommodate those prisoners who lapse in their religious practices three reasons. First, there was no actual finding that Mr. Mohammed ate the meatloaf and, thus, violated his religious beliefs. Second, Tourovia Correctional Center still substantially burdened Mr. Mohammed's religious exercise, even if Mr. Mohammed consumed the meatloaf and, thus, violated the Nation of Islam tenets.

a. <u>There was no actual finding that Mr. Mohammed ate the meatloaf and, thus, violated the Nation of Islam tenets</u>

The record does not indicate that Mr. Mohammed actually ate the meatloaf. Mere belief that a prisoner is guilty of violating religious diet is insufficient to justify a revocation of the diet. *See Thompson*, 809 F.3d at 381 (holding that without a finding of theft, denying a prisoner food and removing the prisoner from a Ramadan meal plan was not justified). For example, in *Thompson*, a prison provided Ramadan meal bags at sunset to each Muslim prisoner. A prison official removed a Muslim prisoner from the meal bag list due to an allegation that the prisoner stole an extra bag and ate from both bags. *See id.* at 378. As a result of receiving no meals, the prisoner resulted to eating at the prison cafeteria, which meant a violation of the prison policy and a forfeiture of the right to meal bags for the rest of the month-long fast. *See id.* The Third Circuit found that the denial of the meal bags substantially burdened the prisoner's free exercise rights,

rejecting the defendants' argument that the prison was justified in withholding the prisoner's meal bag because the prisoner supposedly stole a meal bag. *Id.* at 380-81.

The *Thompson* holding is applicable in this case. Just as the prison merely alleged that the prisoner stole the meal bags, TCC merely alleged that Mr. Mohammed violated Directive 99 by possessing the uneaten meatloaf. *See* R. 6. Even if TCC asserts that Mr. Mohammed violated Directive 99 by virtue of the meatloaf, eaten or otherwise, being under his mattress because he gave "prison administration adequate reason to believe that the religious diet is not being adhered to," R. 26, this argument cannot stand because the fact remains disputed as to whether possessing the meatloaf would give the prison adequate reason.

TCC's religious diet policy would fail to rise even to a lower standard under the First Amendment, just as the policy failed in *Thompson*, 809 F.3d at 378. The *Thompson* court considered the prisoner's claims under the First Amendment, meaning that the case was not analyzed under the strict scrutiny, "compelling governmental interest" and "least restrictive means test" codified in RLUIPA. 809 F.3d at 378. However, if the proffered reasoning for the revocation of the meal bags failed to meet the lower standard of the "legitimate penological interest" standard as articulated in *Turner v. Safley*, 482 U.S. 78, 79 (1987), how much more would the proffered reasoning fail to meet the higher standard in RLUIPA? The same argument applies to TCC's Directive 99. The prison policy is similar to the prison policy in *Thompson*, and if the *Thompson* prison's reasoning fails to even meet the lower standard under First Amendment, then the similar TCC reasoning would not meet the lower standard under the First Amendment and, thus, would fall short of the higher RLUIPA's strict scrutiny standard.

b. Tourovia Correctional Center still substantially burdened Mr. Mohammed's religious exercise, even if Mr. Mohammed consumed the meatloaf and, thus, violated the Nation of Islam tenets.

Mr. Mohammed's religious exercises were substantially burdened in this case even if he violated the tenets of NOI by actually consuming the meatloaf. A single incident of lapsing in one's religious speaks to imperfection, and imperfection in adherence does not justify a revocation of a religious diet. At the very least, this Court should refuse to follow the Eighth, Seventh, and Third Eighth Circuit holdings to this case because these cases were analyzed under a lower constitutional scrutiny standard and are factually incompatible with the case at bar.

i. Mr. Mohammed's religious exercises were substantially burdened because imperfection in adherence does not justify a revocation of a religious diet.

Revoking the halal diet constitutes a substantial burden on Mr. Mohammed's religious exercises, even if Mr. Mohammed actually consumed the meatloaf. For example, in *Lovelace* the Fourth Circuit held that a prison substantially burdened a prisoner's exercise when it removed a prisoner from the Ramadan observance list after the prison merely alleged that the prisoner broke his Ramadan fast. 474 F.3d at 183. The court noted that the removal meant that the prisoner could not fast or participate in NOI group prayers, and thus was thus unable to fulfill one of the five obligations of Islam. *Id.* at 187. Regardless of how the prisoner's removal was characterized, RLUIPA's protections may apply even though the alleged rule infraction triggered his removal from the observance list. *Id.* at 188. Likewise, in holding a prisoner's claim that a prison policy allowed his religious diet to be suspended for a single dietary violation as moot, the District of New Hampshire noted that the prison's newer policy of removing a prisoner from their religious diet after four lapses may be regarded as a substantial burden under RLUIPA. *Kuperman*, 2009 U.S. Dist. LEXIS 108576 at *15.

Here, like the prisoners in *Lovelace* and *Kuperman*, Mr. Mohammed's religious exercise was substantially burdened when he was removed from his religious diet. Just as the prisoner's

religious exercise in *Lovelace* was substantially burdened when the removal from the Ramadan observance list meant he could not eat his religious diet nor join in the Nation of Islam group prayers, 472 F.3d at 187, Mr. Mohammed's religious exercise was substantially burdened because the prison removed Mr. Mohammed from the halal diet and barred him from attending any worship services for one month as punishment not only for the alleged threats against his new prisoner but for also deviating from his religious diet program. R. 6. The analysis does not change just because the burden on Mr. Mohammed's religious exercise resulted from discipline from an alleged infraction, just as the analysis did not change in the face of an alleged infraction in *Lovelace*, *id.* at 188. RLUIPA's protections may apply even though Mr. Mohammed's alleged rule infraction triggered his exclusion. Just as the prison's policy in *Kuperman* may impose a substantial burden on imperfect but nonetheless sincere believers who happen to stray form their diets, 2009 U.S. Dist. LEXIS 108756 at *16, TCC's policy imposes a substantial burden on Mr. Mohammed as an imperfect but nonetheless sincere believer who alleged strayed from his diet.

ii. The Eighth, Seventh, and Third Eighth Circuit holdings do not apply to this case because these cases utilize different analyses and are factually incompatible with the case at bar.

The *Daly*, *Brown-El*, and *Contant* rulings should not be applied in this case because each case failed to apply a RLUIPA analysis. Each case only considered the prisoner's claims under the First Amendment and the Fourteenth's Amendment due process. As expressed above, a free exercise of religion claim is not analyzed under the strict scrutiny, "compelling governmental interest" and "least restrictive means test" as codified in RLUIPA. *See Warsoldier*, 418 F. 3d at 994. Rather, these cases were analyzed under a lower standard in the First Amendment context. Further, the Eighth Circuit in *Brown-El* required a showing from the prisoner that Islam had an exception for prisoners who eat daylight meals when injured. F26 F.3d at 70. However, requiring

a showing that the practice affects a "central tent" of the prisoner's face is contrary to RLUIPA's ban on a centrality requirement. *See* 42 U.S.C. § 2000cc-5(7); *see Adkins*, 393 F.3d at 568.

At the very least, the holdings in *Daly* and *Contant* should not be followed by this Court because these cases are factually incompatible with this case. The *Daly* and *Contant* courts construed the purchase or consumption of non-compliant food as prohibited conduct. The *Daly* court found that the prison policy did not compel the prohibited conduct. 2009 U.S. App. LEXIS 6222 at *6. Essentially, the *Daly* court found that prison did not force the prisoner to purchase non-kosher foods that violate his religious beliefs. *See id.* Likewise, the *Contant* court simply found that the prisoner failed to comply with the prison policy. 450 Fed. Appx. at 190. However, these cases do not apply to the case at hand because unlike the prisoners in *Daly* and *Contant*, Mr. Mohammed did not repeatedly break his halal diet. Further, the *Daly* court used only half of the substantial burden definition as supplied by *Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008). *Koger* noted that a substantial burden occurs not only when the government compels conduct contrary to religious beliefs, but also if the government prevents or inhibits religiously motivated conduct. *Daly*, 2009 U.S App. LEXIS at *6.

B. Tourovia Correctional Center fails to bear the burden of persuasion to prove that any substantial burden on Mr. Mohammed's religious exercise is both in furtherance of a compelling governmental interest and the least restrictive means of furthering that compelling governmental interest.

Because Mr. Mohammed meets his burden in successfully demonstrating a prima facie claim that TCC substantially burdened his religious exercise of NOI when TCC revoked his halal diet, the burden now shifts to TCC to prove, not merely assert, that Directive 99 is the least restrictive means of furthering a compelling governmental interest in security, financial costs, and order. *See id.* at § 2000cc-2(b).

1. Tourovia Correctional Center fails to prove any compelling governmental interest in order, security, and financial costs when revoking Mr. Mohammed's halal diet in the face of alleged backsliding.

TCC is required to prove they have a compelling governmental interest in revoking Mr. Mohammed's halal diet in the face of alleged backsliding. 42 U.S.C. § 2000cc-1(a). TCC states in Directive 99 that it will accommodate religious diets within the constraints of security, financial costs, and order considerations. *See* R. 26. TCC also cites concerns about the allegations that Mr. Mohammed threatened his new cellmate with violence if he was not provided with the meatloaf. R. 6. This concern could speak to TCC's interest in order and security and, indeed, a prison's interest in order and security is always compelling. *Fowler*, 534 F.3d at 939 (*citing Cutter*, 544 U.S. at 725 n. 13). Prisons may also cite cost minimization as a compelling interest. *See Moussazadeh*, 703 F.3d at 794-95. However, TCC must provide something more than bare assertions about security, order, and costs concerns in justifying the revocation of Mr. Mohammed's halal diet. This Court in *Cutter* held that prison officials must be given due deference due to their experiences, 544 U.S. at 723, but this does not mean that courts should rubber stamp or mechanically accept the judgments of prison administrators, *see Lovelace*, 472 F.3d at 190. Rather, a prison must *demonstrate* the security concern. *Murphy v. Missouri Dep't. of Corr.*, 372 F.3d 979, 982 (8th Cir. 2004)(emphasis added).

TCC's concern for security could be plausible if they argued that setting forth a halal diet for Mr. Mohammed may invoke unrest and violence among other prisoners who would deem the diet as special treatment to Mr. Mohammed only. For example, in *Moussazadeh*, the prison there offered evidence that prisoners have generally been convicted of more violent crimes, but it did not offer any evidence that those more violent prisoners would be more likely to cause violence or

safety disturbances as a result of some prisoners being served religious foods. 703 F.3d at 794. Here, TCC makes no such assertion for their security concerns beyond the disagreements in Mr. Mohammed's own cell. *See* R. 6. The record is silent as to whether violence could result from Mr. Mohammed being served a halal diet in the face of backsliding. There was no evidence alleged or discovered that indicates that Mr. Mohammed perpetrated actual violence against his new cellmate for the meatloaf. R. 6. TCC only provides a written statement from Mr. Mohammed's cellmate, outlining the alleged threats, as the basis for their decision to remove Mr. Mohammed from his halal diet. R. 7. Essentially, Mr. Mohammed's religious practices were substantially burdened on the basis of one written statement, a simple matter of "he-said, she said."

While TCC may have a *valid* interest in extinguishing insincere requests for religious diets, there is still some question as to whether that interest is truly *compelling*. *See Kuperman*, 2009 U.S. Dist. LEXIS at *17 (emphasis added). This same concern was echoed in *Koger*, where the court found that while good order requires the prisoners' religious affiliations to be verified, orderly administration of a prison dietary system is not a compelling interest. 523 F.3d at 800. The *Lovelace* court also found that a prison did not elaborate how the articulated legitimate interest in removing prisoners from religious diets where the prisoners flout prison rules qualifies as compelling. 472 F.3d at 190. The *Kuperman* court noted that widespread abuse of religious diets by insincere prisoners might speak to compelling financial cost concerns, 2009 U.S. Dist. LEXIS at *17, but just as the prison in *Kuperman* did not present any evidence to that accord, TCC has not provided any evidence of a similar concern. TCC merely provided an affidavit from Abreu that included an addendum with the prison's documented cost containment stratagems. R. 7. However, the record is silent as to whether those cost containment stratagems specifically

supports the assertion that TCC has a compelling interest in reducing costs to prisoners who violate the religious diet program.

This Court can only give deference to prison officials when they have set forth their positions and demonstrated their compelling interest. Here, TCC failed to demonstrate any compelling interests beyond bare assertions.

2. Even if Tourovia Correctional Center has a compelling governmental interest in order, security, and financial costs, it did not employ the least restrictive means of furthering the interest when it revoked Mr. Mohammed's halal diet.

Even if this Court finds that TCC properly proved a compelling governmental interest in order, security, and financial cost, TCC did not employ the least restrictive means of furthering those interests. TCC must *show* that it lacked other means of achieving its desired goal without imposing a substantial burden on Mr. Mohammed's NOI exercise. *Holt*, 135 S. Ct. at 864 (*citing Hobby Lobby Stores*, 134 S. Ct. at 2780 (emphasis added). This is not to state that a prison must refute every conceivable option to satisfy the least restrictive means requirement. *See Fowler*, 534 F.3d at 940. However, TCC must consider and reject other means before it can conclude that their policy is the least restrictive means. *See Couch v. Jabe*, 679 F.3d 197, 203 (4th Cir. 2012); *see Warsoldier*, 418 F.3d at 999. If the least restrictive means is available, TCC must use it. *Holt*, 135 S. C.t at 864.

This case is comparable to *Lovelace*, where the court found that the removal provision was far reaching in that it excluded prisoners not only from their religious meals but also from their Ramadan prayer services. 472 F.3d at 191. TCC's policy is similar, in that Mr. Mohammed was removed from his halal diet immediately and barred from attending any worship services for one month as punishment for deviating from his religious diet. R. 6. Just as the policy in *Lovelace* was

not the least restrictive means to further the governmental interest, the policy at bar is certainly not the least restrictive means to further the governmental interest.

Other less restrictive alternatives could have been utilized in this case. For example, imposing a loss of canteen privileges or even a higher threshold for a dietary suspension would have been less restrictive. *See Kuperman*, 2009 U.S. Dist. LEXIS at *18. This Court can also look to other prison policies to determine if there are other least restrictive means of furthering the compelling interests cited by TCC. *See Holt*, 135 S. Ct. at 866; *see Rich v. Fla. Dep't. of Corr.*, 716 F.3d 525, 534 (11th Cir. 2013). While the practices at other prisons are not controlling, they are certainly relevant to an inquiry about whether a particular restriction is the least restrictive means. *Id.* The following prison policies provide several alternatives TCC could have either utilized or considered when seeking to employ a least restrictive mean:

- The California Department of Corrections provides a two-step process prison officials must follow before revoking a prisoner's religious diet. *See* Cal. Dep't of Corr. and Rehab. Adult Instit., Programs, and Parole, Operations Manual Section 54080.14 (Jan. 1, 2015), *available at* http://www.cdcr.ca.gov/Regulations/Adult_Operations/docs/DOM/DOM%202015/DOM%202015.pdf. A staff member reports non-compliance in writing and then the prison chaplain meets with the prisoner to give him or her a chance to respond to the allegation. *Id.*
- The Idaho Department of Corrections does not take action until a prisoner either 1) misses more than 25% of their selective diet meals within a 30-day period, or 2) eats a meal that is not part of their religious diet. Idaho Dep't of Corr., Standard Operating Procedure, Control Number 404.02.01.003 (Mar. 5, 2011), *available at*

https://www.idoc.idaho.gov/content/policy/908. If either option occurs, the prisoner is not allowed to participate in the religious diet program for up to sixty days. *Id.*

- The Michigan Department of Corrections has a comprehensive religious diet policy. When a prisoner possesses or eats non-compliant foods, the prisoner is referred to the chaplain for counseling. Mich. Dep't of Corr., Policy Directives, Number 05.03.150 (Jan. 22, 2015), *available at* http://www.michigan.gov/documents/corrections/PD_05_03_150_481514_7_509125_7.pdf. If the prisoner violates their diet a second time, he is removed from their diet for sixty days. *Id.* If the prisoner violates their diet a third time, he is removed for one year. *Id.* If the prisoner violates their diet a fourth time, the prisoner must appeal for reinstatement to their religious diet. *Id.*

a. The Nebraska Department of Corrections will remove a prisoner from the religious diet if the prisoner violates his or her diet four times within one month and fails to contact a religious coordinator to discuss their reasoning for their lapses within forty-eight hours. Neb. Corr. Serv., Administrative Regulation, Number 108.01 (Nov. 30, 2015), *available at* http://www.corrections.nebraska.gov/pdf/ar/rights/AR%20108.01.pdf. The prison institutes the following lengths of time of removal before a prisoner can reapply for the religious diet program. 1st voluntary withdrawal or removal - 60 days, 2nd voluntary withdrawal or removal - 120 days, 3rd voluntary withdrawal or removal - 6 months, 4th voluntary withdrawal or removal - 1 year. After the 4th stoppage, each subsequent voluntary withdrawal or Removal – 1 year. *Id.*

TCC's failure to explain why other institutions with the same compelling interests were able to accommodate the same religious practices could constitute a failure to establish that TCC was utilizing the least restrictive means. *See Warsoldier*, 418 F.3d at 1000.

CONCLUSION

Based on the foregoing, this Court should reverse the ruling of the United States Court of Appeals for the Twelfth Circuit and enter judgment in favor of Mr. Mohammed.

Respectfully submitted,

Team 15

Counsel for the Petitioner

Dated: March 7, 2016