No. 985-2015

In the Supreme Court of the United States

SIHEEM KELLY,
Petitioner,

v.

KANE ECHOLS, Warden,
Tourovia Correctional Center et al.,
Respondents.

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

BRIEF FOR THE PETITIONER

TEAM 16
Counsels for Petitioner

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QUESTIONS PRESENTED

1. Whether Tourovia Correctional Center's policy of denying prayer services to minority inmate religions violates those inmates' religious freedom rights under RLUIPA?

2. Whether Tourovia Correctional Center's policy of punishing inmates who allegedly backslide from their religious diets by removing them from the religious diet violates their religious freedom rights under RLUIPA?

JURISDICTIONAL STATEMENT

The judgment of the 12th Circuit was entered on June 1, 2015. R. at 16. The petition for a writ of certiorari was granted on July 1, 2014. R. at 23. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Background

Siheem Kelly is a devout member of the Nation of Islam (NOI). R. at 3.[1] This case arises because Tourovia Correctional Center's ("TCC") Director of the Chaplaincy Department ("Director") and Warden refused to accommodate Mr. Kelly's sincere religious beliefs regarding access to prayer services and to a special diet. R. at 5. Mr. Kelly followed prison protocol in self-designating as a member of NOI, which made him eligible to attend religious services and for a religious diet. R. at 3.

The Nation of Islam is a minority subgroup of Sunni Islam and accounts for less than one percent of the prison population, about seven members. *Id.* For the last five years, NOI members have maintained "satisfactory behavioral standing" and have never been responsible for "violence." *Id.* This could be because of the strong fraternal bond between NOI members who spend most of their day together. *Id.*

Nightly Prayer Services

NOI requires an adherent to pray the five "Obligatory and Traditional Prayers" at dawn, early afternoon, late afternoon, sunset, and late evening. R. at 3–4. Prayer must be conducted in a clean, solemn environment and without interruption. R. at 4. Per TCC Directive #98, NOI members are able to prayer outside of their cells only three times a day. R. at 4, 25.[2] TCC further impedes NOI adherents' prayer by requiring that an official chaplain be present at all services. R at 4.

The current policy is inapposite to Kelly's request for additional prayer services. The policy arose in 1998 after Christian inmates used prayer time for illicit communication. *Id.* In

[1] The facts developed by the District Court serve as the factual guide for this case.
[2] Tourovia Directives ##98–99 are reprinted in an appendix to this brief. App., *infra*, 4a–5a.

response, the prison banned prison volunteers from leading the prayer and prohibiting nightly services. *Id.* TCC had some interest in ensuring inmates were in their cells by 8:30 but maintained a policy of placing inmates in solitary confinement if they missed head count, or if they violated a religious diet. *Id.* The district court found that TCC instituted the policy to create a uniform time for head count, and "partly as punishment." *Id*.

As a devout member of NOI, Mr. Kelly sought an accommodation to the policy and advocated on behalf of his fellow NOI members for additional prayer services to fulfill their religious duties. R. at 5. In early 2013, Mr. Kelly entered a written request for an additional congregational prayer for NOI after the last meal at 7:00 P.M. *Id.* Mr. Kelly suggested that the prayer could be held "at 8:00 P.M. after the last meal but before [the] final head count at 8:30 P.M." *Id.*

The Director verbally denied Kelly's request. R. at 5. The district court did not indicate that the Director took account of "demand, need, staff availability, [or] prison resources." R. at 4. Rather, the Director denied the request because of the need for a uniform final head count time and because he believed that the prayer structure was sufficient. R. at 5. There was no finding that the Director considered Mr. Kelly's proposed alternative. *Id.* When Mr. Kelly received the denial, he pleaded for a compromise, but the Director denied Mr. Kelly's additional entreaty. *Id.*

Seeking recourse for this treatment, Mr. Kelly filed two additional grievances. R. at 5. The first grievance requested a different prayer arrangement because Mr. Kelly's cellmate made it impossible for him to pray in a solemn environment, as required by NOI. *Id.* Mr. Kelly's cellmate would ridicule him and engage in lewd behavior during Mr. Kelly's evening prayer. *Id.* Mr. Kelly's experience of abuse by cellmates is common among NOI

members. *Id.* TCC denied this grievance because Mr. Kelly did not prove that his cellmate actually engaged in the described behavior. *Id.* The second grievance submitted that Mr. Kelly's evening prayer's proximity to the toilet contravened NOI's requirement of a clean prayer space. *Id.* TCC again denied the grievance, failing to alleviate the burden on Mr. Kelly's religious exercise. *Id.*

In a final attempt to protect his religious exercise, Mr. Kelly filed a formal grievance with the Warden and reiterated his requests. *Id.* Specifically, Mr. Kelly provided verses from *The Holy Qur'an* to demonstrate the necessity of nightly, congregational prayer. *Id.* The verses read, "Keep up prayer . . . till the darkness of night. . . . [C]elebrate the praise of the Lord . . . during the hours of the night." R. at 5–6. The Warden denied the request and transferred Mr. Kelly to a new cell. R. at 6. Again, TCC refused Mr. Kelly's request and simply reminded Mr. Kelly that inmates could request transfers if specific incidents of violence due to religion occur. R. at 4. TCC showed no signs of considering the matter further.

Vegetarian Diet Facts

Consistent with his designation as a member of NOI, Mr. Kelly received a religious alternative diet pursuant to Torovia Directive #99. R. at 26. After Mr. Kelly's requests for nightly prayer services, a new cellmate was placed with him. R. at 6. Mr. Kelly's new cellmate claimed that Mr. Kelly had threatened him for his meatloaf. *Id.* Prison officials found a piece of meatloaf wrapped in a napkin under Mr. Kelly's mattress. *Id.* Mr. Kelly insisted that it was not his. *Id.* Directive #99 allows the prison to revoke a special religious diet if a religious inmate breaks from his religious diet. R. at 6, 26. Acting pursuant to Directive #99, the prison removed Mr. Kelly from the vegetarian diet and barred him from the religious services. R. at 6.

In response, Mr. Kelly began to fast by refusing the non-vegetarian diet options in order to uphold the requirements of his faith. R. at 6. After two days of fasting, and refusing the non-vegetarian meals offered by the prison, TCC employees "forcibly began to tube-feed Kelly." *Id.* Due to the painfulness and invasive nature of the tube feeding, Mr. Kelly complied with eating standard prison fare. *Id.*

Procedural History

After these scarring events, Mr. Kelly filed a complaint in the Federal District Court of Tourovia contending that his Religious Land Use and Institutionalized Persons Act ("RLUIPA") rights were violated. R. at 6. Mr. Kelly argued that the prison's policy of denying the requisite number of congregational prayer services and removing him from the vegetarian diet "compelled him to violate his religious beliefs and practices." *Id.* In defending its actions against Mr. Kelly, TCC responded that religious exercise is constrained only if a particular practice is inconsistent with "agency security, safety, order, and rehabilitation concerns." *Id.* According to the prison, the prayer service accommodations requested by Mr. Kelly "would impose heightened staffing burdens on the prison[] to conduct a nightly service only for several people." R. at 7. Furthermore, TCC argued that Mr. Kelly was insincere in his religious beliefs and that removal from the vegetarian diet was appropriate. *Id.*

The District Court found that Mr. Kelly's religious exercise was substantially burdened and that the government failed to show that its security interest was compelling and that it adequately explored other less restrictive means of pursuing that goal. R. at 15. Because of this failure, the District Court found for Mr. Kelly as a matter of law pursuant to Fed. R. Civ. P. 56 (f). *Id.* The Court of Appeals found that the District Court erred in finding a RLUIPA violation

and vacated the grant of summary judgment for Mr. Kelly. R. at 22. This Court then granted certiorari to hear Mr. Kelly's challenges against the prayer service and religious diet policies.

SUMMARY OF THE ARGUMENT

This Court has explicitly and implicitly found prayer and religious dieting to be religious exercises. Therefore, the 12th Circuit rightly did not dispute that Kelly's requests for an additional evening prayer service and his strict vegetarian diet are implicated under RLUIPA.

Kelly demonstrated his sincere religious need for the prayer service and diet considering his faithful attendance to all of the other services and the liaison capacity he assumed on behalf of his fellow NOI members. While there was evidence that he backslid in following his diet, one discrepancy is insufficient to demonstrate insincerity. Moreover, to remove him smacks of religious policing, which is inconsistent with the purposes of RLUIPA.

The denial of the prayer service and vegetarian diet imposed a substantial burden on Kelly's religious exercise. The threat of punishment effectively pressured him from meeting with his NOI brothers in the evening, and the choice between eating a regular diet and not eating was no choice at all.

TCC's generalized interests of ensuring security, cost savings and institutional order are not compelling as applied to Kelly. In regards to Kelly's prayer request, TCC failed to demonstrate that Kelly poses a legitimate threat to security, that any cost was more than just a *de minimis* expenditure, or that an accommodation would create tension with other religious groups. As to the diet, a vegetarian diet simply does not present a threat to security; providing vegetarian diets could save money; and TCC has no legitimate interest, much less a compelling interest in enforcing Kelly's orthodoxy.

Finally, assuming, *arguendo*, that TCC proffered compelling interests, it has not pursued the least restrictive means of achieving them. TCC could have maintained prison security by allowing a nightly prayer service before final head count and after dinner, as Kelly suggested. Further, TCC could withhold final head count until after NOI's prayer service or group NOI adherents in the same cellblock. The prison failed to show that these alternatives were not viable. So, too, the prison can address the interest in security by closely monitoring religious adherents. The interest in order can be addressed by denying other benefits of being a religious adherent to backsliders, thereby disincentivizing feigners. A final catchall would be to raise the evidentiary standard for revoking the diet, giving backsliders a few "strikes," and allowing the penitent to resume the diet, just as the federal system does already.

ARGUMENT

The 12th Circuit's decision to uphold the prison's policy should be reversed. RLUIPA's institutionalized persons provision is the result of Congress's efforts "to accord religious exercise heightened protection from government-imposed burdens" in prisons out of concern that prisons regularly imposed " frivolous or arbitrary barriers" against inmates' religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 714 (2005). The protection is critical because "institutionalized persons . . . are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Id.* at 721. RLUIPA prohibits a governmental entity from "impos[ing] a substantial burden on the religious exercise" of an institutionalized person unless the government affirmatively demonstrates that the burden is the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a).[4] The provisions better "secure redress for

[4] These provisions are also reprinted in an appendix to this brief, along with all other cited sections of RLUIPA. App., *infra*, 1a–2a.

inmates who encounter[] undue barriers to their religious observances[.]" *Cutter*, 544 U.S. at 716-17. RLUIPA is to be construed broadly to protect religious exercise "to the maximum extent permitted." 42 U.S.C. § 2000cc-3(g).

I. MR. KELLY'S PRAYER MEETING AND VEGETARIAN DIET QUALIFY AS RELIGIOUS EXERCISES

The exercise of religion includes "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). This Court has defined the "exercise of religion" as involving belief, profession, and the "performance of (or abstention from) physical acts: assembling with others for a worship service [and] abstaining from certain foods . . . ." *Employment Div., Dep't of Human Res. Of Oregon v. Smith,* 494 U.S. 872, 877 (1990).

A. Mr. Kelly's Prayer Is An Exercise of Religion

Religious congregational prayer is undoubtedly an exercise of religion. Adherents of NOI are required to pray five times a day, as outlined in the Islamic prayer guide, the *Salat*. R. at 3. The *Salat* further requires that one of the five prayers occur in the late evening. R. at 4. RLUIPA defines "religious exercise" as the "exercise of religion." 42 U.S.C. § 2000cc-5(7)(A). This circular definition provides little guidance, but the Supreme Court's decision in *Smith* affords greater insight into the constitutional definition of "exercise of religion." *See also Holt v. Hobbs*, —U.S.—, 135 S. Ct. 853, 861 (2015) (confirming implicitly that prayer is a religious exercise by noting that a prisoner had the opportunity to "exercise his religion" by "praying on a prayer rug"). Many of the Supreme Court's cases in the Establishment Clause

context demonstrate the undoubted presumption that prayer is an exercise of religion.[5] Given this evidence, it is indisputable that prayer is an exercise of religion.

B. Mr. Kelly's Vegetarian Diet Is An Exercise of Religion

As to the religious diet removal policy, NOI members follow a strict vegetarian diet (or Halal) . . . . R. at 3. In addition to *Smith*'s identification of "abstaining from certain foods" as an exercise of religion, 494 U.S. at 877, this Court recently recognized religious dieting as a religious exercise. *See Holt*, 135 S. Ct. at 862 (finding the alternative means of practicing religion, including the opportunity to maintain a required diet, was relevant to the substantial burden analysis, but that RLUIPA provided greater protection). The circuit courts have also affirmed that following a religious diet is an exercise of religion.[6] Indeed, the 12th Circuit conceded that Kelly's religious diet qualified as a religious exercise under RLUIPA. R. at 16–17.

Therefore, given that this Court has explicitly and implicitly identified prayer and religious dieting as religious exercises, it seems beyond dispute that both Kelly's prayer and strict vegetarian diet qualify as exercises of religion under RLUIPA.

II. THE PRISON SUBSTANTIALLY BURDENED MR. KELLY'S SINCERELY HELD RELIGIOUS BELIEFS

The prison's denial of Kelly's nightly prayer request and removal from the vegetarian diet substantially burdened Kelly's sincerely held religious beliefs in violation of RLUIPA.

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[5] *See, e.g.*, *Town of Greece v. Galloway*, —U.S.—, 134 S. Ct. 1811 (2014) (considering whether opening town hall meetings with prayer was an establishment of religion); *Santa Fe Ind. School Dist. v. Doe*, 530 U.S. 290 (2000) (questioning whether student-led prayer at a public school violated the Establishment Clause); *Marsh v. Chambers*, 463 U.S. 783 (1983) (inquiring whether opening legislative sessions with a prayer was an establishment); *Engel v. Vitale*, 370 U.S. 421 (1962) (considering possible Establishment Clause violations when a government official offers a prayer).

[6] *See, e.g.*, *Baranowski v. Hart*, 486 F.3d 112, 124 (5th Cir. 2007) ("keeping kosher [] qualif[ies] as religious exercise[] for the practice of Judaism under RLUIPA's generous definition.") (internal quotation marks omitted); *Koger v. Bryan*, 523 F.3d 789, 797–98 (7th Cir. 2008) (finding a non-meat diet not compelled by Thelema qualified as religious exercise under RLUIPA); *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (finding that observing Ramadan was a religious exercise under RLUIPA).

Under RLUIPA, an institutionalized person challenging a prison policy must demonstrate that his sincerely held religious belief is substantially burdened by the challenged government action. Thus, the first inquiry is whether a "prisoner's request for an accommodation [is] sincerely based on a religious belief and not some other motivation." *Holt*, 135 S. Ct. at 862. The second inquiry analyzes whether that belief is substantially burdened.

The determination of whether an inmate's religious beliefs are sincerely held is "of course, a question of fact." *United States v. Seeger*, 380 U.S. 163, 185 (1965). A person challenging the government's imposition carries the burden to show that his religious beliefs are sincere. *Holt*, 135 S. Ct. 853, 862 (2015). Despite the requirement of this inquiry, the Court has noted the limited adjudicative weight to be given to sincerity questions. *Gillette v. United States*, 401 U.S. 437, 457 (1971). Often, the Court foregoes a scrutinizing analysis of the sincerity of a religious belief and treats the question in a cursory manner.[7] The Court sincerity inquiry does not rely upon specific factual elements. *See generally Bowen v. Roy*, 476 U.S. 693 (1986)

In keeping with the maintenance of security and good order in a correctional facility, prison officials may appropriately question whether a prisoner's religiosity, asserted as the basis for a requested accommodation, is authentic. Due deference is afforded to the expertise of prison officials. *Cutter*, 544 U.S. at 722. RLUIPA allows inquiry into the sincerity of a particular religious belief, but it precludes the government from determining whether such a belief is "central" to a religion or even if the belief is true. *See* 42 U.S.C. § 2000cc-5(7)(A); *cf. Gillette*, 401 U.S. at 457 ("'[T]he "truth" of a belief is not open to question'; rather, the question is whether the objector's beliefs are 'truly held.'" (quoting *Seeger*, 380 U.S. at 185 (1965)).

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[7] *See, e.g.*, *Holt*, 135 S. Ct. at 862 (finding that the inmate's religious belief was not in dispute); *Burwell v. Hobby Lobby*, —U.S.—, 134 S. Ct. at 2779 (noting that the Court and parties in the case do not question the sincerity of the challenger's religious beliefs); *Lyng v. Northwest Indian Cemetery Protective Ass'n*., 485 U.S. 439, 447 (1988) (noting the undisputed sincerity of the claimants' religious beliefs); *Gillette*, 401 U.S. at 440 (finding that there was no doubt about the sincerity conscientious objector's sincerity of belief).

The prison's policy imposes a substantial burden on Kelly's religious exercise under both the Supreme Court's recent individualized determinations and under the Court's traditional application of Free Exercise Clause calculus. RLUIPA does not provide a definition for "substantial burden," but the Supreme Court has typically utilized the definition of substantial burden from its Free Exercise Clause jurisprudence. *See Lovelace*, 472 F.3d at 187 (4th Cir. 2006). RLUIPA review utilizes First Amendment language, but also "provides greater protections" than the protections provided by the First Amendment. *Holt*, 135 S. Ct. at 862.

Under the framework of its two most recent cases involving substantial burdens, Kelly's religious exercise is substantially burdened. In *Holt v. Hobbs* and *Burwell v. Hobby Lobby*, the Supreme Court did not employ a strict substantial burden test. In *Holt*, the Court determined that because the prison gave the inmate a Hobson's Choice, his religious exercise was substantially burdened. *Holt*, 135 S. Ct. at 862. The prison forced the inmate to decide between two options. *Id*. First, the prisoner could ignore the prison policy, uphold his religious beliefs by growing his beard beyond the allowed length, and face serious discipline. Or, second, the prisoner could follow the prison policy and contravene his religious beliefs by trimming his beard. *Id*. Putting the "petitioner to this choice . . . substantially burden[ed] his religious exercise." *Id*. In *Hobby Lobby*, a RFRA case using the same Free Exercise Clause definition of "substantial burden," the Supreme Court similarly dismissed a rigid substantial burden inquiry. *Hobby Lobby*, 134 S. Ct. at 2779. Rather, the Court stated uncritically that a rule forcing people to bear a heavy cost for acting in accordance with their religious beliefs "clearly impose[d] a substantial burden on those beliefs." *Id*.

Even if the Court does not continue this recent trend, Kelly's religious exercise is substantially burdened under the Court's older analysis. The specific definition of "substantial

burden" has evolved. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). In *Lyng*, the Court held that policies that have "*no* tendency to coerce" an individual to act contrary to his religious beliefs may survive the substantial burden test. *Lyng*, 485 U.S. at 450 (emphasis added). However, the Court produced a clearer definition of "substantial burden" in *Thomas v. Review Bd*., saying that a government policy imposes a substantial burden if it places "pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. Of Ind. Employment Sec. Div*., 450 U.S. 707, 718 (1981). In *Thomas*, the state of Indiana denied the plaintiff unemployment compensation after he quit his job due to religious objection to funding the war effort. *Id*. at 710–11. Therefore, the government denied a benefit because of mandated religious belief. *Id*. at 717–18. The Court found that the state violated the plaintiff's constitutional rights by substantially burdening his belief. *Id*. at 718. This is just one of a number of iterations of this definition.[8] In the RLUIPA context specifically, courts of appeal have defined "substantial burden" similarly to the *Thomas* Court.[9]

[8] *See, e.g*., *Hobbie v. Unemployment Appeals Comm'n. of Fla*., 480 U.S. 136, 141 (1987) (determining that substantial burdens put "substantial pressure on an adherent to modify his behavior and to violate his belief"); *Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (identifying a substantial burden when an individual must "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other"); *but see Bowen v. Roy*, 476 U.S. at 707–08 (1986) (discovering no substantial burden when the government interfered with an individual's religious belief, but did not coerce them). While *Sherbert* and *Bowen* are part of the Supreme Court's "substantial burden" definition evolution, their direct application to this case is inapposite. Those cases dealt with religious exercise in the context of the government's positive grant of benefits. This case deals with the necessary absence of government restriction of religious exercise.

[9] *See, e.g*., *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (adopting explicitly the *Thomas v. Review Bd*. definition); *Adkins v. Kaspar*, 393 F.3d 559, 570 (5th Cir. 2004) (defining "substantial burden" as action that "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs"); *Midrash*, 366 F.3d at 1227 ("result[ing] from pressure that tends to force adherents to forego religious precepts"); *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004) ("a significantly great restriction or onus upon [religious] exercise"); *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 761 (7th Cir. 2003) (a burden "that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise . . . effectively impracticable").

A. Mr. Kelly's Sincere Religious Beliefs Include Praying During the Evening and This Belief is Substantially Burdened

1. Sincerity of Mr. Kelly's Religious Beliefs Regarding Prayer

Kelly's prayer beliefs are sincere. Under *Seeger*'s fact-intensive analysis, it is obvious that Mr. Kelly sincerely believes in the importance of prayer as religious exercise. First, Kelly has attended all prayer services made available to him by TCC. R. at 5. Second, Kelly advocated for an expansion of prayer services for all of the prison's NOI members. R. at 5–6. This advocacy included filing multiple grievances with prison officials and multiple conversations with the Director of the Chaplaincy Department and the Warden. The district court viewed Kelly's initiative and leadership role in matters of faith as indicative of the sincerity of Kelly's religious beliefs. R. at 10. An insincere religious member would not seek *more* religious exercise opportunities. Third, Kelly's grievances demonstrated knowledge of *The Holy Qur'an* and its requirements for prayer. R. at 5. Fourth, as evidenced by Kelly's grievances, he continued to pray even in spite of his cellmate's abusive conduct and disruptive behavior. *Id*. An insincere religious believer would likely have abandoned attempts to pray after such significant impediment from prison staff and fellow inmates. Kelly's behavior demonstrates the kind of consistency of religious belief that the Court relied upon in *Thomas* and *Bowen* to help make sincerity determinations. Given that there are no facts undermining the sincerity of Kelly's prayer beliefs, this Court should presume his sincerity of belief. *See Holt*, 135 S. Ct. at 862; *Burwell*, 134 S. Ct. at 2779 (2015).

Kelly's sincere religious exercise is substantially burdened by the prison's denial of an additional nightly prayer service. A substantial burden can be found under the Supreme Court's most recent restatements of substantial burden analysis and under its more traditional approach. As in *Holt v. Hobbs*, the prison in this case put Kelly to an impossible choice. Like

the inmate's choice in *Holt* of either shaving his beard or facing negative consequences, Kelly is faced with a choice between not praying or receiving abuse from his cellmate. As the *Holt* Court acknowledged, putting a prisoner "to this choice…substantially burden[ed] his religious exercise." *Holt*, 135 S. Ct. at 862. Furthermore, the costs born in *Hobby Lobby* were presumptively a substantial burden. While Kelly is not bearing a significant financial burden for exercising his religion, he must bear the brunt of negative treatment from his cellmate and incur the cost of being unable to engage properly in congregational prayer services. R. at 4–5. The substantiality of the burden is evidenced by TCC's outright ban on a particular exercise. Prohibiting Kelly from attending a particular "religious worship service[] substantially burden[s] his ability to exercise his religion." *Greene v. Solano County Jail*, 513 F.3d 982, 988 (9th Cir. 2008).

2. Substantial Burden of Mr. Kelly's Religious Beliefs Regarding Prayer

Kelly's religious exercise is substantially burdened by the prison's policy under the Court's more traditional substantial burden analysis. Under *Lyng*, a government action does not substantially burden if it has "no tendency to coerce." *Lyng*, 485 U.S. at 450 (emphasis added). In other words, if a government policy pressures a prisoner to act contrary to his beliefs, his religious exercise is substantially burdened. *See Thomas*, 450 U.S. at 718; *Lovelace*, 472 F.3d at 187. TCC's policy cannot be said to have "no tendency" to coerce. Kelly is subjected to harassment when he prays in his cell in an attempt to partially satisfy his religion's requirement of nightly congregational prayer. R. at 4. Such treatment makes it nearly "impossible to perform the [prayer] ritual in his cell." *Walker v. Beard*, 789 F.3d 1125, 1135 (9th Cir. 2015). In *Walker*, the Ninth Circuit found that placing an Aryan Christian Odinist in a cell with a non-Aryan substantially burdened the prisoner's religious exercise; in the same way, being placed with an

abusive cellmate who does not share his religious beliefs substantially burdens Kelly's religious exercise.

Even if the policy has an insignificant tendency to coerce, TCC's policy forces Kelly to act contrary to his beliefs. NOI maintains that members must pray in community five times a day. R. at 5. If Kelly attempts to pray with his fellow NOI adherents at night, he risks punishment—solitary confinement—for disobeying the prison's policy prohibiting night services. R. at 12. In *Walker*, the court found that any threat of "serious disciplinary action" for following a religious belief amounted to pressure to contravene that religious belief. 789 F.3d at 862. If Kelly were able to pray—that is to say, if he did not have an abusive cellmate—he would still be forced to contradict his faith's requirement of congregational prayer.

Furthermore, the 12th Circuit Court of Appeals erred because the court conflated its substantial burden analysis with the compelling interest and least restrictive means test. R. at 17. Simply because an alternative means may not be viable does not mean that a prisoner's religion is not substantially burdened. *See generally Brown-El v. Harris*, 26 F.3d 68 (8th Cir. 1994). The 12th Circuit also stated that granting an exemption to one faith would "create danger of violence…[and] a strong argument for equal treatment," r. at 18, however, in *Holt*, the Supreme Court rejected exactly this argument. In striking down the prison's argument that one exemption may lead to another, the Court said, "[a]t bottom, this argument is but another formulation of the 'classic rejoinder of bureaucrats throughout history: if I make an exception for you, I'll have to make one for everybody, so no exceptions.'" *Holt*, 135 S. Ct. at 866 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)). The Court went on to say that it has rejected such arguments in analogous contexts. *Holt*, 135 S. Ct. at 866. *See also O Centro*, 546 U.S. at 436 (2006); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963). Under any of

these measures, the prison's policy substantially burdens Kelly's religious exercise of prayer by preventing him from congregating with other NOI members for nightly prayer services.

B. Mr. Kelly's Sincere Religious Beliefs Include a Vegetarian Diet and This Belief is Substantially Burdened

1. Sincerity of Mr. Kelly's Religious Beliefs Regarding a Vegetarian Diet

Kelly's dieting beliefs were sincere. From the moment of Kelly's conversion, he was placed on a watch-list of potential feigners, indicating exaggerated suspicion from the beginning. R. at 7. As discussed in the nightly prayer analysis, Kelly demonstrated sincere belief in the precepts of NOI. He advocated on behalf of himself and the other NOI members to get a nightly prayer service; he filed multiple grievances to facilitate his prayers; he cited verses from *The Holy Qur'an* in his formal grievance as support for the prayer service; he attended all of the services provided; and faithfully followed his diet for some time. R. at 5, 10. *Cf. Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2012) (relying on, as indications of sincerity, an inmate's requests for kosher meals from prison administrators and evidence that he ate the kosher meals provided at his former prison).

The only evidence of Kelly ever deviating from his vegetarian diet was his cellmate's hearsay and the subsequent discovery of the meatloaf, which could have been planted. Kelly insistently denied that ownership of the meatloaf, and when his diet was revoked, he did not eat for two days. R. at 6. It was only after an invasive and painful tube feeding, that Kelly consumed regular meals. In the prison's words, the meatloaf incident "raised serious *questions* about Kelly's religious sincerity." R. at 6–7 (emphasis added). "[R]aised serious questions" is hardly a recognized standard of proof, and TCC should have required more evidence before removing Kelly. Other circuits have found a substantial burden even after an inmate was

observed violating a religious diet. *See Lovelace*, 472 F.3d at 187; *Reed v. Faulkner*, 842 F.2d 960, 962 (7th Cir. 1988).

Assuming that Kelly did actually violate his vegetarian diet, one instance of backsliding is insufficient for a finding of insincerity. As a starting point, courts are "singularly ill-equipped to sit in judgment on the verity of an adherent's religious beliefs." *Ford v. McGinnis*, 352 F.3d 582, 588 (2d Cir. 2003) (Sotomayor, J.) (internal quotation marks omitted). While Kelly's backsliding may be evidence of insincerity, it is not conclusive. *See Nasir v. I.N.S.*, 122 F.3d 484, 487 (7th Cir. 1997). For that matter, many courts have come to anticipate backsliding from sincere prisoners.[11] The *Qur'an* itself contemplates forgiveness for deviating from the halal diet.[12] If perfection is the standard for sincere religious observance, it is a wonder that Congress enacted RLUIPA at all; presumably almost every inmate has already violated the dictates of his religion in addition to the criminal law.

2. Substantial Burden of Mr. Kelly's Religious Beliefs Regarding a Vegetarian Diet

To say that TCC "pressure[d]" or "tend[ed] to coerce" Kelly into eating a regular diet is an understatement—they force fed him. R. at 6; *Thomas*, 450 U.S. at 718; *Lyng*, 485 U.S. at 450. Mr. Kelly did not challenge the force feeding, but it lends little needed credibility to his claim that the prison, by revoking his special diet status, "forced him to disobey the dietary laws of the Nation of Islam." R. at 2, 6.

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[11] *See e.g.*, *Moussazadeh*, 703 F.3d at 791–92 ("'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?' . . . even the most sincere practitioner may stray from time to time") (quoting *Grayson v. Schuler*, 666 F.3d 450, 454 (7th Cir. 2012)); *Caruso v. Zenon*, 2005 WL 5957978, at *11 (D. Colo. 2005) ("He may have strayed from the teachings of his faith--even repeatedly--with regard to his purchase of *haram* foods. These purchases demonstrate carelessness at best, and spiritual weakness at worst, but they do not suggest that his intent to adhere to Islamic law or a *halal* diet is somehow insincere.").

[12] He has only forbidden you what dies of itself, and blood, and flesh of swine, and that over which any other (name) than (that of) Allah has been invoked; but whoever is driven to necessity, not desiring, nor exceeding the limit, no sin shall be upon him; surely Allah is Forgiving, Merciful. *QUR'AN* 2:173.

Putting the force feeding aside, Kelly faced a Hobson's choice of eating a non-vegetarian diet or not eating. Starvation is a far worse penalty than any disciplinary action in *Holt*, which "easily satisfied" the substantial burden requirement. 135 S. Ct. at 862. *See also Nelson v. Miller*, 570 F.3d 868, 879 (7th Cir. 2009) ("We have held that a prisoner's religious dietary practice is substantially burdened when the prison forces him to choose between his religious practice and adequate nutrition.").

The prison and 12th Circuit argued below that "the prison's removal of Kelly from the program did not compel him to violate his own religious beliefs and religious practices; instead, Kelly's own actions violated the principles of the NOI, which Kelly allegedly had adopted." R. at 7, 20 (citing *Daly v. Davis*, 2009 WL 773880, at *2 (7th Cir. 2009) (conceding that Daly repeatedly broke the program's rules by buying non-kosher food from the commissary). It is undoubtedly true and undoubtedly irrelevant that if Kelly in fact did take the meatloaf, he was responsible for the initial violation of his beliefs; TCC subsequently forced him to violate his beliefs. There is a wide distinction between succumbing to temptation and being forced to violate one's beliefs as punishment. *Reed*, 842 F.2d at 963 ("It would be bizarre for prisons to undertake in effect to promote strict orthodoxy, by forfeiting the religious rights of any inmate observed backsliding, thus placing guards and fellow inmates in the role of religious police."). While there is a certain irony about Kelly being punished for breaking his diet by being forced to break his diet, the irony rises to a substantial burden. Just as TCC could not punish a lactose intolerant inmate for eating a cupcake by giving him nothing but dairy, it cannot punish Mr. Kelly for backsliding by making him sin again and again.

Any argument that Kelly was being punished for bullying, not violating his diet, both contradicts the record and is irrelevant to the substantial burden analysis. It would not matter if

Kelly murdered his cellmate for meatloaf; his religious exercise of a vegetarian diet would still be substantially burdened. The justifications for revoking the diet are properly examined in the compelling interest prong. *See Holt*, 135 S. Ct. at 862–63 (considering the prison's proffered compelling interests in safety and security, only after finding a substantial burden).

Therefore, Kelly demonstrated his sincerity via his faithful attendance at prayer meetings and advocacy on behalf of himself and fellow NOI members. He further demonstrated a substantial burden on his religious exercises of prayer and dieting in light of the pressure, if not compulsion TCC placed upon him to abandon both.

III. THE PRISON'S INTERESTS ARE NOT COMPELLING AND EVEN IF THEY ARE, THE PRISON FAILED TO SATISFY THE LEAST RESTRICTIVE MEANS PRONG

TCC's polices fail strict scrutiny. Since Kelly has demonstrated that his religious practices of nightly prayer and a vegetarian diet have been substantially burdened, TCC must demonstrate that the burden "(A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a).

While the prison context matters in applying the compelling interest standard, and due deference is owed to prison administrators, *Cutter*, 544 U.S. at 709, RLUIPA does not permit "unquestioning deference." *Holt*, 135 S. Ct. at 864. Courts must still consider whether exceptions are required, necessitating the prison "not merely to explain why it denied the exemption but to *prove* that denying the exemption" satisfies RLUIPA. *Id*. (emphasis added).

As in RFRA, RLUIPA requires the challenged law to be applied to the "person"—"'the particular claimant whose sincere exercise of religion is being substantially burdened.'" § 2000cc(a)(1); 42 U.S.C. § 2000bb-1(b); *Holt*, 135 S. Ct. at 863 (quoting *Hobby Lobby*, 134 S. Ct.

at 2779). It follows that the Court should "'look beyond broadly formulated interests'"; rather, it should examine the "'marginal interest'" of enforcing its policies against Mr. Kelly. *Holt*, 135 S. Ct. at 863–64 (finding it "hard to swallow" that denying the petitioner a ½-inch beard actually furthered the interest in detecting contraband) (quoting *Hobby Lobby*, 134 S. Ct. at 2779). *See also Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 831–32 (2006) (finding that general references to the dangers of drug use insufficient for judicial consideration of the use of a *particular* drug).

It is true that "'[i]n the dangerous prison environment, "regulations and procedures" are needed to "maintain good order, security and discipline, consistent with consideration of costs and limited resources.'" *Holt*, 135 S. Ct. at 867 (Sotomayor, J., concurring) (quoting *Cutter*, 544 U.S. at 723). "[T]hat is not to say that cost alone is an absolute defense to an otherwise meritorious RLUIPA claim." *Id.* (citing § 2000cc–3(c)) (stating that RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). *See also Hobby Lobby*, 134 S. Ct. at 2780–81 (citing RLUIPA for the proposition that the government could pay for women's contraception when their employers have religious objections). This Court has found in another context that even a threat to an entity's financial integrity is insufficient. *Mem'l Hosp. v. Maricopa County,* 415 U.S. 250, 263 (1974) (rejecting the interest in insuring the "fiscal integrity" of a free medical care program as a compelling interest sufficient to justify penalizing new residents' right to travel to and settle in the state).

Furthermore, the least restrictive means prong requires the government to "show" that it lacks other means of achieving its interests, which would not impose a substantial burden. *Holt*, 135 S. Ct. at 864 (citing *Hobby Lobby*, 134 S. Ct. at 2780). "'[I]f a less restrictive means is

available for the Government to achieve its goals, the Government must use it.'" *Id*. at 864. In *Holt*, the prison failed to show why it was so different from the state and federal institutions that allowed facial hair. The prison also failed to prove that the petitioner's proposed alternative, of taking a picture of him while clean-shaven and another with a beard, would not equally serve the interest in preventing him from evading guards by quickly shaving his beard and thereby changing his appearance. *Id*. at 865.

A. TCC Failed to Identify an Appropriate Compelling Interest in Restricting Mr. Kelly's Prayer and Failed to Employ the Least Restrictive Means to Pursue its Interests

1. TCC Failed to Identify a Compelling Interest in Denying Nightly Prayer Services

In denying Kelly's request for nightly prayer services, TCC failed to identify a compelling interest as applied to Kelly. Tourovia Directive #98 allows the prison to limit religious services only on "a showing of threat to the safety of staff, inmates, or other person" to maintain "the security of good order in the facility." R. at 25. Restrictions on prayer services may be required generally for the protection of a prison's security interests, but TCC failed to show their necessity as related to Mr. Kelly and other NOI adherents. It is undisputed that NOI members have maintained "satisfactory behavioral standing" and have no "record or history of violence." R. at 3. TCC's decision to ban nightly prayer punished religious groups that had engaged in illicit activity during nightly prayer, however, that incident took place nearly twenty years ago and the government made no showing that Kelly and other NOI adherents posed the same security threat. R. at 4. Even if it is true that Kelly was on a watch-list of inmates who may have assumed a religious identity to cover up illicit gang activity, the government made no showing that those suspicions are supported. R. at 7. In fact, Kelly's insistence for extra prayer time demonstrates the sincerity of his claims. Therefore, the government would need to make a more precise and convincing showing that Kelly's request for nightly prayer services posed a

threat to prison security. *See Murphy v. Missouri Dep't. of Corr*., 372 F.3d 979, 988–89 (8th Cir. 2004) (asserting that prison administrators must provide evidence for concern of violence resulting from an accommodation).

Additionally, the prison does not have a compelling financial interest in denying Kelly's nightly prayer request. Another evening prayer service would cause the prison to incur an insignificant cost. RLUIPA considers that accommodating prisoner's religion "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." § 2000cc-3(c); *see also Holt*, 135 S. Ct. at 864–65 (deciding that a prison's institution of a dual-photo identification mechanism and increased searches of prisoners' bodies did not impose too much cost). The cost of bringing in an additional chaplain for an evening prayer creates a *de minimis* financial imposition on TCC. In holding that TCC did have a compelling interest in avoiding these costs, the 12th Circuit relied upon *Adkins v. Kaspar*. R. at 19 (citing *Adkins*, 393 F.3d 559 (5th Cir. 2004)). The court correctly noted that the prison had a uniform chaplain policy, like TCC, and that the *Adkins* court upheld the denial of additional prayer services. R. at 19. However, the 12th Circuit ignored a critical fact. *Id*. The prison involved in *Adkins* already had an exception for Muslim inmates, allowing them to meet without an outside volunteer. *Adkins*, 393 F.3d at 566, 571. Therefore, the prison in Adkins had already incurred the cost of overseeing Muslim prayer services, thus undermining any parallel to the instant case.

The government also failed to show that it had a compelling interest in preventing potential tension in the prison arising from an accommodation of Kelly's prayer needs. The 12th Circuit argued that the prison had a compelling interest to avoid tension arising from a perception of "special treatment" of NOI adherents over other religious groups. R. at 18. It may

be true that differential treatment "could pose a threat to prison morale, and, therefore, to prison safety." *Kahey v. Jones*, 836 F.2d 948, 951 (5th Cir. 1988). However, the prison failed to make a showing that prison morale would be affected so substantially by the accommodation of a minority religious group as to create a threat to prison safety. A tension of this kind would arise only if the prison did not accommodate other groups. The prison must do more than "merely assert a security concern—they [must] demonstrate the security concern." *Murphy*, 372 F.2d at 988. Prison authorities offered mere conclusory statements regarding the compelling interest and failed to carry its statutory burden.

2. TCC Failed to Employ the Least Restrictive Means Available

Even if the court were to assume that the government had a compelling interest, TCC still fails the strict scrutiny analysis because it failed to employ the least restrictive means in pursuing any of its alleged interests. As the Supreme Court commented, the least restrictive means prong is "'exceptionally demanding' and it requires the government to affirmatively demonstrate an absence of other means for achieving its interest. *Holt*, 135 S. Ct. at 864 (quoting Hobby Lobby, at 2780). TCC must affirmatively prove that denying Kelly an accommodation furthers its interest in the least restrictive way possible. *Id*. There are three ways in which TCC fails least restrictive means review: the policy is underinclusive for achieving its stated interest; TCC failed to identify abuse of the accommodation scheme by Kelly or other NOI adherents; and TCC had alternative means of achieving its goals that did not impose a substantial burden on religious exercise.

A governmental entity's policy fails strict scrutiny if its policy is underinclusive in pursuing its stated interests. In *Holt*, the Supreme Court struck down a prohibition on beards longer than a quarter inch because it was underinclusive. The prison stated that the rule was

necessary to prevent contraband passing into the prison and to identify inmates. In striking down the rule, the Court determined that the prison did not limit hair length or baggy clothing, both of which are helpful in transporting contraband. Because the prohibition failed to prohibit other vehicles of contraband transportation, the policy was underinclusive. *Holt*, 135 S. Ct. at 861.

Moreover, TCC fails strict scrutiny because Kelly did not abuse the accommodation process. A prison "might be entitled to withdraw an accommodation if the claimant abuses the exemption in a manner that undermines" a prison's interests. *Id.* at 867 (emphasis added). It is noteworthy that the Court did not indicate that abuse was a sufficient reason for denying an accommodation. Furthermore, the government may only deny accommodations for religious exercise if they become "excessive, imposed unjustified burdens on other institutionalized persons, or jeopardize the effective functioning" of the prison." *Cutter*, 544 U.S. at 726 (emphasis added). Absent abuse that undermines the prison's interests, the prison's denial of an accommodation fails the least restrictive means analysis.

Finally, TCC fails the least restrictive means test because viable alternatives exist. If "*a* [single] less restrictive means is available for the Government to achieve its goals, the Government *must* use it." *Holt*, 135 S. Ct. at 864 (quoting *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803, 815 (2000) (emphasis added)). In conducting this review, courts cannot "assume a plausible, less restrictive alternative would be ineffective," but the government must demonstrate the inefficacy of any proffered alternative. *Holt*, 135 S. Ct. at 866 (internal citations omitted). Therefore, if only one less restrictive means of pursuing an interest exists, TCC fails under RLUIPA's strict scrutiny review.

TCC's Directive #98 is an underinclusive means of pursuing the prison's stated interest in maintaining the security and good order of the prison. TCC is concerned with prayer services

serving as a cloak for illicit gang activity. R. at 4. For this reason, an official chaplain monitors the prayer services. R. at 25. However, the policy is severely underinclusive because religious groups can still interact with one another throughout the day. In fact, NOI adherents indisputably travel from their daily activities in groups. R. at 3. The prison did not demonstrate that prayer service opportunities pose a greater threat of illicit behavior than conduct during meals, at night in one's cell, or at any other point of the prison day. To avoid underinclusivity, the prison would need to monitor these interactions as well; or, at the very least, give some explanation for why these non-religious activities are less likely to pose a threat to prison security than a religious activity. TCC's failure to include nonreligious conduct that endangers the same prison interests demonstrates the policy's excessive underinclusivity.

Second, TCC's denial of nightly prayer services fails least restrictive means because there is no evidence of abuse by Kelly. The record indicates that Kelly followed appropriate protocol in establishing his religious belief with the prison, requesting the accommodation, and in airing his grievances. R. at 3, 5. Even if previous religious groups had abused an accommodation, the prison does not possess evidence that Kelly has used prayer for illicit activity. The government's failure to show that Kelly has, or would, abuse his requested accommodation dooms the prison's decision within the *Holt* framework. Furthermore, there is no evidence in the record that Kelly's claims were excessive, that the accommodation would create unjustified burdens for other inmates, or that effective functioning of the prison was endangered. TCC's inability to demonstrate these facts, compounded by its failure to illustrate Kelly's supposed or potential abuse, further demonstrates the government's failure of the least restrictive means analysis.

Additionally, TCC failed to show that sufficient alternative means were not available. First, TCC did not demonstrate that it could not accept Kelly's initial compromise. Kelly suggested that a nightly prayer service could be held at 8:00 P.M. after dinner and before final head count. R. at 5. The Director's dismissal of this suggestion did not demonstrate that this alternative was financially infeasible or logistically precluded. *Id*. Without evidence as to the efficacy of this alternative, courts are forced to "assume [whether the] plausible, less restrictive alternative" would be effective. *Holt*, 135 S. Ct. at 866. *See also Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) ("[A] prison could not meet its burden to prove the least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice."). If a court must assume the efficacy of an alternative, the government has failed its burden of proof. Second, the district court offered two alternatives: either "the prison could have scheduled a final head count after an inmate returned to his cell" or it could have "group[ed] NOI inmates into the same cells or adjacent cell blocks." R. at 14. TCC again failed to demonstrate that these alternatives were not feasible, too costly, or posed increased security risks. The Court is forced to make assumptions about these alternatives efficacy, which demonstrates the government's evidentiary shortcomings. TCC impermissibly forced the courts to assume that alternative measures were insufficient by failing to provide evidence that other alternatives were infeasible. Due to this evidentiary failing, and because the policy is underinclusive and Kelly did not abuse an accommodation policy, TCC failed to meet its burden and fails the least restrictive means analysis.

B. TCC Failed to Identify an Appropriate Compelling Interest in Removing Mr. Kelly from His Vegetarian Diet and Failed to Employ the Least Restrictive Means to Pursue its Interests

1. TCC Failed to Identify a Compelling Interest in Removing Mr. Kelly from His Vegetarian Diet

TCC lacked a compelling interest to remove Kelly from his vegetarian diet. Tourovia Directive #99 provides three "broadly formulated" interests in limiting dieting accommodations: security considerations, budgetary or administrative considerations, and the orderly operation of the institution. R. at 26; Holt, 135 S. Ct. at 863–64. The proffered interests did not prevent Kelly from initially receiving an accommodation, so the issue is specifically whether the interests were implicated once Kelly allegedly violated the diet.

The interest in security is not compelling as applied to Kelly's vegetarian diet. TCC argued Kelly was on a watch-list of inmates who had potentially assumed religious identities to cloak illicit conduct and to join a gang. R. at 7. Perhaps false adherents would be a concern if religious groups were permitted unsupervised time together enabling them to engage in illicit conduct; vegetables, however, simply do not facilitate illicit activity. Forcing a regular diet upon Kelly will not prevent him from assimilating. *Cf. Holt*, 135 S. Ct. at 863 (finding a prison's argument that its efforts to suppress the flow of contraband would be seriously compromised by allowing an inmate to grow a ½-inch beard was "hard to take seriously." Even if a "vegetarian gang" could present a threat to security, the NOI members have no history of violence. R. at 3; *see Murphy*, 372 F.3d at 988–89 ("prison authorities must provide some basis for concern that . . . violence will result from any accommodation . . . ."); *cf. Ochs v. Thalacker*, 90 F.3d 293, 296–97 (considering prior racial violence as relevant to deferring to prison administrators' security concerns). Kelly's alleged bullying might seem to implicate security concerns. Even if the prevention of bullying was considered compelling, revoking the vegetarian diet did not serve

the interest. Kelly now has an incentive to bully vegetarians for their food. Abidance by the religious diet may serve as a litmus test of sincerity when evaluating security considerations behind other privileges, but the diet itself presents no dangers.

Likewise, there is no compelling budgetary reason to deny Kelly a vegetarian diet. Vegetarian meals are potentially cheaper than regular meals. *See* Sherry F. Colb, *A Prisoner Seeks Vegan Food in Prison: Why Refusing Him is Both Illegal and Foolish*, FindLaw, (Mar. 31, 2010), http://writ.news.findlaw.com/colb/20100331.html ("Some of the simplest, cheapest, and most nutritious foods are vegan."). Even if the government proves that vegetarian meals cost more, the continued marginal cost of backsliders' diets is *de minimis*. In any event, if TCC could afford Kelly's vegetarian diet before he allegedly backslid, it can afford it after he backslid. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546–47 (1993) (city failed to establish a compelling interest in preventing the slaughter of animals in one religious context when it allowed slaughter in other religious and secular contexts). *See Moussazadeh*, 703 F.3d at 794 (the proffered compelling interest in minimizing costs by denying free kosher meals to an alleged backslider was "dampened" by the prison's provision of kosher meals to all observant Jewish inmates). An interest in saving money by revoking a few backsliders' diets is simply not compelling. Especially since RLUIPA expressly provides that the government may need to incur expenses to avoid imposing substantial burdens on religious exercise. § 2000cc-3(c).

Finally, TCC's interests in the orderly operation of the prison are not compelling, as applied to Kelly. The 12th Circuit below raised two interests in removing Kelly from his diet. First, the bullied cellmate's statement raised "alarming questions" about Kelly feigning the need for the vegetarian diet to receive the benefits of special foods and added fellowship and rest

days. R. at 20. Second, Kelly needed to face the repercussions of his decision to breach the vegetarian diet. R. at 21. The possibility of an inmate feigning a diet to get special food and holidays hardly seems alarming, much less compelling. *See Cutter*, 544 U.S. at 718 (upholding RLUIPA despite the district court's contention that it might encourage prisoners to become religious for the benefit of greater rights); *Koger*, 523 F.3d at 800 (recognizing that courts have found legitimate penological interests in verifying prisoners' religious affiliations in the administration of an orderly accommodation program, but pointing out that no appellate court has found the interest to be compelling); *Lovelace*, 472 F.3d at 190 (prison failed to present evidence or elaborate on how the "articulated 'legitimate interest'" in removing inmates from religious dietary programs when they "'flout[]'" the dietary rules qualified as compelling). The second interest in having Kelly face the repercussions of backsliding smacks of religious policing rejected in *Reed*, 842 F.2d at 963. Enforcing orthodoxy is not a legitimate government interest and certainly not a compelling interest.

2. TCC Failed to Employ the Least Restrictive Means Available

Assuming, *arguendo*, that the Court finds any of the proffered interests in security, cost savings, or orderly operation compelling, the measures taken were not the least restrictive means of serving the interests. As to the interest in security, the prevention of illicit activity and gang activity can be served by maintaining supervision of the groups and perhaps by not allowing vegetarians to be cellmates. Certainly bullying must be addressed, but the traditional remedy of solitary confinement would not burden Kelly's dietary beliefs, nor would it encourage him to bully vegetarians for their rations.

Likewise, the interest in order can be served by denying backsliders the benefits of rest days, holidays, and special foods, and thereby disincentivize feigning the need for a special diet (though withholding the benefits would raise RLUIPA issues as well).

A final catchall would be to raise the evidentiary standard for revoking the diet, giving backsliders a few "strikes," allowing them the opportunity for consultation, and giving them the opportunity to resume the diet after a reasonable time. In fact, federal prisons implement all four alternatives. *See* U.S. DEP'T. OF JUSTICE, FEDERAL BUREAU OF PRISONS, BUREAU OF PRISONS PROGRAM STATEMENT, RELIGIOUS BELIEFS AND PRACTICES P5360.09 at p.19 (*https://www.bop.gov/policy/progstat/5360_009_CN-1.pdf*). [13] The Statement provides that inmates will be removed if "observed" eating from the main line, or if they purchase or consume noncertified foods from the commissary. Inmates are notified in writing of their violation and potential removal. *Id.* Prison authorities are limited to imposing a maximum thirty day removal period for the first few violations and up to a year after the first few. Notably, "[r]emoval is not punitive in nature," instead it allows the staff and inmate to reevaluate the diet's appropriateness for the inmate. *Id.* The federal provisions all help to insure that occasionally backsliding, but sincere religious inmates can follow the dictates of their beliefs. Moreover, the provisions have been in place since at least 2004, *id.*, and the Bureau of Prisons "has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners." *Cutter*, 544 U.S. at 725 (quoting U.S. Br. at 24 (No. 03-9877)). TCC has the burden of proving why the proposed alternatives are not sufficient for its compelling interests. *Holt*, 135 S. Ct. at 865–66 (evidence that the vast majority of states and the Federal Government allowed

[13] The following provisions are also reprinted in the appendix. App., *infra*, 3a.

inmates to grow ½-inch beards required the offending prison, "at a minimum," to offer persuasive reasons for deviating).

Therefore, TCC's proffered interests in security, cost saving, and institutional order are not compelling as applied to Kelly. Moreover, even if the Court found any of the interests compelling, TCC has not pursued the interests via the least restrictive means available, especially in light of the alternatives Kelly has provided.

CONCLUSION

Because Tourovia Correctional Center substantially burdened Mr. Kelly's sincere religious exercises of prayer and dieting and TCC cannot prove either a compelling interest or use of the least restrictive means, the District Court correctly entered summary judgment for Mr. Kelly. For the foregoing reasons, we respectfully request that this Court reverse the Court of Appeals and remand with instructions to affirm the grant of summary judgment.

APPENDIX

Religious Land Use and Institutionalized Persons Act in relevant part

42 U.S.C. § 2000cc-l. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person -

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which -

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-3. Rules of construction

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

42 U.S.C. § 2000cc-5. Definitions

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

U.S. Department of Justice, Federal Bureau of Prisons, Bureau of Prisons Program Statement, Religious Beliefs and Practices P5360.09, CN-1 in relevant part

[b. An inmate who has been approved for a religious diet menu must notify the chaplain in writing if the inmate wishes to withdraw from the religious diet. Approval for an inmate's religious diet may be withdrawn by the chaplain if the inmate is documented as being in violation of the terms of the religious diet program to which the inmate has agreed in writing. In order to preserve the integrity and orderly operation of the religious diet program and to prevent fraud, inmates who withdraw (or are removed) may not be immediately reestablished back into the program. The process of re-approving a religious diet for an inmate who voluntarily withdraws or who is removed ordinarily may extend up to thirty days. Repeated withdrawals (voluntary or otherwise), however, may result in inmates being subjected to a waiting period of up to one year.]

Prepared and wrapped trays will be provided for inmates approved for the certified food component. Those who are observed eating from the main line may be removed temporarily from that component. In addition, those who purchase and/or consume non-certified foods from the commissary may also be temporarily removed from that component.

The Warden has authority to remove inmates from and reinstate them to the program. Ordinarily, this authority is delegated to the chaplains. Inmates will be notified in writing (BP-S820) of a religious diet violation and potential removal from the religious diet program. Removal is not punitive in nature but provides an opportunity for the inmate and staff to reevaluate this program's appropriateness to meet the inmate's demonstrated needs. At the inmate's request for reinstatement, an oral interview will be conducted prior to reinstatement.

Tourovia Directive #98 in relevant part

98. Religious Corporate Services

Purpose: to establish policy for the practice of faith groups and ensure that inmates have the opportunity to participate in practices of their faith group, individually or corporately as authorized, that are deemed essential by the governing body of that religion, limited only by a showing of threat to the safety of staff, inmates, or other person involved in such activity, or that the activity itself disrupts the security or good order in the facility. Religious based programs/observances shall be accommodated, within available space and time, unless an overriding compelling governmental interest exists.

1. Inmates who wish to participate in prayer services shall conduct any congregational service at the Designated Prayer Times.

a. Requirement for a Chaplain. To protect the integrity and authenticity of the beliefs and practices of religious services and programs, a Chaplain must be available for the coordination, facilitation, and supervision of inmate services or programs and there must be sufficient offender interest (10 or more designated faith group members)

b. Restrictions on Services. Due to security and administrative efficiency, no inmate is to leave their cells for any reason after the last inmate head count. Prayer services shall not be allowed after the last inmate head count at 8:30 P.M., daily.

After consultation, the facility chaplain may

a) limit the participation in a particular religious activity or practice (e.g. religious, work proscription, ceremonial meals, etc.) to offender that that religious group or

b) curtail the congregate interaction of groups involved in a given faith group as a group if

- no specific faith group leader is involved to lead the ceremony; or
- deemed a potential security risk to the safety and security of the facility.

Tourovia Directive #99 in relevant part

99. Religious Alternative Diets

Requirement of a Written Request. Inmates who wish to observe religious dietary laws shall provide a written request for a special diet to the Director of Chaplaincy Services along with their Declaration of Religious Preference Form. The requests shall be accommodated to the extent practicable within the constraints of the Tourovia Correctional Center's

a) security considerations

b) budgetary or administrative considerations, and

c) the orderly operation of the institution.

Backsliding from a Religious Diet. In the event that an inmate gives prison administration adequate reason to believe that the religious alternative diet is not being adhered to, Tourovia Correctional Center reserves the right to revoke religious alternative diet privileges for any designated period of time or revoke the privilege permanently.