Docket No. 985-2015

In The

Supreme Court of the United States

October Term 2015

SIHEEM KELLY,

Petitioner,

v.

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

Respondent.

On Writ of Certiorari to the United States

Court of Appeals for the Twelfth Circuit

BRIEF FOR THE PETITIONER

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March 7, 2016

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QUESTIONS PRESENTED

RLUIPA forbids the government from substantially burdening a prisoner's religious exercise unless imposition of that burden on the prisoner is the least restrictive means of furthering a compelling interest. 42 U.S.C. § 2000cc-1(a). This statutory standard was enacted to provide "expansive protection for religious liberty" and codifies the same strict-scrutiny standard that this Court endorsed in *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006), *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014), and *Holt v. Hobbs*, 135 S. Ct. 853 (2015). Because Tourovia Correctional Center's ("TCC") policies, generally and as applied to Kelly and NOI, impose a substantial burden on religious exercise in violation of RLUIPA, TCC bears the burden of proving that their policies are "based on penological concerns of the higher order," and not on "mere speculation" or "exaggerated fears." 146 Cong. Rec. at 16699; S. Rep. 103–11 at 10 (1993). The court of appeals held that TCC's policies did not violate RLUIPA, misapplying case law and reasoning that "due deference" was owed to the security concerns of TCC officials even though those concerns were based on "events that occurred over a decade ago." The questions presented are:

I. Whether Tourovia Directive #98 violates RLUIPA by forcing Kelly to choose between bypassing the *late evening* prayer service, which would violate his religious beliefs, or exercising his religion by praying which would violate the prison's policy and send Kelly to "solitary confinement?"

II. Whether Tourovia Directive #99 violates RLUIPA by removing Kelly from his religious diet and further suspending him from services for a month due to a single instance of alleged "backsliding," in a circumstance where Tourovia Correctional Center itself admits that it had "no evidence of" of such backsliding?

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the present case pursuant to 28 U.S.C. § 1331 (2000). The district court's federal question jurisdiction was based on Kelly's complaint that the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §2000cc (2006), was violated. The decision of the United States Court of Appeals for the Twelfth Circuit reversed the decision of the United States District Court for the Eastern District of Tourovia, and was entered into on June 1, 2015. R. 16. Petitioner was then granted writ of certiorari for the October 2015 term. R. 22. This Court has jurisdiction over the case pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution is relevant to this case and reprinted in Appendix A.

STATUTORY PROVISIONS

The following statutes are relevant to this case and reprinted in Appendix B:

42 U.S.C. §2000cc-1 (2006).

STATEMENT OF THE CASE

Religion is an important, indeed vital, part of many people's lives. While those found guilty of crimes lose many things – their liberty, their independence, their freedom in every sense of the word – those imprisoned *do not* lose their ability to practice their religion. In fact, the right to practice one's religion is one that has been steadfastly protected.

Factual Background

Nation of Islam Siheem Kelly ("Kelly") was incarcerated at the Tourovia Correctional Center ("TCC" or prison) sixteen years ago. R. 3. After two years at TCC, Kelly found purpose in religion and converted to the Nation of Islam (also known as "the Nation" or "NOI"). R. 3. In

accordance with this decision, Kelly filed the required "Declaration of Religious Preference Form" in order to change his religious affiliation to NOI. R. 3. With this form and written approval by the Warden, an inmate can partake in religious services and dietary restrictions. R. 3. NOI is a subgroup of the traditional Sunni Muslim religion, and there are seven acknowledged members at TCC. R. 3. None of the current NOI members have *any* record or history of violence at TCC; thus, NOI is considered to have maintained satisfactory behavioral standing. R. 3.

Muslim Religious Practices The Muslim religion requires a Halal diet, and in order to satisfy the rules of the Qur'an, NOI members receive vegetarian diets.[1] R. 3. NOI members also fast for the month of Ramadan and other special holidays. R. 3. In addition, according to the *Salat*, or prayer guise, NOI adherents are required to pray five times a day according to the *Salat*, or prayer guide. R. 3. Prayer times, termed "Obligatory and Traditional Prayers," are 1) Dawn, 2) Early Afternoon, 3) Late Afternoon, 4) Sunset and 5) *Late Evening*. R. 3–4 (emphasis added). Adherents require a clean and solemn environment in which to engage in prayers – they must wash themselves, and their clothes, as best they can, and find a clean surface on which to kneel and face Mecca. R. 4. Once prayer begins it should not be interrupted in *any way*. R. 4. NOI members prefer to pray together, which is mandatory during Ramadan and on Friday Evenings. R. 4. At TCC, Nation members are forced to pray in their cell twice daily, and only pray together for three of their five daily prayers. R. 4. The NOI member's cellmate may or may not be a member of their religion, and based on simple math, the latter is far more likely. R. 4.

TCC's Outdated Religious Service Policy Two years prior to Kelly's arrival, and *eighteen years* prior to this day, TCC changed their religious service policy – to Directive 98 –

[1] Halal "food is that which adheres to Islamic law, as defined in the Koran." Meat is not prohibited, but it must be slaughtered and prepared in accordance with religious law. Halal meals are not regularly provided in prisons; thus, Kelly and others similarly situated must eat

and made it more restrictive by "banning the option to petition for prayer services at night with a prison service volunteer." R. 4, 25. This decision was made after it was discovered that the incarcerated members of the Christian community were relaying gang orders through their service volunteer. R. 4. Since the enactment of this policy, no services may be held if no official chaplain is available; chaplain's only hours of operation are during the three Designated Prayer Times in the Tourovia Directive Definitions. R. 24–25. If an inmate is not in their cell when headcount occurs that inmate will be placed in solitary confinement. R. 4.

Kelly's Repeated Grievances & Denials In February of 2013, Kelly, acting on behalf of all NOI members, filed a written prayer service request for an additional congregational nightly prayer service after the last meal at 7:00 P.M. R. 4–5. The request asked that the prayer take place at 8:00 P.M. – after evening meal but before final headcount at 8:30 P.M. R. 5. A week later, Saul Abreu ("Abreu") notified Kelly the request was denied "due to the prison policy prohibiting all inmates from going anywhere (but their cells) before the final headcount." R. 5. According to Abreu's judgment, the three services provided were "adequate" to fulfill the Nation's needs, and they could just pray in their cells. R. 5. This judgment was verbally indicated to Kelly. R. 5. Kelly did not drop the matter, however, and to get Abreu to agree to just one additional service so he could "conduct his last two prayers of the day with his brothers." R. 5. He additionally requested this prayer service be conducted away from non-NOI inmates and with a NOI affiliated Chaplain. R. 5. Abreu never bothered to respond to these verbal requests. R. 5.

Following this denial, Kelly filed two grievances with TCC. R. 5. Kelly explained that he requested an additional prayer service was because his cellmate had made prayer impossible. R. 5. Kelly explained that his non-NOI cellmate "intentionally ridiculed him or engaged in lewd behavior on those nights when he attempted to pray." R. 5. Kelly, standing up for his brothers in

the NOI, wrote that several NOI members were having similar experiences. R. 5. This grievance was denied on the grounds that Kelly "had not proven that his cellmate was actually engaging in the negative conduct described." R. 5.

But Kelly was not done fighting to practice his religion. He filed a second grievance, stating that praying in a cell where a toilet was only a few feet away was "a disgrace to Allah's preference that he pray in a clean and solemn environment with other members of his faith." R. 5. This request too, was denied. R. 5.

Undeterred, Kelly filed a third, formal grievance with the prison that incorporated the other two grievances. R. 5. Reiterating his desire for a nightly congregational service, Kelly quoted the Qu'ran and pleaded with TCC officlas to allow him to pray, as required by his faith "*during the hours of the night*." R. 5. Warden Kane Echols replied that Kelly's request violated TCC policy, and "allegations against his cellmate could not be verified." R. 5–6. However, the record shows *no attempt* to verify Kelly's allegations. Echols suggested Kelly should "simply" request a new cellmate, who hopefully would be more respectful. R. 6.

Doubtful Allegations Against Kelly Two weeks later, however, the prison miraculously *did* investigate a grievance – but not Kelly's. R. 6. What was investigated were allegations by Kelly's new cellmate, who reported that Kelly had threatened him with violence if he did not provide Kelly with his dinner – meatloaf. R. 6. Tourovia Directive #99 states that if any inmate is found to bully any other inmate for their food or is caught breaking their religious diet, that inmate can be removed from his diet. R. 6, 26. If any violence or threat of violence is connected to any other member of a faith group, the prison can suspend an inmates freedom to attend religious services for "*any* amount of time TCC sees fit." R. 6, 26. *No evidence* of Kelly perpetrating actual violence was alleged or discovered. R. 6. However, prisoners did find

meatloaf, wrapped in a napkin, under Kelly's mattress. R. 6. Kelly denies the meatloaf was his. R. 6. Despite Kelly's protests, and the fact that the cellmate had opportunity and motive to plant the meatloaf, Kelly was immediately removed from his vegetarian diet program, and barred from attending worship services for *one month* as punishment. R. 6.

Kelly's "Choice" Kelly then had a choice: eat the food given to the regular prison population, violating the Qu'ran, or starve. R. 6. And so, he chose to starve. R. 6. Kelly began a hunger strike, refusing to eat anything at all. R. 6. In response, the prison resorted to forcibly tube-feeding Kelly - an invasive, painful procedure. R. 6. Due to the heinous nature of this forced treatment, Kelly ultimately ended his hunger strike. R. 6. However, Kelly remains steadfastly committed to practicing his religion, and that commitment brings us before this Court today.

Procedural History

Eastern District of Tourovia Kelly filed a complaint in the District Court challenging both TCC's prison's prayer services and diet program policies, claiming that said policies violated his First Amendment rights as codified in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). R. 6. The district court found that the policies at issue were a substantial burden on Kelly's exercise of his sincere religious practices. R. 8–13. The court also found that the Defendant's alleged interests to be insufficient, based on "exaggerated fear[s]" – falling far short of a compelling interest. R. 14. Even if a compelling interest was shown, the district court found "the Defendants did not adequately demonstrate that they explored or adopted the least restrictive means to further their interests." R. 15. Thus, the court denied Defendant's motion for summary judgment and held that "there is *no dispute of material facts*" and that Kelly "was entitled to judgment as a matter of law." R. 15 (emphasis added).

Twelfth Circuit On appeal, the United States Court of Appeals for the Twelfth Circuit reversed, vacating summary judgment for the plaintiffs. R. 16. The court, applying an unconventionally deferential standard, found no substantial burden with regards to prayer because congregational prayer was not "compulsory," and no burden with regards to the diet because Kelly's departure from his diet was "voluntary." R. 19–20.

STANDARD OF REVIEW

Summary judgments are reviewed de novo, and awarding summary judgment "is appropriate where, taking the evidence in the light most favorable to the nonmoving party, there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law." *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 787 (5th Cir. 2012).

SUMMARY OF THE ARGUMENT

I. RLUIPA prohibits the government from imposing a "substantial burden" on a prisoner's "exercise of religion" unless doing so "is the least restrictive means of furthering a compelling governmental interest." 42 U.S.C. § 2000cc-1(a). The government imposes a substantial burden on religious exercise whenever it puts a religious claimant to the choice of violating his religious beliefs or facing substantial punishment. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). In this case, TCC substantially burdens Kelly's religious exercise by threatening him with solitary confinement unless he complies with Directive #98's prohibition on nightly prayer services, in violation of his Muslim faith. That is a textbook substantial burden on religious exercise. Likewise, TCC has failed to demonstrate that denying Kelly's night prayer exemption is the least restrictive means of furthering a compelling interest. TCC's interest in prison safety is unavailing given that its fears about possible "illicit conduct during prayer services" are based on "events that occurred over a decade ago." R.13. And the experience of other prison systems and

the fact that TCC already offers daytime prayer services—without such illicit conduct—undermines its claim that it cannot use a less restrictive means.

II. By removing Kelly from his religious diet program and correspondingly barring Kelly from services for a month, based on a single instance of alleged backsliding evidenced only by an unreliable complaint by his cellmate, TCC placed an insurmountable substantial burden on Kelly's religious exercise. TCC's policy, and unfathomable actions in their deficient investigation and force-feeding, forced Kelly to chose "between daily nutrition and religious practice." *Thompson v. Holm*, 809 F.3d 376, 380 (7th Cir. 2016). If the facts of this case do not present a substantial burden, it is hard to imagine what might. Kelly's religious beliefs are sincere – he maintains he did not eat meatloaf, and even if he did violate his diet *one time* in *fourteen years*, such an incidence of "backsliding" was *not* conclusive evidence of insincerity. *See, e.g.*, *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988). TCC fails to allege a compelling government interest to justify this substantial burden – any argument regarding security, budgetary concerns, administration, and orderly operation "is dampened by the fact that [TCC] has been offering [vegetarian] meals to [Kelly] for fourteen years without issue." *Moussazadeh*, 703 F.3d at 794. Further, the record fails to indicate whether *any* alternative means were actually considered and rejected as insufficient. *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005). Thus, TCC violated RLUIPA in their application of Tourovia Directive #99.

ARGUMENT

I. TOUROVIA CORRECTION CENTER'S POLICIES PROHIBITING NIGHTLY PRAYER SERVICES AND RESERVING THE RIGHT TO REMOVE AN INMATE FROM A RELIGIOUS DIET VIOLATE RLUIPA BY PLACING A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE.

Prisoners "do not forfeit all constitutional protections by reason of their conviction and confinement in prison." *Bell v. Wolfish*, 441 U.S. 520, 545 (1979). The Religious Land Use and

Institutionalized Persons Act ("RLUIPA") provides that "[n]o government shall impose a substantial burden on 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 the burden "(1) is in furtherance of a compelling governmental interest" and "(2) is the least restrictive means of furthering that … interest." 42 U.S.C. §2000cc-1(a) (2006). As that "exceptionally demanding" test reflects, Congress designed RLUIPA to provide "expansive protection for religious liberty." *Holt v. Hobbs*, 135 S.Ct. 853, 861 (2015).

Congress's impetus passing RLUIPA was twofold. First, in the wake of this Court's decision in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which held that RFRA—RLUIPA's sister statute—exceeded Section 5 power, Congress wanted to ensure the highest level of protection to the free exercise rights of prisoners. *See Cutter v. Wilkinson*, 544 U.S. 709, 714–19 (2005) ("RLUIPA is the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens."). To accomplish this, a *unanimous* Congress enacted RLUIPA and imported the strict scrutiny test verbatim into its text.[2] Second, Congress wanted to address the recurring problem of "prison officials…impos[ing] frivolous or arbitrary rules" that had, all too often, "impeded institutionalized persons religious exercise."[3] Before RLUIPA, to prevail in a prisoner Free Exercise claim, prison officials needed only to

[2] RLUIPA's legislative history leaves *no doubt* that Congress intended to adopt a strict scrutinytest. *See*, *e.g.*,146 Cong. Rec. 7778 (2000) (statement of Sen. Reid) (describing the strict scrutiny test to be applied under RLUIPA, which is "the highest standard the courts apply to actions on the part of government.").
[3] 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA).

show that its policies were "reasonably related to legitimate penological interests." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)).[4]

RLUIPA turned this standard on its head by replacing *O'Lone*/*Turner*'s "reasonableness" standard with a standard of strict scrutiny. Additionally, RLUIPA shifted the burden to prison officials to *demonstrate*—defined as, "going forward with evidence and persuasion"—why imposing a substantial burden *on that person* is the least restrictive means of furthering a compelling interest. *Holt*, 135 S.Ct. at 863. As such, prison officials can no longer assert "broadly formulated interests" (here, "cost containment," "staffing burdens," or "potential illicit conduct") to defeat prisoner exemption claims. *Id*. And courts must now engage in a "case-by-case consideration...[of] specific claims for exemptions as they arise." *Gonzales v. O Centro Espirita Beneficiente Uniao do Vegetal* 546 U.S. 418, 436 (2006).

The Twelfth Circuit below did not apply RLUIPA's strict scrutiny standard. It applied a "watered down" version of strict scrutiny—deferring to TCC officials "mere say-so" that they could not accommodate Kelly's requests. To be sure, courts are to give deference to prison officials, but that does not abdicate their responsibility, conferred by Congress, to apply "RLUIPA's rigorous standard." *Holt*, 135 S.Ct. at 864.

A. Partaking in Nightly Congregational Services and Engaging in a Diet in Accordance with One's Religious Belief Constitutes Religious Exercise

RLUIPA protects "any exercise of religion, whether or not compelled by, or central to, a system of belief." § 2000cc-5(7)(A). This intentionally broad definition covers "not only belief and professions but the performance of… physical acts [such as] assembling with others for a

[4] This was quite easy to do—as one state prison official candidly explained, "After *O'Lone*, we…made sure that *all reasons* for denial of any type of [religious] practice were based on security concerns." *In the Belly of the Whale: Religious Practice in Prison*, 115 HARV. L. REV. 1891, 1894 (2002).

worship service ….” *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). To avoid doubt about its scope, Congress explicitly instructed that RLUIPA “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.” § 2000cc-3(g). “Thus, RLUIPA protects any and all prisoners' claims to religious exercises, regardless of the importance of a practice to a particular religion.” Noha Moustafa, *The Right to Free Exercise of Religion in Prisons: How Courts Should Determine Sincerity of Religious Belief Under RLUIPA*, 20 MICH. J. RACE & L. 213, 220 (2014) (hereinafter “Moustafa.”).

1. Nightly Congregational Prayer

TCC concedes—and both courts below do not dispute—that Kelly’s request for an additional prayer service is a protected religious exercise under RLUIPA. Here, Kelly exercises his religion by “congregating” with members of the NOI for “prayer five times a day” which he believes will “bring about communication with Allah.” R. 8. As the district court correctly observed, group worship is a “quintessential religious practice” protected by RLUIPA. R. 8. And we are aware of *no* court that has said otherwise. *See*, *e.g.*, *Cutter*, 544 U.S. 709, 720; *Lovelace v. Lee,* 472 F.3d 112, 174, 187 (4th Cir. 2006).

2. Religious Diet

TCC and the courts below also agree that acting in accordance with a diet or fast that is in accordance with one’s religious belief is undoubtedly a religious practice. *See Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (holding that the prisoner’s right to a non-meat diet was clearly established under RLUIPA); *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003) (“[A] prisoner has a right to a diet consistent with his or her religious scruples.”). Kelly partakes in a Halal diet in accordance with the Qu’ran, the holy book of the Islamic faith.

Accordingly, both group worship religious diet are “undoubtedly religious practices” subject to RLUIPA’s protection. R. 8, 16.

B. Prison Officials Placed a Substantial Burden on Kelly’s Religious Exercise By Denying Nightly Congregational Prayer Services and by Removing him From his Dietary Program.

RLUIPA does not define “substantial burden,” so courts have given the term its ordinary and natural meaning. *Ratzlaf v. United States*, 510 U.S. 135, 147–48 (1994). While RLUIPA itself does not define the term “substantial burden,” Congress plainly intended the term to codify this Court’s long-standing definition from free exercise cases preceding *Employment Division v. Smith*, 494 U.S. 872 (1990). *See* 146 Cong. Rec. S7774-75 (July 27, 2000). Under that line of cases, the government substantially burdens religious exercise when it forces an adherent to “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” and “when government actions or qualifications placed on benefits and privileges have a ‘tendency to inhibit’ religious exercise.” Derek L. Gaubatz, *Rluipa at Four: Evaluating the Success and Constitutionality of Rluipa's Prisoner Provisions*, 28 HARV. J.L. & PUB. POL'Y 501, 515 (2005); *Sherbert v. Verner*, 374 U.S. 398, 404 & n.6 (1963).

RLUIPA’s substantial burden inquiry precludes a court from inquiring into the “merits” of the prisoner’s beliefs, including: whether the religious exercise at issue is “central,” “fundamental,” or “compelled” by his faith. *Cutter*, 544 U.S. at 725. Instead, the substantial burden inquiry asks whether the prison policy at issue has a *coercive impact* on the prisoner’s ability to exercise his religion. *Yellowbear v. Lampert*, 741 F.3d 48, 56 (10th Cir. 2014). Significantly, a prisoner need not prove that the policy “compels” him to violate his religious

beliefs—a substantial burden need not be a complete and total burden—rather, it is enough that the policy forces him to choose between serious punishment and "following his faith." *Id.* at 56.

1. Nightly Congregational Prayer

Directive #98 imposes a substantial burden on Kelly's religious exercise because it forces him to take actions that violate his religious beliefs on pain of substantial punishment. That is the very definition of a substantial burden on religious exercise.

Two of this Court's decisions are instructive in determining the types of punishment that qualify as substantial burdens on religious exercise. In *Burwell v. Hobby Lobby Stores, Inc.*, 134 S.Ct. 2751 (2014) several closely held for-profit corporations challenged the Affordable Care Act's ("ACA") contraceptive mandate, arguing that the provision violated their sincerely held religious beliefs that life begins at conception. *Id.* at 2757. The mandate required the corporations to provide health coverage—including contraceptive services—on pain of severe economic consequences if they refused to do so. *Id.* This Court determined that the mandate left the corporations with two options: (1) provide coverage for contraception in violation of their religious beliefs or (2) pay significant penalties. *Id.* Given those choices, this Court held that the mandate "imposed a substantial burden." *Id.*

The Court reached the same result in *Holt v. Hobbs*, 135 S.Ct. 853 (2015). In that case, a Muslim inmate asserted that the prison grooming policy substantially burdened his religious exercise because it prohibited him from growing a half-inch beard, in accordance with his religious beliefs. *Id.* at 859. This Court explained that because the "grooming policy required" the inmate "to shave his beard," the policy "put [him] to the choice" of violating his religious beliefs or "fac[ing] serious disciplinary action." *Id.* at 862. For this reason, just as in *Hobby*

Lobby, this Court concluded that the "grooming policy substantially burdened his religious exercise." *Id.*

What this Court said in *Hobby Lobby* and *Holt* applies with equal force here. Directive #98, by its terms, prohibits—without exception—all "prayer services after the last inmate headcount at 8:30 P.M." R. 25. Applying this policy to Kelly leaves him with two choices. On the one hand, if Kelly complies with the policy and prays within his cell, he will be forced to violate his religious beliefs. R. 12. As part of his NOI faith, Kelly is required to pray five times a day: (1) Dawn, (2) Early Afternoon, (3) Late Afternoon, (4) Sunset, and (5) *Late Evening*. R. 4. (emphasis added). Before praying, NOI adherents are required to "wash themselves and their clothes…and [to] secure a clean surface" upon which to "kneel and face Mecca." R. 4. Once prayer has started, they "should not be interrupted in any way." R. 4. Here, two factors made that "almost impossible" for Kelly. R. 12. First, praying within his cell meant that Kelly had to conduct his last two daily prayers "next to the toilet." R. 12. And, second, Kelly's cellmate "consistently ridiculed" him and "behaved in a lewd manner"—often "us[ing] the toilet"—each time he "knelt to pray." R. 12.

On the other hand, if Kelly contravenes the policy and conducts his prayer services outside of the cell, he will miss the final headcount and will face a set of "harsh punishments." R. 10. These punishments, escalating in severity, include: (1) restrictions on religious activities and ceremonial meals, (2) work proscription, and (3) solitary confinement. R. 25. The threat of such punishment plainly placed Kelly under substantial pressure to modify his behavior and violate his religious beliefs. R. 4, 6.

Directive #98, then, does not give Kelly much of a choice at all. Rather, it puts him to a Hobson's choice. He can either: (1) pray in an "environment that derogates his religious beliefs"

or (2) pray outside his cell and be "thrown in solitary confinement." R. 12. Put another way, Kelly must choose between "engag[ing] in conduct that seriously violates [his] religious beliefs" and facing "severe punishment." *Hobby Lobby*, 134 S.Ct. at 2775. That is a quintessential substantial burden on religious exercise.

The Twelfth Circuit nevertheless held that Directive #98 "did not constitute a substantial burden" on Kelly's religious exercise. R. 17. The court first stated that there was no substantial burden because Kelly already "has the privilege of attending prayer services," and, in any event, could pray "in a cell and in the presence of another inmate." R. 18–19. That is not the law. As this Court reaffirmed in *Holt*, the substantial burden inquiry asks whether the government "has substantially burdened religious exercise…not whether the claimant is able to engage in *other* forms of religious exercise." *Holt*, 135 S.Ct. at 862. As such, the "availability of alternative means of practicing religion" is an *irrelevant* consideration under RLUIPA. *Id.*

The court next asserted that there was no substantial burden in Kelly's case because "congregational prayer is not a *compulsory* aspect of prayer within the Nation…only *preferred*." R. 19. Again, the court has it wrong. RLUIPA protects religious exercise "*whether or not compelled*" by a system of religious belief. § 2000cc-5(7). Thus, religious exercise that a court might deem only *preferred*—*i.e.*, a Jewish inmate's decision to wear a yarmulke, a Catholic's desire to pray the rosary, or, in this case, a Muslim's preference to pray in the company of others—is also protected by RLUIPA and cannot be substantially burdened.

Compounding its error, the court next stated that Directive #98 did not place substantial pressure on Kelly to modify his beliefs because, "congregational prayer is not a compulsory aspect of prayer within the Nation" and is "only…mandatory…during the holy month of Ramadan." R. 19. RLUIPA, however, prohibits such an inquiry. Indeed, it is well settled law

that courts are "not arbiters of scriptural interpretation," *Thomas*, 450 U.S. at 716, and therefore it is "not within the judicial function [or] judicial competence to inquire whether" Kelly has "correctly perceived the commands of [his] faith." *Id*. That same rule applies here. The Twelfth Circuit has neither the authority nor the competence to decide what the Muslim faith requires of its believers. And it cannot—consistent with RLUIPA and this Court's precedents—second-guess Kelly's religious preferences. Article III courts do not sit as ecclesiastical courts. And for that reason, what is orthodox in this case is best left for Kelly to decide.

Finally, the case law on which the court of appeals grounded its position underscored that it had no intention of applying RLUIPA's rigorous standard. The pre-RLUIPA cases it cited—including *Turner v. Safley*, 482 U.S. 78 (1988) and *Kahey v. Jones*, 836 F.2d 948 (5th Cir. 1988)—are inapposite because those cases applied *O'Lone*'s rational-basis standard, which asked only whether the prison regulations were "reasonably related" to "legitimate penological interests." *O'Lone*, 482 U.S. at 349. RLUIPA, instead, asks whether a prison regulation is the "least restrictive means" of furthering "a compelling interest." § 2000cc-1(a). *Lyng v. Nw. Indian Cemetery Protective Assoc.*, 485 U.S. 439 (1988) is also readily distinguishable. *Lyng* involved a Native American organization's free exercise challenge to the government's decision to build a road and harvest timber on tribal land. *Id*. at 443. This Court, rather than "rejecting the broad reading of RLUIPA" R. 18., simply held that the Native Americans had failed to show that they would be "*coerced* by the Government's action into violating their religious beliefs." *Lyng*, 485 U.S. at 449. Here, Kelly is *coerced* by TCC's policies into either taking action that violates his religious beliefs or facing substantial punishment.

2. Religious Diet

Prison officials are required to make accommodations for a prisoner's religious dietary needs. 28 C.F.R. § 548.20. Revoking special diet programs from "backsliding" inmates imposes a substantial burden; such a punishment is especially burdensome in this particular case where such "backsliding" is "supported" only by a highly suspicious allegation by a cellmate of a *single* departure from a religious diet. R. 6. The Fourth, Fifth, Sixth, and Seventh Circuits have held as much in similar cases. *See Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006); *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988); *Colvin v. Caruso*, 605 F.3d 282, 296 (6th Cir. 2010); *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 791 (5th Cir. 2012).

Contrary to the district courts opinion, R. 9, there is no circuit split on this issue. *Daly v. Davis*, 2009 WL 773880 (7th Cir. 2009) is at odds with several other Seventh Circuit decisions in cases with far more similar facts. *See Reed*, 842 F.2d 960; *Thompson v. Holm*, 809 F.3d 376, 380 (7th Cir. 2016). The only circuit on the other side of this issue is the Eight Circuit. *See, e.g.*, *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008). However, as the Fifth Circuit explains in *Moussazadeh*, the Eight Circuit applies a different, improperly rigid standard:

> According to the Eighth Circuit, government action must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion in order to constitute a substantial burden.

703 F.3d at 794. RLUIPA forbids such an inquiry. § 2000cc-5(7)(A) ("any exercise of religion, *whether or not compelled by, or central to*, a system of religious belief.").

TCC contends that removing Kelly from his diet program is "warranted because Kelly himself broke his religious diet." R.2. That could not be farther from the truth. Directive #99 provides: "If any inmate is *found* to bully another inmate for their food or is caught breaking

their respective religious diet—the prison reserves the right to take him off his diet program." R.6, 26. Here, Kelly was removed from his diet program and barred from services for a month after his cellmate alleged that Kelly was "threatening him with violence" if he did not provide him with his meatloaf dinner. R.6. TCC found "no evidence of…violence" against his cellmate, but did turn up "meatloaf wrapped in a napkin under Kelly's mattress." R. 6. It is undeniable that Kelly's cellmate could have placed the meatloaf there himself. Despite Kelly's denials and "no evidence" of wrongdoing, TCC removed Kelly from his diet program without further investigation. R. 6. Thus, Kelly refused to eat – he went on hunger strike rather than violate his diet. R. 6. Two days into Kelly's hunger strike, prison employees began to forcibly tube-feed Kelly. R. 6. It was only due to the invasiveness and intense pain of being force-fed that Kelly ended his strike and agreed to eat what the prison would provide him. R. 6.

From the outset it should be noted that the so called "jailhouse snitching" engaged in by Kelly's cellmate is inherently suspect. *See, e.g.*, *Alexandra Natapoff, Beyond Unreliable: How Snitches Contribute to Wrongful Convictions*, 37 GOLDEN GATE U. L. REV. 107 (2006) (discussing unreliability of jailhouse snitch testimony and the contribution of such testimony to wrongful conviction). "Evidence of such a witness ought to be received with suspicion, and with the very greatest care and caution." *Crawford v. United States*, 212 U.S. 183, 204 (1909). Despite the profusion of scholarly work and precedent urging an abundance of caution when dealing with jailhouse snitches, prison officials and the circuit court neither investigated or even considered the possibility that it could very well be the cellmate who was being dishonest.

i. Kelly's Removal From his Religious Diet for *Alleged* Backsliding, and Corresponding Removal From Services, Imposed a Substantial Burden

Regardless of whether Kelly actually consumed the meatloaf in question, the prison's removal of Kelly from his religious diet as well as services for a month constituted a substantial burden on his religious exercise. In *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006), a NOI prisoner, Lovelace, was removed from the prison's Ramadan observance pass list after breaking his fast once. Lovelace's inability to fast and attend services was a substantial burden because it prevented him from fulfilling one of the five pillars of Islam. *Id*. at 186. Additionally, Lovelace was further restricted from participating in group services or prayer, despite the fact he might still wish to do so. *Id*. Here, was the case in *Lovelace*, "[t]he prison's policy is further causing Kelly to violate the pillar of his mandated Friday congregational prayer and has effectively pressured him to abandon his religious diet." R. 9. Yet, unlike in *Lovelace*, TCC admits no one *actually saw* Kelly violating his diet in any way. R. 6. Despite the inherent unreliability of Kelly's cellmate and the complete and utter lack of evidence – both issues *not* present in *Lovelace* – Kelly faces the same exact punishment ruled a substantial burden in *Lovelace*.

The Twelfth Circuit held, relying on *Daly v. Davis*, 2009 WL 773880 (7th Cir. 2009), that Kelly's religious exercise was not substantially burdened. R. 20. But, the court's reliance on *Daly* is misplaced. In that case Daly enrolled in his prison's religious diet program and was suspended three times "because he was *observed* purchasing *and* eating non-kosher food and trading his kosher tray for a regular non-kosher tray." *Id*. at *1. This case is distinguishable not only because the violation of the diet was *actually seen*, but also because Daly was reinstated to the program *each* of the three times – making the burden in this case significantly more substantial than in *Daly*. *Id*. Moreover, Daly denied ever agreeing to the terms of the religious diet, and "*concede[d]* that he repeatedly broke the program's rules by buying non-kosher food from the commissary." *Id*. at *2 (emphasis added). Additionally, *Daly* is a brief, cursory opinion

that did nothing to disturb the holding of the Seventh Circuit in *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988), which held evidence of backsliding *did not* evidence insincerity and *did not* warrant removal from a religious program.

Nor did *Daly* affect the Seventh Circuit's recent holding in *Thompson v. Holm*, 809 F.3d 376, 380 (7th Cir. 2016). In *Holm*, a Muslim inmate, Thompson, was given a meal bag on the way back to his cell during the month of Ramadan, only to find another in his cell. *Id*. at 378. Because Thompson could not leave the cell, he left one unopened. *Id*. Thereafter, guards failed to deliver meal bags the next two days, claiming Thompson had eaten from both bags and was removed from his diet. *Id*. As a result, Thompson refused to eat, experiencing hunger pangs, exhaustion, and anxiety to the point that he missing a morning prayer. *Id*. The court found this to be a substantial burden. *Id*. at 380. Like Kelly, Thompson was "forced to choose between foregoing adequate nutrition or violating a central tenant of his religion." *Id*. Like Kelly, Thompson "did not know if he would ever be put back on the [diet] list and get regular food. " *Id*. *Reed* and *Holm* demonstrate that *Daly* – the only case the circuit court cites in support of finding no substantial burden – is far from the whole story when it comes to the Seventh Circuit.

The circuit court summarily concludes that the "diet program did absolutely nothing to force Kelly's hand into threatening other inmates to give him their dinner. Kelly's choices were his own." R. 20. This incorrectly assumes that Kelly's cellmate's allegations are true, and that Kelly had any choice. "Forcing an inmate to choose between daily nutrition and religious practice is a substantial burden." *Holm*, 809 F.3d at 380; *see also Nelson v. Miller*, 570 F.3d 868, 879 (7th Cir. 2009) (finding substantial burden where prison forced inmate to choose between his religious practice and adequate nutrition); *Love v. Reed*, 216 F.3d 682, 689–690 (8th Cir. 2000) (ruling prison's failure to accommodate prisoner's religious diet substantially burdensome);

McElyea v. Babbitt, 833 F.2d 196, 198 (9th Cir. 1987) ("Inmates have the right to be provided with food sufficient to sustain them in good health that satisfies the dietary laws of their religion."). The circuit court's notion that Kelly's "choices" were somehow "his own" falls flat, to say the very least.

ii. Kelly's Religious Beliefs are Sincere, and a single *Alleged* Incident of Backsliding does not Prove Otherwise.

Kelly's religious beliefs *are* sincerely held and fully supported by the record. Kelly's actions as an NOI member for the last fourteen years of his incarceration speak volumes about the sincerity of Kelly's religious beliefs. R. 3, 6, 10. First, Kelly served as the de factor leader of the NOI at TCC, filing several grievances and lobbying on behalf of his fellow NOI members for an additional services. R.10. Second, Kelly went on a hunger strike for two days after he was removed from his diet program – an action that demonstrates tremendous devotion. R. 6. After that, prison employees began to forcibly tube-feed Kelly, and it was only due to the invasiveness and intense pain of being force-fed that Kelly ended his strike and agreed to eat what the prison would provide him. R. 6. Hardly his "own choice." R.6. And, finally, Kelly has brought suit against TCC and appealed that lawsuit all the way to the Supreme Court – a long way to go to simply "cloak illicit conduct" and "reap the benefits of being an acknowledged member of a religious faith group" as the government and circuit court seem to believe. R. 7, 20.

Sincerity of belief has been found in far more complex cases, for example, *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008). Koger entered prison as a Baptist, three years later converted to Buddhism, and stopped eating meat or anything that touched meat to accommodate his yoga practices. *Id*. at 793. Koger explained he was not a part of a formally established religion, but requested a non-meat diet as part of his religious exercise. *Id*. at 793–94. Koger

searched for a religion that fit his beliefs, and joined the Ordo Templi Orientis ("OTO"), a the religion that "[may] include dietary restrictions as part of [an individuals] personal regimen of spiritual discipline." *Id*. The court held that "Koger was asking for accommodation of a religious exercise rooted in sincerely held beliefs." *Id*. at 798. If sincerity can be found in *Koger*, surely it should be found here. Like Koger, the fact Kelly too fought the prisons decisions, primarily as a member of his religion "clearly demonstrates that his beliefs were sincerely held." *See id*.

TCC argues that Kelly's conversion to NOI made him suspect and that his "threats … raised serious questions about Kelly's religious sincerity." R. 7. While Kelly did convert to the NOI two years after arriving at TCC, that that conversion took place in 2002 – *fourteen years ago*. R. 3. Regardless, in *Reed v. Faulkner*, 842 F.2d 960 (7th Cir. 1988), the court declined to question whether Reed was a sincere adherent to his faith after he was observed eating meat, in contravention of Rastafarian tenets. R. 9. The court held that Reed's "backsliding" was not conclusive evidence of his insincerity and that Reed's removal from his religious program was unjustified. *Reed*, 842 F.2d at 962. The *Reed* court held that "the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere." *Id*.

Thus, *even if* Kelly did eat the meatloaf, "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?" *Moussazadeh v. Tex. Dep't of Crim. Just.*, 703 F.3d 781, 791 (5th Cir. 2012). Importantly, the Fifth Circuit held that "the sincerity inquiry is "almost exclusively a credibility assessment," and should not be a matter of consistent questioning. *Id*. Rather, "sincerity is *generally presumed or easily established*." *Id*. at 791 (emphasis added). "Other circuits have followed suit and approached the sincerity inquiry in a

similar manner." *See* Moustafa, *supra* p. 11, at 232.[5] Accordingly, this Court should not find Kelly's beliefs to be insincere due to a single allegation with doubtful veracity, which resulted in a truly impossible situation for Kelly.

C. TCC Fails to Establish a Compelling Government Interest Because the Prison's Alleged Security Concerns are Based Solely on Exaggerated, Stale Fears

Because Directives #98 and #99 substantially burden Kelly's exercise of religion, TCC bears the burden of proving that its policies are the "least restrictive means of furthering a compelling state interest."§ 2000cc-1(a). TCC has failed to carry that burden.

To satisfy the compelling interest prong, TCC must prove that its refusal to grant Kelly an exemption from Directive #98 and #99 furthers an interest of "the highest order." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). This "focused' inquiry" turns on not whether TCC has a compelling interest in enforcing Directive #98 and #99 as a general matter, but on whether the "marginal interest in enforcing [Directive #98 and #99] in th[is] particular case" is compelling. *Holt*, 135 S.Ct. at 863. Thus, in order to carry its burden, TCC must "demonstrate that the compelling interest test is satisfied through application of the challenged law *to the person*—[here, Kelly] whose sincere exercise of religion is being substantially burdened." *Id.*

1. Nightly Congregational Prayer

TCC argues that refusing to grant Kelly an exemption from Directive #98 furthers its compelling interest in prison safety and security in two ways. First, TCC argues that granting Kelly's request for a night prayer accommodation would undercut "prison security," specifically,

[5] *See also* John T. Noonan, Jr., *How Sincere Do You Have to Be to Be Religious?*, 1988 U. ILL. L. REV. 713, 718 (1988) ("Faith is faith because it cannot be demonstrated. A degree of doubt is therefore always possible."); Moustafa, *supra* p. 11, at 227 (discussing potential for bias by those making determinations, and how testing sincerity unfairly disadvantages the prisoner.)

the "potential for gang activity or illicit conduct." R. 6, 13. Second, TCC contends that such an accommodation would impose "financial and personnel concerns" in the form of "heightened staffing burdens" and "a lack of qualified volunteers." R. 6, 19. The Twelfth Circuit erred in holding that TCC satisfied their burden under RLUIPA on the basis of these arguments.

On TCC's interest in security, the Tenth Circuit's recent decision in *Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014) is instructive. In that case, a Native American prisoner brought a RLUIPA claim after he was refused access to the prison's existing sweat lodge for purposes of religious exercise. *Id.* The Tenth Circuit rejected the prison's "abstract" security and cost concerns, explaining that the prison had offered "no support" for its claims about the "inherent dangers of sweat lodges" and had likewise "not even attempt[ed] to quantify [the] cost." *Id.* The court acknowledged that prison officials may receive due deference upon a showing of "record evidence," but that they could not "declare a compelling government interest by *fiat*." *Id.*

That is exactly what TCC attempts to do here. TCC contends it has a compelling interest in the present case due to "security concerns," but, as the district court aptly stated, they "offer little support for the validity of their security concerns, especially as it pertains to Kelly and the NOI members he speaks for." R. 13. Indeed, "Kelly has absolutely no history of violence" and "none of the current members of the Nation at TCC" do either. R. 3,14. Yet TCC insists that Kelly and his fellow NOI inmates could use the night prayer services "to conduct gang activity or illicit conduct." R.19. But, like the prison in *Yellowbear*, TCC has provided no "record evidence" for these alleged security concerns. And these are exactly the kinds of "exaggerated fears" that Congress intended to prohibit when enacting RLUIPA. *Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007) (quoting 146 Cong. Rec. S7775) (daily ed. July 27, 2000)).

Additionally, TCC has to do more than merely assert a security concern – they have to actually demonstrate that security concern by placing evidence into the record. *Murphy v. Missouri Dept. of Corrections*, 372 F.3d 979, 982 (8th Cir. 2004). Here, no such demonstration has occurred, and this court "can only give deference to the positions of prison officials as required by Cutter when the officials have set forth those positions and entered them into the record." *Koger*, 523 F.3d at 800; *see also Moussazadeh*, 703 F.3d at 794 ("TDCJ…did not offer any evidence that those more violent offenders would be more likely to cause violence or safety disturbances as a result of some prisoners being served kosher food.").

TCC's refusal to grant Kelly's prayer exemption for "personnel and financial concerns" is no more compelling. Under TCC's policy, the only persons who can conduct prayer services are "prison Chaplains." R. 19. Traditionally, inmates at TCC had been allowed to petition for a prayer service with a prison service *volunteer*. R. 19. However, in 1998, TCC changed its policy, banning the use of all volunteers in an effort to curb gang-related activity. R. 14. TCC continues to enforce this policy today and, as part of this litigation, they submitted an affidavit to this Court based upon the very same "events that occurred over a decade ago." R. 14. All and all, TCC has no interest in prohibiting what the majority of state and federal prisons permit—the use of religious volunteers for prayer services.

This Court and several courts of appeals have traditionally relied on the experience of other prisons when evaluating prisoner claims; thus, that experience is directly relevant to TCC's claim of a compelling interest. *See e.g.*, *Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974) ("While not necessarily controlling, the policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction."). In *Holt*, for example, the Court rejected a prison's compelling interest in its restrictive grooming policy based partly on

the fact that "so many other prisons allow inmates to grow beards while ensuring." 135 S.Ct. at 866. Likewise, in *Spratt* the court struck down a prison regulation, prohibiting inmates from preaching during worship services, after prison officials failed to provide "any evidence…or explanation" between [the prison at issue] and a federal prison that would render federal policy unworkable." 482 F.3d at 42. Finally, in *Garner v. Kennedy*, 713 F.3d 237, 247-248 (5th Cir. 2013), the court found it "persuasive that prison systems that are comparable that are comparable in size…allow their inmates to grow beards, and there is no evidence of any specific incidents affecting prison safety in those systems."

2. Religious Diet

No administrative, budgetary, or security fears specifically motivated Kelly's removal from the *diet program*, according to the record. Indeed, all such concerns are unpersuasive considering Kelly had been on his diet program for *fourteen years*. R. 3; *Moussazadeh*, 703 F.3d at 794 ("[prisons] argument that it has a compelling interest in minimizing costs by denying Moussazadeh kosher food, however, is dampened by the fact that it has been offering kosher meals to prisoners for more than two years."); *see supra* Part I.C.1. If the prison has any financial concern related to the diet program, it is purely one of self-interest. *See* Moustafa, *supra* p. 11, at 225 (discussing high cost of religious accommodations and prison facilities interest in granting accommodations to as few inmates as possible).

Orderly administration of a prison dietary system, and corresponding accommodations, are legitimate concerns. *See Resnick v. Adams*, 348 F.3d 763, 769 (9th Cir. 2003). "The problem for the prison officials, however, is that no appellate court has ever found these to be *compelling* interests." *Koger*, 523 F.3d at 800. Additionally, "the governmental interest should be considered in light of the prisoner's request and circumstances at the detention facility." *Id*. Accordingly, this

court must consider that TCC *already* provided Kelly with a vegetarian diet for *fourteen years*. *Id*. Thus, accommodating Kelly's diet was no threat to orderly administration of the prison dietary system. Indeed, no evidence was presented indicating this was the case, and this Court "can only give deference to the positions of prison officials as required by *Cutter* when the officials have set forth those positions and entered them into the record." *Id.*

In *Lovelace*, the Defendants "assert[ed] simply a legitimate interest in removing inmates from religious dietary programs where the inmate flouts prison rules." 472 F.3d 174, 190 (2006). In that case Defendant's "d[id] not elaborate how this articulated 'legitimate interest' qualifies as compelling; they do not present any evidence with respect to the policy's security or budget implications." *Id*.; *see also Makin v. Colorado Dept. of Corrections*, 183 F.3d 1205, 1213–14 (1999) (holding policy denying Ramadan meals served no legitimate governmental interest owing to the lack of evidence that the policy served deterrence, rehabilitation, security, or cost saving). The court in *Lovelace* concluded by stating "[g]iven the superficial nature of the defendants' explanation, we cannot at this stage conclude that the asserted interest is compelling as a matter of law." 472 F.3d at 190. This Court should hold the same here.

D. Even if This Court Concludes That the Prison's Grounds for Denial of Kelly's Demands Stem From a Compelling Government Interest, the Defendants Still Have the Burden of Proving That Their Policies are the Least Restrictive Means of Furthering That Interest, a Burden Which They Cannot Meet.

Under RLUIPA, the burden is on the government to show that the challenged policy is the least restrictive means of achieving their interests. § 2000cc(a)(1)(B). The policy must be narrowly tailored to achieving the government's stated interests and the government must demonstrate that alternative means of achieving those interests were actually considered and deemed insufficient. *See generally, Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005);

Wygant v. Jackson Bd. Of Educ., 476 U.S. 267, 280 n. 6 (1986). In this analysis the court must not only look to see if the prison tried other alternatives, but we should look to see if the prison actually ruled out other viable alternatives. *Warsoldier*, 418 F.3d at 995. In the present case, the prison has failing to bring forth any evidence that any alternative course of action was considered – if even for a fleeting moment.

1. Nightly Congregational Prayer

The Twelfth Circuit held that the denial of Kelly's exemption was "the least restrictive means for the institution to further its compelling interests. R. 21. The court asserted "a blanket ban on all services was required" in order to "keep the peace in a potentially dangerous and hostile environments such as a prison." R. 21. As a consequence, as the Twelfth Circuit saw it, granting an "individualized exemption" for a group that "lacked the demand necessary" for an additional prayer service would be "perceived as deferential treatment among the inmate population" and thus disrupt the uniformity of the prison. R. 7, 18.

This court considered—and rejected—that same argument in *Gonzales v. O Centro Espirita Benefiacente Uniao Do Vegetal*, 546 U.S 418 (2006). There, plaintiffs sought a religious-based exemption from federal drug laws for the use of hoasca, a tea containing a hallucinogen for use in religious ceremonies*. Id.* at 425. Much like this case, the government argued that because it had "a compelling interest in the *uniform* application" of its drug laws, if such an exception were made for the plaintiffs, then "there would be no way to cabin religious exceptions." *Id.* at 419, 430. This Court rejected that argument, reasoning that the government's refusal to make an exception for the plaintiffs was "fatally undermined" by its "peyote exception" to the federal drug laws already in place. *Id.* at 421.

This same reasoning dooms TCC's arguments about uniformity here. To be sure, TCC's concerns about maintaining security during a night prayer service deserve "particular sensitivity," however; those same concerns exist during the daytime prayer services. This fact diminishes TCC's contention that Directive #98 is the least restrictive means of furthering its interests. *Id.* at 421. Additionally, much like the government in *O Centro*, TCC also relies on the argument that if Kelly's exemption were granted there would be "no way to cabin religious exemptions." *Id.* at 430. This argument for denying Kelly's request rests not on any specific security concerns, but on a generalized slippery slope concern that could be invoked for any RLUIPA exception. In other words, "if I make an exception for you, I'll have to make one for everybody, so no exceptions." This Court has rejected that flawed reasoning throughout its free exercise jurisprudence and should do so again today.

RLUIPA's least restrictive means prong also requires that TCC show "good faith consideration of workable alternatives." *Fisher v. Univ. of Tex.*, 133 S. Ct. 2411, 2420 (2013). Here, TCC has not engaged in any "good faith consideration" of such alternatives, much less carried its burden of "prov[ing]" that such alternatives are unworkable. *Holt*, 135 S.Ct. at 864.

The Ninth Circuit's decision in *Shakur v. Schiriro* 514 F.3d 878 (9th Cir. 2008) is instructive. In *Shakur*, a Muslim inmate brought a RLUIPA claim after he was denied a kosher-meal diet because prison officials wanted to "avoid the prohibitive expenses of acquiring Halal meat for all Muslim inmates." *Id.* Prison officials offered an affidavit, signed by the Prison Chaplain, stating that the inmate's request was denied due to "security" and "cost containment" concerns. *Id.* The Ninth Circuit found that the prison could not meet its burden to prove least restrictive means. *Id.* The court stated that it was "troubled by…the reliance on this affidavit" because it made "conclusory assertions that providing all…Muslim prisoners with kosher meals

would cost an additional $1.5 million annually" and because it came from the Department's "Pastoral Administrator rather than an official specializing in food service or procurement." *Id.*

There is no daylight between *Shakur* and this case. Much like the Department in *Shakur*, TCC has not provided any evidence to support its concerns about cost containment or potential security threats that allowing Kelly's request would bring about. *See id.* As in *Shakur*, the "Director of the Chaplaincy Department," submitted TCC's affidavit—not a financial administrator or an official with expertise in security. *See id.* And, much like in Shakur, where the court found that the Pastoral Administrator was not "competent to testify about the cost of procuring prison meals," a court would find in this case that the Chaplain Director is equally unqualified to testify about security or "cost containment stratagems." *See id*.

Finally, as the District Court pointed out, TCC could have either: (1) scheduled a final headcount after an inmate returned to his cell, (2) grouped NOI inmates into the same cells or adjacent blocks, or (3) had their prison officials conduct the head count during the prayer service. R. 14. TCC also could have given the NOI members the option to fund their own Chaplain and prayer service or could have provided Kelly with a prayer mats, religious materials, and new cellmate to alleviate the burden of praying within his cell. Because TCC considered none of these alternatives, it has woefully failed to meet its burden of proving least restrictive means.

2. Religious Diet

There is no evidence in the record indicating Tourovia Directive #99 is the least restrictive means. The Government has not put forth a scintilla of evidence to suggest that other alternatives were tried *or* that the prison actually ruled out any viable alternatives. Indeed, Tourovias own policy suggests a (slightly) less restrictive means: temporary, rather than permanent, removal from the diet program. R. 26. Additionally, the prison could have declined

to bar Kelly from services. However, the record shows no indication that these options were considered and ruled out. The additional penalty of removal from religious services shows that the prison was concerned *only* with punishment – not their obligations under RLUIPA.

The circuit court incorrectly, and frankly confoundingly, stakes their conclusion that TCC's policy is the least restrictive means on *Brown-El v. Harris*, 26 F.3d 68 (8th Cir. 1994); R. 21.[6] That case involved a Muslim prisoner who was receiving meals after dark in order to observe Ramadan. *Id*. After getting in a fight with a prison guard and being placed in the infirmary, Brown-El *voluntarily* ate a daytime meal. *Id*. Based on this *voluntary* action, Brown-El was removed from the diet program in accordance with prison policy stating such consequences would stem from daytime eating. Based on those facts, the *Brown-El* court held that "the prisoner has chosen to remove himself or herself by conduct in rejecting the accommodation." *Id*. at 69. After discussing this case, the circuit court concludes – without any further explanation – that "[t]he prison policy at TCC, like the policy in *Brown-El*, is the least restrictive means … because it sets consequences in motion only for inmates who break the rules of their own accord." R. 21. Therefore, the circuit court found "that Kelly forced the prison to revoke his diet program benefits … removing himself from the program, by threatening other inmates for their food, an allegation which was later corroborated by the prison guards." R. 21.

There are several issues with this analysis. First, the facts of *Brown-El* are entirely distinguishable from the present case. Kelly denies threatening his cellmate for his meatloaf, and this Court should not just accept the word of Kelly's cellmate, especially since *no one actually saw* Kelly violate his diet. R. 6. The circuit court's statement that the cellmate's story was "later

[6] *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007), also cited by the circuit court, provides Defendants no help. R. 22. The Fifth Circuit's more recent *Moussazadeh* decision limited *Baranowski* to its facts. 703 F.3d at 795.

corroborated" should be taken with a grain of salt since it is entirely plausible the cellmate planted the meatloaf for the guards to find. Second, Kelly's eventual violation of his Halal diet was anything but voluntary – he was force fed by feeding tube after he *refused* to violate said diet voluntarily, and only eventually succumbed due to this painful, and invasive procedure. *See supra* Part I.B.2. Lastly, and most importantly, contrary what the circuit court's decision indicates, the standard by which courts are to judge least restrictive means has *nothing* to do with whether rules were broken voluntarily or not and everything to do with whether alternatives were considered and rejected by prison officials. *See Warsoldier,* 418 F.3d at 995; *Wygant,* 476 U.S. at 280 n. 6. The circuit court misses the point by failing to engage in any discussion as to what, if any, alternatives were considered and rejected, let alone tried, by TCC.

Here, no evidence whatsoever has been presented that indicates a single alternative idea was considered and rejected as insufficient. Thus, Defendants have failed to meet their burden that their policies are the least restrictive means.

CONCLUSION

The judgment of the Twelfth Circuit should be reversed.

APPENDIX A

Constitutional Provisions

U.S. CONST. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

APPENDIX B

Statutory Provisions

42 U.S.C.A. § 2000cc-1

(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.