No. 15-275

IN THE

Supreme Court of the United States

SIHEEM KELLY,

Petitioner,

v.

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

Respondents.

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

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I. Does Tourovia Correctional Center's (TCC) policy of prohibiting an additional nightly religious congregational service in order to preserve resources and maintain security violate RLUIPA when the prisoners are granted three daily congregational services, the prison staff cannot oversee an additional nightly congregation, and the policy against night services is applied in a fair and uniform way?

II. Under RLUIPA, does TCC's religious alternative diet policy adhere to RLUIPA's substantial burden provision when an inmate can only be removed due to evidence that the inmate has violated their religious diet and cannot be penalized with any other loss of religious benefits?

JURISDICTIONAL STATEMENT

This is a timely appeal pursuant to 28 U.S.C. § 2101(c) (2012). The opinion of the Twelfth Circuit was entered on June 1, 2015. Supreme Court Record at 3, *Kelly v. Echols*, No. 985-2015 at 2. Petitioner, Mr. Kelly, filed his appeal, and this Court granted his petition for a writ of certiorari on July 1, 2015, within the 90 days required by § 2101(c). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2012), which allows this Court to review any case for which a writ of certiorari has been granted.

STATEMENT OF THE CASE

The Tourovia Correctional Center ("TCC") is a maximum-security prison, which houses this country's most dangerous criminals and deviants. Siheem Kelly ("Petitioner") is an inmate at TCC, serving back-to-back sentences for drug trafficking charges and an aggravated battery offense. Supreme Court Record at 3, *Kelly v. Echols*, No. 985-2015 at 3. As a maximum-security institution, TCC employs strict policies and guidelines to ensure safety for its staff and inmates. However, TCC makes an honest effort to afford its inmate's religious freedoms, and endeavors not to let strict security policies infringe on the prisoner's rights.

Petitioner does not believe this is the case, and will attempt to persuade this Court to set precedent that will severely weaken the safety and security of prisons across the country. Petitioner wishes to have a policy that will allow him free reign to leave his cell and congregate with other religious inmates for each and every prayer, and further wishes to avoid disciplinary action for his dietary back-sliding and aggressive prison behavior. These facts will show that TCC has not burdened petitioner's religious freedoms. Rather, Petitioner would use his religious preferences to unlawfully burden the prison, and this cannot be upheld.

1. TCC Policies

TCC has two relevant religious practice policies. *Id.* at 25-26. The first is Tourovia Directive #98: Religious Corporate Services. *Id.* at 25. TCC's policy on services was most recently amended in August 1998 because a service volunteer was using a corporate prayer service to relay orders from incarcerated Christians to gang-affiliated civilians outside the prison. *Id.* at 4. TCC's new policy was also a reaction to Christian and Sunni Muslim groups ignoring the last in-cell evening headcount by staying in prayer rooms longer than authorized, in violation

of TCC security policy. *Id.* Thus, TCC ended nightly services and banned the use of volunteers, both for punitive reasons and to ensure that the headcount would be followed. *Id.*

TCC now has three designated prayer times at 8:00 A.M, 1:00 P.M., and 7:00P.M. *Id.* at 24. A TCC chaplain may only work outside of those hours in emergencies, where a prisoner is ill or dying. *Id.* at 4. If they are not available during those times no services will be held. *Id.* TCC retains the right to limit group prayer services based on demand, need, staff availability, and prison resources. *Id.* Official chaplains oversee each prayer service, which are held in TCC's chapel or one of four other classrooms. *Id.* TCC currently holds three services a day for Catholic, Protestant, Muslim, and Jewish inmates, and counter-majoritarian groups meet once a day. *Id.*

TCC's second relevant religious policy is Tourovia Directive #99: Religious Alternative Diets. *Id.* at 26. Inmates who wish to observe religious dietary restrictions must present a written request and a Declaration of Religious Preference Form to the Director of Chaplaincy Services. *Id.* The requests are accommodated to practicable extents within the constraints of TCC's "security considerations, budgetary or administrative considerations, and the orderly operation of the institution." *Id.* TCC reserves the right to remove an inmate from a religious alternative diet if "an inmate gives prison administration adequate reason to believe that the religious alternative diet is not being adhered to." *Id.* Privileges can be revoked for any designated period of time, or permanently, at TCC's discretion. *Id.* Although not codified in Tourovia Directive #99, the district court noted that bullying another inmate for food constitutes adequate reason for removal, and that threats of violence connected to any member of a faith group may result in the suspension of an inmate's ability to attend religious services for any designated period of time at TCC's discretion. *Id.* at 6.

2. Nation of Islam Practices at TCC

The Nation of Islam ("NOI"), a subgroup of the Sunni Muslim religion, represents less than one percent of the TCC prison population. *Id.* at 3. NOI has never had more than ten members practicing at TCC, and currently has seven recognized members. *Id.* The current NOI members at TCC have no record or history of prison violence, and the NOI in general has maintained satisfactory behavioral standing in the last five years. *Id.* The prison monitors the NOI nonetheless because of their tendency to move through the facility in groups, which protects NOI inmates from harassment, but also makes it easier for them to conceal illicit or gang related activity. *Id.* Members are recognized after they file a "Declaration of Religious Preference Form" with TCC. *Id.* Membership allows NOI inmates to take advantage of prayer services and a special diet program, which consists of a strict Halal vegetarian diet and a fast during the month of Ramadan, and two other NOI religious holidays. *Id.*

NOI requires prayers as outlined in the *Salat* prayer guide, and consists of "Obligatory and Traditional Prayers" at 1) Dawn, 2) Early Afternoon, 3) Late Afternoon, 4) Sunset, and 5) Late Evening. Record 3-4. NOI does not mandate corporate prayers outside of Ramadan and Friday evenings, though corporate prayers are preferred by NOI members. *Id.* at 4. At TCC, Prayers can be performed outside the cell up to three times a day, and at least twice a day inside the cell. *Id.* Concerning procedures, most adherents claim to require a clean environment, which includes washing themselves and their clothes as best as practicable, procuring a clean surface to kneel on and face Mecca, and no interruptions. *Id.* Although TCC does not assign cellmates based on religion, there is a general policy that allows an inmate to transfer with the Warden's approval if actual violence occurs against an inmate, regardless of the religious motivations. *Id.*

3. Petitioner's Incarceration and Petition for Group Services

Petitioner has been an inmate at TCC since 2000. *Id.* at 3. Petitioner filed his "Declaration of Religious Preference Form" two years after his arrival at the prison to indicate an affiliation with the NOI. *Id.* Petitioner also requested a name change to "Mohammed" and began taking advantage of NOI religious services benefits and a halal diet. *Id.* Petitioner currently attends all three corporate prayer services offered to NOI inmates. *Id.* at 5.

Despite TCC policies, Petitioner filed a written prayer service request with Saul Abreu in February 2013. *Id.* at 4-5. Petitioner, on behalf of himself and the other six NOI inmates, requested an additional congregational nightly prayer service after the last meal at 7:00 P.M. *Id.* at 5. The service would be held at 8:00 P.M. but before the final head count at 8:30 P.M. *Id.* This request was denied by Abreu because of the prison policy prohibiting inmate movement before final head count, and also due to the adequacy of current prayer services and the ability to pray in his own cell. *Id.* Petitioner later made a verbal request to Abreu, where Petitioner asked for one additional prayer service, but did not receive a response. *Id.*

Petitioner filed two grievances after the denial of additional prayer services. *Id.* The first grievance expressed Petitioner's belief that he could not longer pray in his cell and thus required an additional prayer service. *Id.* Petitioner believed that cell prayers were distracting and disrespectful to his religious practice because his non-NOI inmate would intentionally ridicule Petitioner or engage in lewd behavior when Petitioner attempted to pray. *Id.* Petitioner claimed that other NOI inmates were experiencing the same harassment, but his grievance was denied because of lack of proof of these incidents. *Id.* Petitioner's second grievance stated that prayer in the cell was a disgrace to Allah's, because Petitioner could not pray with a toilet in his cell. *Id.* This grievance was also denied. *Id.*

Petitioner‘s last action was to file a formal grievance with the prison based on the previous two grievances. *Id.* Petitioner’s grievance reiterated his complaints and requests for congregational prayers outside his cell, and included passages from the Qu’ran supporting his position. *Id.* Warden Kane Echols’ written response explained that Petitioner’s request would violate TCC’s policy. *Id.* Additionally, Petitioner’s allegations could not be verified, and regardless, Petitioner could request a transfer to a different cell to try and find a cellmate who would be more respectful of his prayer time. *Id.* at 5-6.

4. Petitioner’s Removal from the Alternative Diet Program

Petitioner was also removed from his religious alternative diet program after TCC was made aware of evidence that he had deviated from his vegetarian diet. *Id.* at 6. Two weeks after Petitioner’s formal grievance requesting nightly congregational services, Petitioner’s new cellmate reported that Petitioner had threatened him with violence to obtain his meatloaf dinner. *Id.* Warden Echols and Abreu were informed, and the incident was investigated and documented. *Id.* Petitioner’s cellmate signed a written statement, included in Respondents papers provided to the court. *Id.* at 7. Although no evidence of actual violence against the new cellmate was discovered, a search of Petitioner’s cell uncovered meatloaf wrapped in a napkin hidden under Petitioner’s mattress. *Id.* at 6. Despite Petitioner’s protests, he was removed from the vegetarian diet program. *Id.* In response, Petitioner began a hunger strike that lasted two days before TCC employees began forcible tube-feedings, which prompted Petitioner to end his strike and begin eating food provided to the general population. *Id.*

5. Petitioner’s RLUIPA Claim

Petitioner filed a complaint in the Federal District Court of Tourovia for the Twelfth alleging that TCC’s prayer and diet policies violated his First Amendment rights under RLUIPA.

Id. at 6. Regarding prayer, Petitioner argued that three daily religious congregations did not suffice under RLUIPA, and that all NOI members are entitled to at least "one additional congregational prayer, outside of their cells, and away from . . . non-NOI inmates." *Id.* Regarding the prison diet program, Petitioner argued that his removal due to his aggressive behavior toward his cellmate and his religious backsliding violated RLUIPA. *Id.* TCC stated that the heightened staffing burdens, and security risk, justify the denial under RLUIPA and prison policy. *Id.* TCC attached a lengthy affidavit by the Director of the Chaplaincy Department, "attesting to the validity of the prison's reasons," . . . and also attached an addendum containing the prison's "documented cost attainment stratagems." *Id.* at 6-7.

The District Court ruled in favor of Petitioner and granted summary judgment concluding that both policies violated RLUIPA, and even if a compelling interest could be found for both policies, TCC had not met the least-restrictive-method burden for carrying out such interests. *Id.* at 12-14.

On June 1, 2015 the Twelfth Circuit vacated the District Court's ruling, and concluded that (1) Petitioner failed to prove that the denial of an additional congregational prayer service substantially burdened his religious exercise; (2) Petitioner's removal from the diet program was not a substantial burden on religious exercise, (3) a compelling government interest existed in security; and (4) TCC's policies were the least restrictive means of furthering that compelling interest. *Id.* at 19-22. This Court granted certiorari on July 1, 2015. *Id.* at 23.

SUMMARY OF THE ARGUMENT

TCC's prohibition of an additional out-of-cell congregational night service for all religious faiths does not violate RLUIPA because it does not impose a substantial burden, and

even if it did, TCC's policy is the least restrictive means of furthering a compelling government interest.

Petitioner has the burden of proving that there is a substantial burden placed on his freedom of religious practice. Petitioner failed to meet this burden, because Petitioner did not show how a prohibition of an extra nightly congregation substantially burdens his religious freedom when he is already granted ten and a half hours of congregational worship a week, and is not restricted in his ability to pray in his prison cell.

Further, prayer in one's cell does not impose a substantial burden because it merely inconveniences Petitioner in that he must pray in the presence of a toilet. All inmates in every prison must pray in the presence of a toilet. This is the nature of being in prison and can hardly be called a "substantial" burden. Petitioner can take steps in his cell to cover up the toilet in order to sanctify his cell for prayer.

Finally, Petitioner is not substantially burdened by being placed in a cell with a non-Muslim cellmate. Petitioner has the ability to request a transfer. Petitioner never requested a transfer. Once again, requesting a transfer is merely an inconvenience and can be likened to a longer walk, as in *Midrash*. Petitioner is given an avenue to relieve himself of the anxiety of a non-Muslim cellmate, and this cannot be considered a substantial burden until Petitioner has attempted transfer.

TCC's policy against granting extra nightly congregational services to religious groups exists to serve the compelling interest of security for its staff and prison population. This Court has found that security within the prison system is a compelling government interest. TCC is a maximum-security prison, which houses this country's most dangerous criminals, and as such security is of highest priority. Further, TCC's Director of the Chaplaincy Department filed an

affidavit with this Court attesting to the security and budgetary concerns. Therefore TCC's policy is in furtherance of a compelling government interest.

TCC's policy is the least restrictive means to further the compelling interest in security. TCC is a maximum-security prison, and as such the least restrictive means are require more restrictive methods than in a minimum-security prison. In considering the least restrictive means, this Court should consider the effect or burden it would have on this institution in particular. Any less restrictive means would place far too much of a burden on TCC to be a viable alternative. Further, TCC tested the efficacy of the only less restrictive alternative, and that failed entirely in 1998. Under RLUIPA TCC is only required to test the efficacy of reasonably less restrictive alternatives, and even this Court has said that a government institution is not required to test every single possibility before it meets its least restrictive methods burden. TCC has met its burden under RLUIPA.

Likewise, TCC's backsliding policy, which reserves the right to remove an inmate from a religious alternative diet based on evidence that the diet is not being adhered to, does not violate the substantial burden provision of RLUIPA. The TCC policy does not cause any inmates to violate their beliefs, and only applies after an inmate removes themselves from the diet through evidence of non-adherence. A reactionary policy like TCC's does not impose any mandate for a religious inmate to modify their behavior, and is not a substantial burden upon religious practice.

TCC's backsliding policy also is buffered by a compelling interest in maintaining religious sincerity upon alternative religious diet participants. The policy is the most effective and least restrictive way of ensuring that an inmate has sincere beliefs. The plan narrowly focuses on an inmate's sincerity to their religious alternative diet, and does remove any other

religious privileges due to evidence of backsliding. Thus the backsliding policy does not impose a substantial burden under RLUIPA.

ARGUMENT

I. TCC's policy of denying requests for nightly congregational services, after the evening meal and immediately before the final head-count, does not violate RLUIPA.

TCC's policy of prohibiting an extra out-of-cell congregational night services to members of all religious faiths does not violate RLUIPA. TCC's policy allows for inmates to participate in prayer services during any of the designated prayer times of 8:00 A.M., 1:00P.M., and 7:00 P.M. R. at 24-25. The policy is subject to the following restrictions:

> 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.

Id. at 25. Section 2000cc-1 of RLUIPA dictates that a government cannot impose a substantial burden on the religious practices of a person confined within a prison "unless the government demonstrates that the 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 government interest. 42 U.S.C. § 2000cc-1(a)(1)-(2); *Cutter v. Wilkinson*, 544 U.S. 709, 712 (2005). In determining whether a substantial burden has been imposed, the plaintiff

bears the burden of persuasion. 42 U.S.C. § 2000cc-2(b); *Holt v. Hobbs*, 135 S. Ct. 853, 857 (2015).

Many circuit courts have agreed that limiting the number of prayer services based on amount or availability of chaplains does not substantially burden an inmate's practice of religion. *Van Wyhe v. Reisch*, 581 F.3d 639, 657 (8th Cir. 2009); *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007) cert. denied. Courts have found that prison security is a compelling interest, *Greene v. Solano Cty. Jail*, 513 F.3d 982, 986 (9th Cir. 2008), and TCC has considered how to meet that interest in the least restrictive manner. *Warsoldier v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005). For these reasons, Respondents request that this Court affirm the decision of the Twelfth Circuit.

A. Petitioner has not met his burden of proof under RLUIPA that the prohibition on an additional nightly religious congregation service substantially burdens his religious practices.

Petitioner bears the burden of proving that the policy in question imposes a substantial burden on the exercise of his religion. "Under RLUIPA, the challenging party bears the initial burden of proving that his religious exercise is grounded in a sincerely held religious belief, and that the government's action substantially burdens his religious exercise." *Holt*, 135 S. Ct. at 857. Petitioner has failed to show that TCC's policy against granting an extra evening congregation service to religious groups imposes a substantial burden.

1. Not receiving an extra congregation, in addition to the three daily congregations already granted, does not impose a substantial burden.

A substantial burden is not imposed by not being granted an extra congregational service in addition to the standard amount already offered. A policy that requires one to choose to "engage in conduct that seriously violates his religious beliefs . . . or face serious disciplinary action," imposes a substantial burden. *Id.* at 862.

An institution that provides a reasonable and uniform amount of time for all of its occupants to practice their religious beliefs has not imposed a substantial burden in regard to the amount of time or the frequency of prayer. "The prison must permit a reasonable opportunity for an inmate to engage in religious activities but need not provide unlimited opportunities." *Van Wyhe*, 581 F.3d at 657. In *Van Wyhe*, the Eighth Circuit considered whether a Jewish inmate was substantially burdened by not being allowed additional time for group Torah study. *Id.* The Eighth Circuit held that "where an inmate was permitted three hours of group worship time, the denial of one extra hour per week did not substantially burden the inmate's religious exercise." *Id.*

If a prison chaplain is not available, and that is the reason the congregation cannot occur, then the prison has not placed a substantial burden on the congregants. The Fifth Circuit "held that the requirement of an outside volunteer [for congregational services] did not place a substantial burden on the plaintiff's religious exercise under RLUIPA." *Baranowski*, 486 F.3d at 125. In *Baranowski*, the plaintiff was prevented from congregating with other Jewish inmates to pray on certain holidays because a Rabbi was not available to lead the congregation. *Id.* The Fifth Circuit concluded that this does not amount to a substantial burden. *Id.* In addition, the Fifth Circuit reached the same conclusion in *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004) (holding that a requirement of an outside volunteer as a uniform requirement does not place a substantial burden on prisoners' rights under RLUIPA). As in *Van Wyhe*, Petitioner is requesting an additional group worship time, in addition to the three already given each day. R. at 6. Further, Petitioner is requesting this additional time immediately before the final headcount when there is not an adequate number of staff to ensure security, and when there is no chaplain or cleric to lead the congregation. *Id.* at 4. Petitioner is already granted three group worship

times: one before the morning meal, one before the afternoon meal, and one before the evening meal. *Id.* at 24.

In total, Petitioner is granted at least ten and a half hours of group worship each week. *Id.* That is more than three times the amount of congregational study and prayer time granted to the Jewish inmates in *Van Wyhe*, 581 F.3d at 657. If this is considered a substantial burden on Petitioner, then most, if not all, maximum-security prisons in the United States impose substantial burdens on their inmates' religious practices. The bottom line is that not granting additional time to one specific religious group does not impose a substantial burden on its religious practices, especially when that group is granted the amount of time Petitioner currently receives. R. at 24.

Lastly, since August of 1998, the TCC policy is that if no chaplain is available no services can be held. *Id*. at 4. The chaplain's hours of operation end after 7:30 p.m. each day, and thus there is never a chaplain or outside volunteer available to lead religious congregations at TCC past 8:00 p.m. *Id.* As the Fifth Circuit held, a policy requiring a chaplain to lead religious congregations does not impose a substantial burden on the prison population. *Baranowski*, 486 F.3d at 125; *Adkins*, 393 F.3d at 571. This policy does not require Petitioner to seriously violate his religious beliefs or face disciplinary action, it simply requires Petitioner to practice his religion in a manner that is in compliance with security policy to ensure his safety and the safety of all NOI members.

2. Praying in one's prison cell, when the prison chapel or congregation room is unavailable, does not impose a substantial burden.

The substantial burden standard under RLUIPA does not require that each prisoner be removed from his/her cell every time he/she wishes to make a prayer. Under RLUIPA "a 'substantial burden' is imposed only when individuals are forced to choose between following

the tenets of their religion and receiving a governmental benefit or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions." *Navajo Nation v. U.S. Forest Serv*., 535 F.3d 1058, 1069-70 (9th Cir. 2008).

An issue that has a simple remedy cannot rise to the level of substantial burden. "[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). In *Midrash*, an Orthodox Synagogue challenged a zoning ordinance under RLUIPA, arguing that the ordinance placed a substantial burden on its congregation. *Id.* at 1128. The Eleventh Circuit held that the ordinance merely inconvenienced the congregation by requiring them to walk "a few extra blocks" and was not a substantial burden under RLUIPA. *Id.*

A burden will not be deemed substantial simply because it offends one's religion. The Ninth Circuit held that "the diminishment of spiritual fulfillment—serious though it may be—is not a 'substantial burden' on the free exercise of religion." *Navajo Nation*, 535 F.3d at 1070. Petitioner, in *Navajo*, argued that the use of recycled water to make snow, which contained a small percentage of human waste, desecrated a holy religious site and "impaired" their ability to pray and conduct religious ceremonies in that area. *Id.* at 1064. The Ninth Circuit, in applying this Court's reasoning in *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988), found that the government's actions did not rise to the level of substantial burden. *Id.* at 1071.

Petitioner is faced with having to pray in his cell two times a day when the prison congregation services are unavailable. R. at 4. Petitioner argues that he cannot pray in the presence of a toilet or any "unclean" environment. *Id.* at 5. However, being in the presence of a toilet only poses an inconvenience for petitioner as in *Midrash*, 366 F.3d at 1227. Petitioner can

face away from the toilet, or petitioner can place a curtain or a garment over the toilet. Having to take minimal steps such as these merely poses an inconvenience for Petitioner. Finally, prayer in a prison cell that contains a toilet is merely a "diminishment of spiritual fulfillment" rather than a substantial burden. *Navajo Nation*, 535 F.3d at 1070. Although Petitioner's "religious beliefs" are against praying in a prison cell, the reality of being incarcerated in a maximum-security prison is that the cells have toilets, and the government cannot be expected to change its action solely because the realities of prison offend an inmate's "religious sensibilities." *Id.* at 1063; R. at 5. Petitioner has not been forced to choose between a governmental benefit and his religious tenets, and Petitioner has not been threatened with criminal sanctions, but has merely been subjected to the environment that all prisoners are subjected to. R. at 5.

3. Praying in one's prison cell, next to an inmate who does not respect one's religion, does not impose a substantial burden, when one may request a transfer.

Finally, there cannot be a substantial burden imposed when there are avenues for Petitioner, that are provided by the prison, which would easily solve Petitioner's problems with his cellmate. "Putting substantial pressure on an adherent to modify his behavior and to violate his beliefs" amounts to a substantial burden. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981).

When one is not required to violate his beliefs one cannot be substantially burdened in the exercise of his religious faith. In *Jehovah v. Clarke*, the Fourth Circuit held that Jehovah made a "prima facie showing under RLUIPA" because he was forced to reside in a cell with a cellmate who constantly harassed him and preached "anti-Christian rhetoric." 798 F.3d 169, 180 (4th Cir. 2015). The Fourth Circuit noted that it was not the fact that Jehovah was sharing a cell

with a person of a different faith that posed a substantial burden, but that this person "chilled" or prevented Jehovah from adequately practicing his religion. *Id.*

Similar to *Jehovah*, this case involves Petitioner being unable to pray due to constant ridicule by his cellmate. R. at 5. However, unlike in *Jehovah*, Petitioner in this case has the ability to request a cell transfer. *Id*. at 6. He has not even tried to request a cell transfer to this date. *Id.* Instead he submitted a complaint requesting to be released from his cell. *Id*. A simple request to transfer is all that Petitioner needs solve his problem. Thus, Petitioner is not being forced to "modify his behavior," but quite the contrary, is choosing to stay in a cell with a disrespectful cellmate. Requesting a transfer is merely an "inconvenience" as the one identified in *Midrash Sephardi, Inc.*, 366 F.3d at 1227. Overall, TCC's policy cannot be said to impose a substantial burden on Petitioner.

B. Even if one believes that respondent's policy imposes a substantial burden, the policy furthers a compelling government interest.

TCC's policy is in place to protect the prison personnel and maintain an adequate number of administrative and security staff, which are both compelling government interests. "It bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area." *Cutter v. Wilkinson*, 544 U.S. 709, 725 (2005).

Staffing and safety concerns are of the highest priority, especially when it comes to maximum-security prisons. Unless there is no possibility of a security threat, courts typically defer to the expertise of prison administrators. For example, the Ninth Circuit considered whether a complete denial of group worship services in a maximum-security prison complied with RLUIPA. *Greene v. Solano Cty. Jail*, 513 F.3d 982, 986 (9th Cir. 2008). In determining whether a compelling government interest existed in maintaining security of a maximum security prison, the Ninth Circuit simply stated that "Prison security is a compelling governmental

interest, *Cutter*, 544 U.S. at 725 n. 13, 125 S.Ct. 2113, and the district court was correct in finding there was no dispute as to this issue." *Id.* at 988.

Similarly, the Ninth Circuit held that a prison policy that refused to grant the Christian Separatist Church Society (CSC) exclusive group prayer rights did not violate the prisoner's first amendment rights. *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 983 (8th Cir. 2004). In making their conclusion, the Ninth Circuit simply stated "We acknowledge . . . a compelling interest in security . . . but to satisfy RLUIPA's higher standard of review, prison authorities must provide some basis for their [security] concern." *Id.* at 989. This requirement was further elaborated in *Lovelace v. Lee*, where the Fourth Circuit held that in order for a compelling interest to be found the prison must present "evidence with respect to the policy's security and budgetary implications." *See* 472 F.3d 174, 190 (4th Cir. 2006). The Fourth Circuit explained that if a simple affidavit by the warden or some official had been included, then the compelling interest would have been met, but they merely offered conclusory statements. *Id.* at 191.

TCC prisoners were using the nightly congregational services to pass gang messages and remain outside of their prison cells past the final headcount, which posed a major security threat. R. at 4. Here, not only is there evidence of a security threat, in the form of previous acts, but the Director of the Chaplaincy Department filed an affidavit attesting to the security and budgetary concerns, and how the policies reduce those concerns. R. at 6-7. TCC instituted the current policy as a security measure to protect its staff, which is a compelling government interest. *Id*. at 4; *See Cutter*, 544 U.S. 709, 725 (2005) (holding that prison security is considered a compelling government interest).

C. The policy is the least restrictive means for furthering this compelling government interest.

TCC's policy, which prohibits an extra religious congregation immediately before the final headcount, is the least restrictive means of furthering its compelling interest in security. The "least-restrictive-means" method requires a showing that the correctional facility "lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting parties in these cases." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

The level of security is an essential element in determining whether a correctional facility passes the least-restrictive-method requirement. The Ninth Circuit distinguished between minimum and maximum-security prisons in making its determination of whether a prison grooming policy violated RLUIPA. *Warsoldier v. Woodford*, 418 F.3d 989, 998 (9th Cir. 2005). In a minimum-security prison in which the inmates are permitted to "sleep in unlocked dorm rooms" and "leave the premises to work," it would be unreasonable to impose higher burdens on inmates than that of a maximum-security prison. *Id*. "The least restrictive means in a maximum security prison may not be identical to what is required for a minimum security facility." *Id.* at 999.

The least restrictive means available will sometimes be dictated by the correctional center's budgetary means. The Fifth Circuit in *Baranowski* determined that although denying inmates access to kosher meals posed a substantial burden, the limited budget would not permit the correctional center to provide kosher meals for Jewish inmates. 486 F.3d 125 at 125. The Eleventh Circuit held the same conclusion in *Linehan v. Crosby*, 346 F. App'x 471, 472 (11th Cir. 2009). Lastly, the Eight Circuit reached the same conclusion in denying petitioner the right to build a sweat lodge for religious ceremonies. *Fowler v. Crawford*, 534 F.3d 931, 940 (8th Cir. 2008). This list is not exhaustive. Several other circuit courts, as well as this Court in *Cutter*,

determined that the costs of changing a policy would affect the outcome of whether the policy complies with RLUIPA. *See* 544 U.S. 709, 725 (2005).

A prison must apply policies on an equal basis to preserve prison morale, resources, and security. This Court recognized that "[a] . . . consideration is the impact accommodation of the asserted . . . right will have on guards and other inmates." *Turner v. Safley*, 482 U.S. 78, 90 (1987). In *Turner,* this Court considered the "constitutionality of regulations promulgated by the Missouri Division of Corrections relating to inmate marriages and inmate-to-inmate correspondence." *Id.* at 81. Although RLUIPA requires a slightly different test than the one enumerated in *Turner,* the consideration, under RLUIPA, is based on the same principle of protecting one's religious freedom. *Holt*, 135 S. Ct. at 864. In *Turner*, this Court ultimately held that "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Id.* at 90.

An institution that shows that it attempted less restrictive methods, and those methods failed, will more likely meet its burden under RLUIPA. As the Ninth Circuit explained, an institution must demonstrate "that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice" in order for that practice to be deemed a least-restrictive method. *Warsoldier*, 418 F.3d at 999. In *Yellowbear v. Lampert*, the Tenth Circuit decided that a blanket refusal to allow a Native American sweat lodge for religious reasons may violates RLUIPA, because the prison authority merely considered and rejected the less restrictive means. 741 F.3d 48, 63 (10th Cir. 2014). "[T]he government's burden here isn't to mull the . . . proposed alternatives, it is to demonstrate the . . . alternatives are ineffective to achieve the government's stated goals." *Id.* However, "prison officials do not have to set up and

then shoot down every conceivable alternative method of accommodating the claimant's . . . complaint." *Turner*, 482 U.S. at 90-91.

One cannot overlook the fact that this case concerns the rights of prisoners in a maximum-security prison. R. at 2. Many prisoners in maximum-security facilities have been sentenced to life imprisonment, or close to it, and "[a]ll things considered, to many inmates . . . the price of murder [or attempting escape] must not be high and to some it must be close to zero." *United States v. Silverstein*, 732 F.2d 1338, 1343 (7th Cir. 1984). As the Ninth Circuit explained, this fact has significant bearing on what constitutes the "least restrictive means." *Warsoldier*, 418 F.3d at 998. Petitioner threatened violence against another inmate on at least one occasion, and even went so far as to steal from his cellmate. R. at 6. So TCC's compelling interest in security is certainly satisfied by "application of the challenged [policy]" to Petitioner, as Petitioner has already demonstrated a propensity toward violence. *Burwell*, 134 S. Ct. at 2779. Further, Petitioner belongs to a subgroup of Sunni Muslim prisoners who have used the extra nightly congregation services of the past to disregard the evening headcount and stay in their prayer rooms longer than allowed. R. at 4. Unlike in *Holt*, where no prisoner was found to have hidden contraband in a ½-inch beard, here, several prisoners of the Sunni Muslim faith, and of other faiths, attempted to abuse their privilege in having an extra evening congregation. *Id*.

Perhaps in a minimum security prison individual exemptions to the prohibition of nightly congregation services would constitute a feasible less restrictive means, but in a maximum security such as this, the night staff are smaller, there are no trained chaplains to carry out the congregational services that late at night, and other prisoners would demand the same congregation services only thirty minutes before the final headcount. *Id.* at 6. Having an abundance of extremely dangerous criminals wandering the halls at 8:30 p.m., with a limited

number of guards available, is simply not feasible. *Id.* In addition, TCC explained in their addendum that the cost of more guards and chaplains late at night is simply not feasible under their current budget. *Id.* at 7.

As this Court explained in *Turner*, when a "ripple-effect" could take place, the courts should defer to the "informed discretion of the prison officials." 482 U.S. at 90-91. The ripple-effect here is obvious: if Nation of Islam members are given an exception to the rule, other religious members will demand the same, and the prison center will have to accommodate their demands, and risk an event similar to the one at TCC in 1998 in which religious members requested nightly congregation services and used the service to relay gang messages and remain out of their cells past the final evening head count. R. at 4. If TCC only grants this privilege to NOI members it will risk inciting other members of religious sects, or having more people join the NOI for the privilege of nightly congregational services. Either way, the result will be the same: TCC will have to strengthen their night shift significantly and risk a breach of security. This Court explained that the impact on the prison should be taken into account as well as the impact on the prisoners. *Turner*, 482 U.S. at 90. The impact of adding nightly congregation services would be too much to bear for a maximum-security prison. *See* id.

Finally, TCC considered the only viable alternative, and that alternative failed prior to August 1998. R. at 4. This is proof that TCC "considered and rejected the efficacy of less restrictive methods" before adopting the current policy, which is all that is necessary for TCC to meet its "least-restrictive-methods" burden under RLUIPA. *See Warsoldier*, 418 F.3d at 999. As this Court held, it is unreasonable to expect a correctional facility to "to set up and then shoot down every conceivable alternative method." *Turner*, 482 U.S. at 90-91. The fact that TCC had used the least restrictive method and that method could not succeed is enough to confirm that

TCC at least "considered less restrictive methods" and therefore complied with RLUIPA. *See Warsoldier*, 418 F.3d at 999. This, along with the context in which the rule applies, indicates that TCC's policy is the least restrictive method available for achieving adequate security for its prison population and staff.

II. Under RLUIPA, the Tourovia Correctional Center's religious alternative diet policy imposes no substantial burden on an inmate who is removed from a religious diet or fast due to evidence of backsliding.

When a prison policy refuses to allow an inmate to obtain a religious alternative diet, or retains the right to remove the inmate for any reason, it is easy to see how the prison has imposed a substantial burden that inmate's practice of religious. It is less easy to identify policies that appropriately refrain from imposing a substantial burden while still ensuring that only religiously sincere inmates are participating in the alternative diet program. *Cutter v. Wilkinson*, 544 U.S. 709, 712,723 (2005). TCC's policy is an example of a policy that does not violate the substantial burden provision of RLUIPA, and states the following:

> 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.

R. at 26. RLUIPA generally prevents the imposition of a substantial burden on the religious practice of inmates housed in institutions receiving federal assistance:

> (a) General rule
>
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> **(1)** is in furtherance of a compelling governmental interest; and
>
> **(2)** is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a)(1)-(2); *Cutter*, 544 U.S. at 712. In determining whether a substantial burden has been imposed, the plaintiff bears the burden of persuasion. 42 U.S.C. § 2000cc-2(b). Although RLUIPA does not give a definition, the Supreme Court has defined "substantial burden" in the context of the Free Exercise Clause and RFRA. *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006).

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

Thomas v. Review Bd. of Indiana Employment Sec. Div., 450 U.S. 707, 717-18 (1981). The Supreme Court has further clarified that mere condition that important benefits will provided to those proscribing to a religious faith will not automatically prove that the plaintiff has suffered a substantial burden, as explained in *Lyng*:

> It is true that this Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny . . . This does not and cannot imply that incidental effects of government programs, which may 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.

Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450-51 (1988) (internal quotations marks omitted).

Since the enactment of RLUIPA, there has been an ever-developing circuit split that has confused the lower courts on how to analyze the appropriateness of various backsliding policies. Several courts have found that backsliding policies pose no substantial burden. *Daly v. Davis*, No. 08-2046, 2009 WL 773880, at *1 (7th Cir. Mar. 25, 2009); *Brown-El v. Harris*, 26 F.3d 68,

69-70 (8th Cir. 1994). Other courts have found that there might be a substantial burden, but are unable to decide whether the prison has pursued the least restrictive means of accomplishing their compelling interests. *Lovelace*, 472 F.3d at 187. Still other courts have found that backsliding policies are not suitable under RLUIPA, *Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 790 (5th Cir. 2012), or that there is not enough case law or factual basis to make a decision. *Colvin v. Caruso*, 605 F.3d 282, 297 (6th Cir. 2010)

TCC's backsliding policy imposes no substantial burden on the religious exercise of inmates. A proper application of the substantial burden analysis indicates that TCC's backsliding policy puts no pressure on inmates to modify their behavior or violate their beliefs. *Lovelace*, 472 F.3d at 187. Even if the policy did impose a substantial burden, TCC's policy furthers a compelling governmental interest, mainly ensuring religious sincerity of inmates. *Cutter*, 544 U.S. at 712, 723. For these reasons, the Respondents request that this Court affirm the decision of the Twelfth Circuit.

A. TCC's policy does not impose a substantial burden because the policy is reactionary, putting no pressure on inmates to modify behavior or violate their beliefs.

Petitioner cannot show that the TCC backsliding policy caused him to modify his behavior or violate his beliefs as the policy does not mandate or prohibit religious conduct. 42 U.S.C. § 2000cc-2(b); *Lovelace*, 472 F.3d at 187; *Daly*, 2009 WL 773880, at *1. For the policy to impose a substantial burden, it must "put substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Lovelace*, 472 F.3d at 187 (quoting *Thomas,* 450 U.S. at 717-18). TCC's policy only applies after an inmate has removed themselves from a religious diet, therefore putting no pressure on an adherent to modify their behavior, but reacting when they deviate themselves. *Brown-El*, 26 F.3d at 69-70; *Daly*, 2009 WL 773880, at *2. Because there is

no pressure to modify behavior, the TCC backsliding policy is distinguishable from other policies that do impose substantial burdens, *Lovelace*, 472 F.3d at 187-88, and other cases that fail to apply the substantial burden analysis before questioning the government's interest. *Colvin v. Caruso*, 852 F. Supp. 2d 862, 868 (W.D. Mich. 2012).

TCC's backsliding policy is reactionary and does not place any burden on an inmate until the inmate has modified his own behavior and thus violated his own beliefs. *Brown-El*, 26 F.3d at 69-70. The policy allows full participation in a religious alternative diet and only reserves the right to remove inmates who give the prison "adequate reason to believe that the religious alternative diet is not being adhered to[.]" R. at 26. Similarly, the Plaintiff in *Brown-El* broke a Ramadan fast and was removed from the special Ramadan meal schedule. *Brown-El*, 26 F.3d at 69-70. "The policy did not coerce worshippers into violating their religious beliefs; nor did it compel them, by threat of sanctions, to refrain from religiously motivated conduct." *Id.* at 70 (internal quotation marks omitted). Although *Brown-El* concerned a free exercise claim under the First Amendment, the term "substantial burden" is defined in the context of the Free Exercise Clause. *Lovelace*, 472 F.3d at 187. Thus, having broken the fast, any consequences under TCC's backsliding policy do not impose a substantial burden on an inmate.

The TCC backsliding policy is easily distinguishable from other prison policies that do impose substantial burdens. In *Lovelace*, the plaintiff was removed from the Ramadan observance pass list after breaking a daytime fast, which barred him from participation in NOI group prayers or services held in the dining hall before or after the special breakfast meal. *Id.* at 187-88. The *Lovelace* court noted that a substantial burden was put on the inmate to change his behavior, or lose all of the benefits of the prison policy, not just the ability to fast:

> The policy was therefore arranged and written so that disqualification from participation in one religious exercise (the fast) meant that normal avenues for

> communal worship (group services and prayers) at the prison became unavailable automatically. When this broad disqualification aspect of the policy was applied to Lovelace, he was forced to "significantly modify his religious behavior," and his RLUIPA right to religious exercise was substantially burdened.

Id. at 189 (internal quotation marks omitted). Alternatively, the TCC backsliding policy does not exclude a backsliding inmate from additional participation in religious programs or accommodations. In Petitioner's circumstances, he was removed from the vegetarian diet program and barred from attending worship services for one month as a punishment for threats against his new cellmate. R. at 6. The TCC policy itself imposes no additional restriction on religious practice, and merely responds after an inmate has modified his own religious diet. *Brown-El*, 26 F.3d at 69-70.

The TCC backsliding policy is also distinguishable from cases that fail to apply the substantial burden analysis before questioning the government's interest, such as *Colvin*, 852 F. Supp. 2d at 868 (holding on remand that the prison's "zero-tolerance" policy constituted a substantial burden under the Free Exercise Clause and RLUIPA because the government interest was not compelling enough under either test.). These cases make no effort to determine if the policy imposed a substantial burden under the *Thomas* standard or any other standard, merely assuming that the first step in the analysis would be the burden on the government to show a compelling interest. *Id.* After applying said test, it becomes clear that this policy, as well as the TCC policy, does not "put substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Lovelace*, 472 F.3d at 187 (quoting *Thomas,* 450 U.S. at 718), and thus imposes no substantial burden under RLUIPA.

B. TCC's policy is essential to ensuring that the religious belief driving the religious diet is sincerely held.

The TTC backsliding policy tests a key element of a prisoner's RLUIPA claim: religious sincerity. Although the TCC policy does not impose a substantial burden on religious practice, TCC can also put forward compelling interests, in this case, religious sincerity. 42 U.S.C. § 2000cc-1(a)(1)-(2); *Cutter*, 544 U.S. at 712,723. When a policy is found to substantially burden religious practice, the burden shifts to the defendants to show that the policy is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a)(1)-(2); *Lovelace*, 472 F.3d at 189. Context matters, as lawmakers were "mindful of urgency of discipline, order, safety, and security in penal institutions." *Cutter*, 544 U.S. at 723. The religious sincerity of an inmate also represents a compelling interest, as the driving intent behind RLUIPA "is to make exceptions for those sincerely seeking to exercise religion[,]" not the insincere. *Yellowbear v. Lampert*, 741 F.3d 48, 62 (10th Cir. 2014). Although RLUIPA prevents rejection of a religious accommodation on grounds that the belief or practice is not "central" to a prisoner's religion, "the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter*, 544 U.S. at 723. Since religious sincerity is necessary for a RLUIPA claim, TCC has a compelling interest in providing religious accommodations to the sincere. *Id.*

Because religious sincerity is a compelling interest under RLUIPA, TCC's backsliding policy acts an effective method of furthering that interest. *Id.* Evidence of backsliding is not dispositive, but it is evidence of religious insincerity. *Reed v. Faulkner*, 842 F.2d 960, 963 (7th Cir. 1988). "Such evidence is particularly relevant where, as here, the prisoner's own actions directly contradict the core of his claim. [Obtaining] nonkosher foods . . . is completely inconsistent with Plaintiff's professed religious belief." *Lute v. Johnson*, No. 1:08-CV-00234-EJL, 2012 WL 913749, at *7 (D. Idaho Mar. 16, 2012). The TCC policy directly addresses this

issue by asking if there is evidence of backsliding, and if so, reserving the right to revoke the privilege for an appropriate period of time. R. at 26.

Additionally, TCC's policy is the least restrictive means of testing religious sincerity. RLUIPA states that there is no substantial burden if the prison employs the "least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(2). This does not mean that the government bears the burden in proving that their chosen method is the least restrictive means of furthering that interest, as the *Hamilton* court explained:

> Although RFRA places the burden of production and persuasion on the prison officials, once the government provides this evidence, the prisoner must demonstrate what, if any, less restrictive means remain unexplored. It would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong of RFRA. Moreover, such an onerous requirement would be irreconcilable with the well-established principle, recognized by the Supreme Court and RFRA's legislative history, that prison administrators must be accorded due deference in creating regulations and policies directed at the maintenance of prison safety and security.

Hamilton v. Schriro, 74 F.3d 1545, 1556 (8th Cir. 1996). Upon remand from the Fourth Circuit, the district court in *Lovelace* held that the defendant had met her burden by showing that a one-strike policy was justified in order to adequately administer the prison's Ramadan program. *Lovelace v. Lee*, No. CIV.A. 7:03CV00395, 2007 WL 2461750, at *15 (W.D. Va. Aug. 24, 2007). The court found that corrections to the program, for instance limiting penalties to removal from the fast and not the entire Ramadan program, embodied the spirit of RLUIPA and constituted the least restrictive means of furthering the prison's interests. *Id.* The TCC plan is nearly identical to the revised plan in *Lovelace*, and meets the standard of "least restrictive means" because it responds to prisoner actions in a limited, effective manner. *Id.* Anything less restrictive would essentially become an "unlimited strikes" policy, failing to administer TCC's compelling interest in religious sincerity. *Id.*

The TTC backsliding policy focuses solely on whether the alternative diet is being adhered to or abused, and does not address broader questions of total religious sincerity, thus making it the least restrictive means of enforcement. R. at 26. Appellate Courts have routinely acknowledged that religious insincerity in one area is not dispositive of total religious insincerity or insincerity in other areas. *Lovelace*, 472 F.3d at 188; *Reed*, 842 F.2d at 963. Unlike the policy in *Lovelace*, the TCC backsliding policy is focused on religious sincerity in regards to a prisoner's adherence to a religious alternative diet, and does not withhold additional religious privileges upon dietary backsliding. *Lovelace*, 472 F.3d at 188. Likewise the *Reed* court held that evidence of backsliding from a religious diet was not dispositive of an inmate's religious sincerity in regards to religiously mandated beard length, and focused rather on each tenant of the inmate's belief separately. *Reed*, 842 F.2d at 963. Thus, dietary backsliding should only be considered in context of an inmate's religious diet. *Id.* The TCC policy avoids these pitfalls by focusing on the sole question of a prisoner's religious sincerity to their alternative diet, exercising limited dietary revocation in response to a specific evidence of dietary backsliding. *Lute*, 2012 WL 913749, at *7. In this way, the TCC policy administers a compelling government interest through an acceptable test of religious sincerity.

TCC's compelling interest in ensuring religious sincerity of alternative diet participants is able to withstand the dissent of other appellate courts. Unlike the district court in *Colvin*, 852 F. Supp. 2d at 868, which failed to conduct the substantial burden analysis, the Fifth Circuit directly addressed religious sincerity in *Moussazadeh*. 703 F.3d at 790. The *Moussazadeh* court held that there was insufficient evidence to prove that the Plaintiff had deviated from his diet. *Id.* at 791. The court went one step further, stressing that "a finding of sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray

from time to time." *Id.* A key difference between Moussazadeh and Petitioner is that Moussazadeh was not per se in possession of non-kosher food, but food that did not have a kosher certification. *Id.* There is evidence that Petitioner broke his vegetarian diet via his possession of his cellmates' meatloaf. R. at 6. Additionally, the *Moussazadeh* analysis fails to recognize the principle that religious sincerity in one area is not dispositive of religious sincerity or insincerity in other areas. *Lovelace*, 472 F.3d at 188; *Reed*, 842 F.2d at 963. Because Petitioner could be sincere in other areas but insincere in his consumption of a religious diet, the most compelling evidence of his sincerity is his ability to adhere to his diet program. *Lute*, 2012 WL 913749, at *7. The TCC policy allows for institutional discretion, which is why Petitioner was placed on a watch-list of newly converted inmates whose sincerity was more in question. R. at 7. With his religious sincerity in question, the only method of further testing his sincerity to an alternative religious diet would be evidence of backsliding, a method that is embodied in the TCC backsliding policy. R. at 26. Anything less would effectively embody an "unlimited strikes policy," *Lovelace*, 2007 WL 2461750, at *15, thus defeating the purpose of the backsliding policy altogether. For these reasons, the TCC policy represents the least restrictive means of furthering TCC's compelling interest in making sure prisoners on alternative religious diets are sincere.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court affirm the decision of the Twelfth Circuit by holding that TCC's policies do not violate RLUIPA.

Respectfully submitted,

Team 17

Counsel for Respondent

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