No. 985-2015

In the Supreme Court of the United States

SIHEEM KELLY, PETITIONER,

v.

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

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT
NO. 472-2015

BRIEF FOR THE RESPONDENTS

Team Number 22

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

QUESTIONS PRESENTED vi

JURISDICTIONAL STATEMENT vii

STATEMENT OF THE CASE 1

The Nature of the Case 1

Course of Proceedings and Disposition Below 1

Statement of the Facts 1

SUMMARY OF THE ARGUMENT 5

STANDARD OF REVIEW 6

ARGUMENT 7

I. Kelly's First Amendment claims should be adjudicated under the *Turner* test because he failed to provide any jurisdictional basis to apply RLUIPA to TCC 8

A. Kelly has failed to allege and prove any jurisdictional basis to invoke RLUIPA's strict scrutiny standard 8

B. TCC's policy prohibiting congregational nightly services and policy revoking dietary privileges for backsliding are constitutional under the *Turner* Test 10

II. TCC's policy prohibiting nightly services does not violate RLUIPA 14

A. TCC's policy prohibiting nightly services does not substantially burden Kelly's religious exercise 14

1. Kelly failed to satisfy his burden of showing that TCC's policy prohibiting congregational nightly services substantially burdened his religious exercise 14

2. TCC's policy prohibiting congregational nightly services does not substantially burden Kelly's religious exercise 15

B. TCC's policy prohibiting nightly prayer services and denial of Kelly's request are the least restrictive means to further TCC's interests of security, discipline, and financial concerns. 19

III. Kelly does not have standing to challenge TCC's dietary policy, which does not violate RLUIPA 21

A. Kelly does not have standing to challenge TCC's dietary policy because he did not exhaust TCC's administrative remedies 21

B. Kelly also failed to adequately prove his diet is a religious exercise, but even if accepted, his removal from it was still not a substantial burden. 22

1. Kelly failed to prove that his diet request is grounded in a sincerely held religious belief. 23

2. Kelly failed to show that TCC's policy substantially burdened his religious exercise because his removal was based on his own actions. 24

C. TCC's dietary policy and removal of Kelly from his vegetarian diet is the least restrictive means to further its compelling interests in security and discipline 25

CONCLUSION .....

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

Anderson v. Bessemer City,
470 U.S. 564 (1985).....6

Anderson v. Liberty Lobby, Inc.,
477 U.S. 242 (1986).....6

Beard v. Banks,
548 U.S. 521 (2006).....6, 10, 11, 12, 14, 19

Booth v. Churner,
134 S. Ct. 2751 (2014).....21

City of Boerne v. Flores,
521 U.S. 507 (1997).....8

Cutter v. Wilkinson,
544 U.S. 709 (2005).....4, 7, 8, 15, 18, 22, 24, 27

Eastman Kodak Co. v. Image Tech. Servs.,
504 U.S. 451 (1992).....6

Lyng v. Northwest Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988).....16, 17

Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,
475 U.S. 574 (1986).....6

O'Lone v. Estate of Shabazz,
482 U.S. 342 (1987).....10, 11

Overton v. Bazzetta,
539 U.S. 126 (2003).....12

Thomas v. Review Bd. of Indiana Employment Sec. Div.,
450 U.S. 707 (1981).....13

Turner v. Safley,
482 U.S. 78 (1987).....9, 10, 11, 12

UNITED STATES COURT OF APPEALS CASES

Baranowski v. Hart,
486 F.3d 112 (5th Cir. 2007) 27

Cutter v. Wilkinson,
423 F.3d 579 (6th Cir. 2005) 9

Daly v. Davis,
2009 WL 773880 (7th Cir. 2009) 22, 24, 25

Freeman v. Texas Dep't of Criminal Justice,
369 F.3d 854 (5th Cir. 2004) 8

Johnson v. Jones,
340 F.3d 624, 627 (8th Cir.2003). 22

Jones v. Shabazz,
352 F. App'x 910 (5th Cir. 2009).....15, 23

Lovelace v. Lee,
472 F.3d 174 (4th Cir. 2006) 25, 26, 27

Midrash Sephardi, Inc. v. Town of Surfside,
366 F.3d 1214 (11th Cir. 2004) 16

NetJets Aviation, Inc. v. LHC Commc'ns, LLC,
537 F.3d 168 (2d Cir. 2008).....6

San Jose Christian Coll. v. City of Morgan Hill,
360 F.3d 1024 (9th Cir. 2004) 4

Van Wyhe v. Reisch,
581 F.3d 639 (8th Cir. 2009) 13

Washington v. Gonyea,
731 F.3d 143, 146 (2d Cir. 2013).....8

Washington v. Klem,
497 F.3d 272 (3d Cir. 2007).....7, 15

UNITED STATES DISTRICT COURT CASE

Brooks v. Roy,
881 F. Supp. 2d 1034 (D. Minn. 2012).....13

Ephraim v. Angelone,
313 F. Supp. 2d 569 (E.D. Va. 2003) 8, 9

Piscitello v. Berge,
2003 WL 23095741 (W.D. Wis. Apr. 17, 2003) 22, 23

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. I. 10

STATUTES

42 U.S.C. § 2000cc (2012).....7, 8, 13, 21

42 U.S.C. § 1997e (2012) 21

CONGRESSIONAL RECORDS

146 Cong. Rec. S7774-75 (July 27, 2000).....15, 18

QUESTIONS PRESENTED

I. Whether Tourovia Correctional Center's prison policy prohibiting nightly services to members of the Islamic faith violates RLUIPA.

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

JURISDICTIONAL STATEMENT

This case asserts a claim pursuant to the Religious Land Use And Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc, *et seq*. (2012). The United States District Court for the Eastern District of Tourovia had subject matter jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (2012). The United States Court of Appeals for the Twelfth Circuit had jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2012) because this is an appeal of a final judgment in a civil case. The United States Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254 (2012). On July 1, 2014, the United States Supreme Court granted the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

The Nature of the Case

Turovia Correctional Center ("TCC"), a maximum-security prison in the State of Turovia, amended it is religious corporate service policy by revoking the privilege of congregating after the evening meal. Additionally, TCC has a dietary policy whereby it permits prisoners to apply for dietary privileges. However, TCC retains the right to remove these privileges if it has adequate reason to believe that that the prisoner does not adhere to the diet. Petitioner Siheem Kelly alleges that TCC violated his First Amendment rights on two grounds. Kelly alleges that TCC substantially burdened his rights when it denied his request for a nightly congressional service after the evening meal and, when it removed him from the religious diet program.

Course of Proceedings and Disposition Below

On March 7, 2015, The United States District Court for the Eastern District of Tourovia denied TCC's motion for summary judgement and found for Kelly as a matter of law pursuant to Federal Rule of Civil Procedure 56 (f).. TCC appealed and on June 1, 2015, the United States Court of Appeals for the Twelfth Circuit disagreed with the district court and entered an order vacating the district court's decision. On July 1, 2015, the United States Supreme Court granted Kelly's Writ of Certiorari.

Statement of the Facts

In 1998, Turovia Correctional Center (TCC), a maximum security prison, discovered that one of its religious service volunteers was relaying gang orders from incarcerated members of the Christian community to gang-affiliated individuals outside of the prison's walls. R. at 4. Soon after, several members of the Muslim groups who were attending the night prayer services disregarded security policy pertaining to the last in-cell daily headcount by staying in their prayer

rooms longer than TCC authorized. R. at 4. In response, TCC banned the use of all prison volunteers and all nightly services. R. at 4. Although this action was partially as punishment, it was primarily done to ensure that inmates of the religious groups were back in their cells promptly at 8:30 p.m. for the final headcount. R. at 4. This policy change is reflected in Turovia Directive #98. R. at 4.

Since August 1998, if no official chaplain is available, no services may be held and the chaplain's hours of operation are only during the day as specified in the Turovia Directive. R. at 4. However, TCC does provide a chaplain in emergency situations in which the prisoner is either near death, or the prisoner is unable to attend prayer services due to illness or physical incapability. R. at 4. Currently, the prison supports the exercise of religious practices by staffing and maintaining three services every day for Catholic, Protestant, Muslim, and Jewish inmates. R. at 4.

In 2000, the Petitioner, Siheem Kelly was convicted of several drug trafficking charges and aggravated robbery and sentenced to TCC. R-3. Two years later, he completed a TCC form to change his religious affiliation from no religion to membership with the Nation of Islam (NOI). R. at 3. This form, along with written approval from the Warden, is required of any inmate that wants to qualify for religious services and dietary restrictions. R. at 3. After his alleged conversion, Kelly also demanded the prison guards call him his new name, "Mohammed." R. at 3.

The NOI is a subgroup of the traditional Sunni Muslim religion. R. at 3. The prison contributes to the members of the Nation participating in a strict vegetarian diet (Halal) and fast for the month of Ramadan. R. at 3. The members of the Nation participate in five prayers per day at dawn, early afternoon, late afternoon, sunset, and late evening. R. at 3-4. The religion does not

mandate collective prayers outside of the holy month of the Ramadan and on Friday evenings. R. at 4.

TCC has found it necessary to monitor the members of the NOI because they never move through the facility alone and TCC must continue to prevent illicit or gang activity. R. at 3. Despite this, TCC still allows the NOI's members to pray three times per day outside of the cell, and twice a day inside the cell. R. at 4.

In 2013, on behalf of himself and six other NOI members that agreed with him, Kelly filed a written prayer service request for another congregational nightly prayer service after the last meal at 7:00 p.m. R. at 4-5. This request was denied because the prison's policy prohibited the inmates from going anywhere except their cells before the final head count. R. at 5. The Warden personally spoke to Kelly and told him that the three services already provided fulfilled the NOI's prayer requirements and that he and the other members could also pray in their cells. R. at 5.

After the denial, Kelly insisted by filing two grievances claiming that he was unable to pray in his cell any longer. R. at 5. Kelly stated that any prayers in the cells were distracting and disrespectful because his non-NOI cellmate ridiculed him or engaged in lewd behavior when he attempted to pray. R. at 5. Kelly claimed in the grievance that several more of his brothers in the Nation were going through the same ridicule and distraction, caused by non-NOI cellmates, while they prayed. R. at 5. However, the facts do not indicate that any of the other members reported such a grievance before Kelly's. Kelly's grievance was denied on the grounds that Kelly had no evidence to prove his cellmate actually engaged in the behavior he alleged. R. at 5. Kelly's next move was a second grievance, also denied, which stated that praying in a cell near a toilet was also a disgrace because Allah preferred that he pray in a clean and solemn environment with other members of his group. R. at 5.

Again, Kelly filed a formal grievance with the prison. R. at 5. He demanded a nightly congregational service for himself and his brothers in NOI to be held outside of their cells. R. at 5. TCC denied this grievance because it, like the others, violated TCC policy and TCC could not verify any of Kelly's allegations about his cellmate. R. at 5. Despite this, Warden Echols did suggest that Kelly request a transfer out of his current cell to see if a new cellmate would be more respectful of his personal prayer time. R. at 5. TCC does not assign cellmates based on religion, but its policy is that, if there are specific incidents of violence, the cellmate can request to be transferred with the Warden's approval. R. at 4.

Two weeks after the formal grievance was denied, a new inmate, who was Kelly's new cellmate, reported to the superintendent that Kelly was threatening him with violence if he did not provide Kelly with his meatloaf dinner. R. at 6. The superintendent immediately informed Warden Echols and other prison staff so that the incident would be investigated and documented. R. at 6. Although there was no evidence of actual violence against Kelly's new cellmate, TCC did discover meatloaf wrapped in a napkin under Kelly's mattress during a search of his cell. R. at 6. As a result of Kelly's threat against his roommate and the evidence found that suggested it happened, TCC had to remove Kelly from TCC's vegetarian diet program. R. at 6. Additionally, the prison barred Kelly from attending worship services for a month as punishment for the threats against the new inmate and for deviating from his religious diet. R. at 6. Kelly's response was to refuse to eat anything from the standard menu and began a hunger strike. R. at 6. After two days of his strike, prison employees were forced to tube-feed Kelly. R. at 6. After this, Kelly ended his strike and ate the food provided to the general population. R. at 6.

SUMMARY OF THE ARGUMENT

TCC did not impermissibly burden Kelly's religious exercise. This Court should review Kelly's claims under its First Amendment jurisprudence because the record lacks of any jurisdictional basis to apply RLUIPA's strict scrutiny standard. Under the *Turner*'s test, TCC's policies are constitutional because they are reasonably related to the prison's legitimate penological objectives of assuring security, discipline and cost containment.

Additionally, TCC's policies are also valid under the RLUIPA's standard. First, Kelly has failed to carry his burden of showing TCC's policy prohibiting congregational nightly services substantially burdens his religious exercise. Indeed, if the policy places any burden on Kelly's rights, that burden is only incidental. Furthermore, TCC is entitled of deference in its assertion of a compelling governmental interest because its policy was amended to respond to real and concrete concerns.

Lastly, TCC's policy that caused removal of Kelly from his diet because of evidence of backsliding also does not violate RLUIPA for two reasons. First, Kelly does not have standing to challenge TCC's dietary policy because he did not exhaust all of his administrative remedies. RLUIPA is subject to PLRA which requires that prisoners shall bring no action regarding prison conditions until he has exhausted available administrative remedies. Further, TCC's dietary policy does not violate RLUIPA because it does not burden Kelly's religious exercise. Kelly did not adequately prove how his diet is a religious exercise but, even if accepted, TCC removing him from that diet did not substantially burden it.

STANDARD OF REVIEW

This Court reviews the district court's finding of fact under the clearly erroneous standard of review. *E.g.*, *Anderson v. Bessemer City*, 470 U.S. 564, 566 (1985). Conclusions of law and the application of law to facts are reviewed *de novo*. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 428 (2006). The Court reviews *de novo* the district court's grant of summary judgment. *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 465 (1992).

To withstand to a motion of summary judgment, the nonmoving party must produce admissible evidence that is significantly probative, and not merely colorable, to require submission of the issue to the jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). In other words, Kelly must present "specific facts showing that there is a genuine issue for trial." *Beard v. Banks*, 548 U.S. 521, 529 (2006) (plurality) (quoting Fed. R. Civ. Pro. 56(e)).

In granting summary judgment *sua sponte*, federal courts are "required to view the record in the light most favorable to the party against which summary judgment is contemplated and to resolve all ambiguities and draw all factual inferences in favor of that party." *NetJets Aviation, Inc. v. LHC Commc'ns, LLC*, 537 F.3d 168, 178-79 (2d Cir. 2008) (citations omitted). In addition to drawing all inferences in favor of the party that suffered summary judgment, federal courts "must accord deference to the views of prison authorities" on disputed matters of professional judgment. *Beard*, 548 U.S. at 530.

ARGUMENT

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") proscribes imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution," unless the government demonstrates "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) (2012). The scope of application of RLUIPA's strict scrutiny standard is restricted to cases where the substantial burden is imposed in a program or activity that receives Federal financial assistance or where the substantial burden affects interstate commerce. Id. § 2000cc-1(b).

In addition to requiring proof that the prison imposed a substantial burden that meets these specific criteria, prisoners must also exhaust the administrative requirements of the PLRA. 42 U.S.C. §§ 2000cc-2(e). If the prisoner produces prima facie evidence in support of these substantive, jurisdictional, and administrative requirements, then the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the challenged practice or law substantially burdens the prisoner's exercise of religion. *Washington v. Klem*, 497 F.3d 272, 277 (3d Cir. 2007) (quotation omitted).

In examining prisoners' claims, federal courts construes RLUIPA in favor of the broad protection of religious exercise and to the maximum extent permitted by the terms of th[e] Act and the Constitution. 42 U.S.C. § 2000cc–3(g). The drafters of the Act however anticipated that courts would apply it with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter v. Wilkinson*, 544 U.S. 709 (2005).

I. Kelly's First Amendment claims should be adjudicated under the *Turner* test because he failed to provide any jurisdictional basis to apply RLUIPA to TCC

The Religious Land Use and Institutionalized Persons Act ("RLUIPA") grants a greater protection to the religious exercise of state prisoners than the Supreme Court's First Amendment jurisprudence. *Freeman v. Texas Dep't of Criminal Justice*, 369 F.3d 854, 858 n.1 (5th Cir. 2004) ("The RLUIPA standard poses a far greater challenge than does *Turner* to prison regulations that impinges on inmates' free exercise of religion."). Pursuant to *City of Boerne v. Flores*, the RLUIPA standard cannot be applied to states through the Fourteenth Amendment because Congress does not have the authority to define rights under the Enforcement Clause of the Amendment. 521 U.S. 507, 532 (1997). Indeed, in enacting RLUIPA, Congress exercised its authority under the Spending Clause and Commerce Clause. *See* 42 U.S.C. § 2000cc-1(b); *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (noting that RLUIPA's constitutionality depends on the "Commerce Clause underpinning or a Spending Clause limitation to recipients of federal funds.").

A. Kelly has failed to allege and prove any jurisdictional basis to invoke RLUIPA's strict scrutiny standard

RLUIPA requires prisoners to show that the prison imposes a substantial burden on their religious exercise "in a program or activity that receives Federal financial assistance." 42 U.S.C. § 2000cc-1(b)(1). Alternatively, they can show that the prison's substantial burden affects commerce with foreign nations, among the several states, or with Indian tribes. *Id.* § (b)(2).

In any event, to be entitled to any relief under RLUIPA, prisoners are required to plead and prove at least one jurisdictional basis. See *Washington v. Gonyea*, 731 F.3d 143, 146 (2d Cir. 2013) (declining to review the RLUIPA claim because plaintiff failed to satisfy the statute's jurisdictional requirements); *Ephraim v. Angelone*, 313 F. Supp. 2d 569, 575 (E.D. Va. 2003) aff'd, 68 F. App'x 460 (4th Cir. 2003), cert. denied, 124 S. Ct. 1084 (2004). In *Ephraim*, the

district court dismissed the RLUIPA claim because the prisoner had not alleged sufficient facts to invoke the statute. 313 F. Supp. 2d at 575. The *Ephraim* court reasoned that the prisoner could not invoke RLUIPA's protection because he did not allege that the prison or its dietary program received federal financial assistance, nor has he alleged a substantial burden that would affect interstate or foreign commerce. *Id.*

The court declined to apply RLUIPA's strict scrutiny standard, and upheld the prison's regulation under the Supreme Court's Free Exercise Clause jurisprudence, which examines the validity of prison policies under the *Turner* test: "When a prison regulation impinges on an inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). In *Cutter v. Wilkinson*, the Sixth Circuit, on remand from the Supreme Court, upheld RLUIPA as a valid exercise of the Spending Clause. 423 F.3d 579, 585 (6th Cir. 2005). The *Cutter* court noticed that the record contained a detailed account of the federal funding received by the state prison. *Id.* at 583.

Here, Kelly failed to allege and proffer any jurisdictional basis to invoke the RLUIPA's strict scrutiny standard. Like in *Ephraim*, this case lacks any allegation or factual finding in support of RLUIPA's jurisdiction. Kelly does not allege that TCC and its programs receive federal funding nor has he alleged a substantial burden that would affect interstate or foreign commerce. In contrast to *Cutter*, the Circuit Court in this case noticed that TCC is a state-funded institution. Kelly has failed to satisfy the necessary requirements to invoke the protection of the Act. Therefore, this Court should not apply RLUIPA's strict scrutiny standard because in this case, like in *Ephraim*, *stare decisis* requires the application of the *Turner* test to Kelly's First Amendment claims.

B. TCC's policy prohibiting congressional nightly services and policy revoking dietary privileges for backsliding are constitutional under the *Turner* test.

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law ... prohibiting the free exercise" of religion. U.S. Const. amend. I. In evaluating a prisoner's First Amendment claim under the Turner test, this Court evaluates four factors to determine whether the policy is reasonably related to a legitimate penological interest. *See Turner*, 482 U.S. at 89–90.

> First, is there a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it? Second, are there alternative means of exercising the right that remain open to prison inmates? Third, what impact will accommodation of the asserted constitutional right ... have on guards and other inmates, and on the allocation of prison resources generally? And, fourth, are ready alternatives for furthering the governmental interest available?

Beard v. Banks, 548 U.S. 521, 529 (2006) (citations omitted). In *O'Lone v. Estate of Shabazz*, this Court held constitutional a prison's policy prohibiting prisoners to return to the institution during the day, which policy impeded Muslim prisoners to attend the Jumu'ah, a weekly congregational service of central religious importance to them. 482 U.S. 342 (1987). The policy was rationally connected to the legitimate penological interest of the prison's security concerns: The prison officials testified that "the returns from outside work details generated congestion and delays at the main gate, a high risk area in any event." *Id*. at 352. The Court determined that, although the policy foreclosed any mean of attending the religious service, the prisoners retain the ability to participate in other Muslim religious ceremonies and observances of their faith. *Id*.

Further, accommodating prisoners' requests of grouping all Muslim inmates together or providing weekend labor for Muslim inmates would have drained the already scarce human resources of the prison, and would have also threatened prison security by allowing "affinity

groups" in the prison. *Id*. at 353. The prison administrator testified as follows: "we have found out and think almost every prison administrator knows that any time you put a group of individuals together with one particular affinity interest . . . you wind up with . . . a leadership role and an organizational structure that will almost invariably challenge the institutional authority." *Id*. (citation omitted).

Here, both TCC's policies satisfy the *Turner* test. First, the policy prohibiting nightly services is rationally connected to TCC's interests in security, discipline, and financial concerns. Like in *O'Lone,* the current policy at TCC was amended to address security concerns of the 1998 incidents during which members of a religious group were taking advantage of the nightly services to communicate gang orders outside the wall, and two religious groups violated the prison's policy by overstaying in the prayer rooms. Accordingly, the policy has a valid, rational connection with TCC's interests. The policy further does not burden Kelly's religious exercise because TCC guarantees him five (5) prayer-times a day, three of which in congregation, unlike in *O'Lone* where the policy completely barred prisoners to attend that specific religious exercise. Furthermore, this case is analogous to *O'Lone* because, if TCC were to accommodate Kelly's request, it would incur a drain of prison's financial resources as evidenced by the prison's documented cost containment stratagems. Like in *O'Lone*, prisoners' proposed accommodations would threaten the prison's security concerns under the "affinity groups" theory. Accordingly, TCC's policy prohibiting congregational nightly services is constitutional.

Second, TCC's dietary policy also withstands the *Turner* test. The backsliding clause of the policy incentivizes good behavior and helps the cost containment. *See e.g*., *Beard*, 548 U.S. at 532 (the need to motivate better behavior on the part of particularly difficult prisoners sufficiently satisfies *Turner's* requirements). If TCC applies the policy to a prisoner because the prisoner did

not adhere to the diet, the prisoner has alternatives means of exercising his rights. *Turner*, 482 U.S. at 90 (the regulation did not deprive prisoners of all means of expression). Even if TCC's policies failed to provide any alternative, it would not be conclusive to determining the reasonableness of the policy. *Overton v. Bazzetta*, 539 U.S. 126, 135 (2003); *Beard*, 548 U.S. at 532 (prisoners who were placed at level 2 security had no other means to exercise their rights until after 90 days when they "may [have been] able to graduate to level 1 and thus regain his access to most of the lost rights."). Here, Kelly was placed in solitary confinement for 30 days. Notwithstanding, the record does not support that he did not have any alternative mean to exercise his religious belief. Kelly could have prayed in his cell while in solitary confinement. Therefore, unlike in *Beard*, here TCC did not preclude all the alternative means of Kelly's religious exercise.

Moreover, the "impact" factor also weighs in favor of reasonableness. Like in *Beard*, because the policy helps to produce better behavior, then its absence (in the authorities' view) will help to produce worse behavior, e.g., backsliding and, thus, the expenditure of more resources than what it is really needed. *Beard*, 548 U.S. at 532. Finally, the fourth factor is also satisfied under *Beard* because there is nothing in the record suggesting an alternative method of accommodating the prisoner's rights at the "*minimis* cost to valid penological interests." *Id*. (quotation omitted). In any event, the dietary policy is reasonably related to the penological disciplinary interest of a maximum-security prison. See e.g., *Overton*, 539 U.S., at 134 (withholding a right with an important constitutional dimension "is a proper and even necessary management technique to induce compliance with the rules of inmate behavior, especially for high-security prisoners who have few other privileges to lose."). Therefore, TCC's dietary policy is constitutional.

II. TCC's policy prohibiting nightly services does not violate RLUIPA.

A. TCC's policy prohibiting nightly services does not substantially burden Kelly's religious exercise.

TCC's policy does not burden Kelly's religious exercise. The district court erred in defining the religious exercise at issue in this case with no reference to the record. Under *Holt v. Hobbs*, the prisoner's religious exercise is defined by the facts of the case as it drives the entire strict scrutiny analysis. In addition, the record shows that Kelly has failed to carry his burden of producing prima facie evidence in support of his religious exercise, and that TCC's policy prohibiting nightly services burdens his religious exercise in a way that would violate RLUIPA.

1. Kelly failed to satisfy his burden of showing that TCC's policy prohibiting congregational nightly services substantially burdened his religious exercise.

RLUIPA defines religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (2014). The religious exercise inquiry should not question the reasonableness of one's belief. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 715 (1981). Rather, the judiciary's narrow function is to determine whether the plaintiffs' asserted religious belief reflects an honest conviction. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

Under RLUIPA, however, prisoners are required to make a threshold showing that the prison substantially burdened their religious exercise. *Van Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009). To do so, prisoners bear the burden of showing that that the relevant exercise of religion is grounded in a sincerely held religious belief. *Holt v. Hobbs*, 135 S. Ct. 853, 861 (2015); *see Van Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009) (prisoners must provide sufficient evidence to "establish the truth or sincerity of this belief."); *Brooks v. Roy*, 881 F. Supp. 2d 1034, 1039 (D.

Minn. 2012) (finding that the plaintiff failed to delineate any sincerely held religious belief when he did "not explain[] what his sincerely held religious beliefs are").

Accordingly, federal courts should distinguish between factual allegations that the prisoner's beliefs are sincere and of a religious nature, which a court must accept as true, and the legal conclusion that his religious exercise is substantially burdened, an inquiry the court must undertake. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting).[1] In other words, prisoners' religious exercise must be established with reference to the record. *See Holt*, 135 S. Ct. at 863; *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 228, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995) ("strict scrutiny does take relevant differences into account—indeed, that is its fundamental purpose").

In *Holt*, the prisoner's religious exercise was defined as growing a 1/2–inch beard not just growing a beard. 135 S. Ct. at 863. Indeed, the specific definition of the religious exercise is critical for the entire strict scrutiny analysis. *E.g.*, *id.* at 863-64 (the length of prisoner's beard had a material impact on the RLUIPA analysis, especially to determine whether the prisoner could have hidden contraband in his "short beard").

Here, the district court erred in defining Kelly's religious exercise. Although Kelly sought an additional congregational prayer session after the evening meal, the district court defined his religious exercise as "[a] physical act of congregating for prayer." TCC guarantees NOI members five prayer-times per day. Therefore, prayer per se is not the religious exercise burdened by the denial of Kelly's request. Likewise,"congregational prayer is not the religious exercise allegedly burdened. At TCC, the Nation is a recognized religion that receives prayers services and its members are guaranteed three prayers a day outside of their cells, and twice a day inside the cells.

[1] Under RFRA, "the term 'exercise of religion' means religious exercise, as defined in [RLUIPA]." 42 U.S.C. § 2000bb-2(4); see Holt v. Hobbs, 135 S. Ct. 853 (2015).

Kelly asserts that he is entitled to an additional evening congregational prayer, outside of his cell, and away from the presence of non-NOI inmates or any type of bathroom apparatuses. However, Kelly has failed to show that this particular religious exercise is grounded on a sincerely held belief. The record presents only conclusory statements about Kelly's alleged religious belief, as evidenced by the district court's reliance not on the record but purely on case law. Since he failed to present evidence in support of his claim that TCC's policy substantially burdened his religious exercise—an element on which he bears the burden of proof at trial—Kelly's claim cannot survive to TCC's motion for summary judgment. *See Jones v. Shabazz*, 352 F. App'x 910, 914 (5th Cir. 2009) (noting that the plaintiff failed to demonstrate a substantial burden because he only produced "a self-serving affidavit claiming he regards viewing the videotapes as a mandatory part of his NOI faith.").

2. TCC's policy prohibiting congregational nightly services does not substantially burden Kelly's religious exercise

RLUIPA does not define the meaning of substantial burden. 42 U.S.C. § 2000cc-5 (2014). However, the legislative history makes clear the Congressional intent to interpret the term by reference to the Supreme Court's jurisprudence. 146 Cong. Rec. S7774-75 (July 27, 2000) (Joint Statement of Sen. Hatch and Sen. Kennedy); *see Washington v. Klem*, 497 F.3d 272, 278 (3d Cir. 2007) ("Legislative history on this point has been cited by the Supreme Court approvingly in *Cutter*"). A prison's policy substantially burdens a prisoner's religious exercise if it requires the prisoner to choose either to engage in conduct that seriously violates his religious beliefs or to face serious disciplinary action. *Holt v. Hobbs*, 135 S. Ct. 853, 861 (2015). In any event, Congress no doubt meant the modifier "substantial" to carry weight. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2798 (2014) (Ginsburg, J., dissenting).

The Eleventh Circuit synthesized the Supreme Court's definition of "substantial burden" as follow:

> 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. Thus, a substantial burden can result from pressure that tends to force adherents to forego religious precepts or from pressure that mandates religious conduct.

Midrash Sephardi, Inc. v. Town of Surfside, 366 F.3d 1214, 1227 (11th Cir. 2004).

Accordingly, it does not place a substantial burden on a prisoner's religious exercise when a prison policy's incidental effects makes certain religious exercises more difficult to practice without having the tendency to coerce the individual into acting contrary to their religious beliefs. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 108 (1988).

In *Lyng*, the members of three Native American religions claimed that the noise and pollution of the highway diminished the sacredness of the praying area, and interfered with the religious experience of the members using the area. *Id.* at 448. The Court however found no substantial burden from the governmental action because the highway's noise and pollution making it more difficult to pray were only incidental effects. The Court reasoned that the government could not operate if it were required to satisfy every citizen's religious needs and desires. *Id.* at 450-52.

In *Ben-Levi v. Brown*, the Court denied *certiorari* review of the district court's summary judgment granted because the prison did not substantially burden the prisoner's religious exercise. No. 14-10186, 2016 WL 763875, at *3 (U.S. Feb. 29, 2016) (Alito, J., dissenting). In *Ben-Levi*, the district court reasoned that the prisoner's religious exercise was not substantially burdened because the prison was merely enforcing a policy requiring either a quorum of ten adult Jews or a volunteer Rabbi leading the study group. *Id.* Justice Alito strongly dissented reasoning that "many prisoners…consider it important to congregate with other practitioners of their faith for prayer and

discussion. Preventing them from doing so burdens their religious exercise, even if they are allowed to study and pray alone in a cell." *Id.* at *9.

Here, the burden on Kelly's religious exercise, if any, is only incidental. Unlike in *Holt* where the prison's grooming policy required the prisoner to violate his religious beliefs or to face disciplinary action, here TCC's policy prohibiting a nightly service does not force Kelly to make any coercive choice. This case moreover is analogous to *Lyng* because Kelly claims that the denial of his request diminishes the sacredness of the praying area and interferes with his religious experience while using the area. He argues that praying in his cell with a non-NOI member and in proximity to a toilet contaminates the praying area and is highly distractive. This burden however is only incidental because, although it may make praying more difficult, it does not coerce Kelly to seriously violate his beliefs by impeding him to pray. Accordingly, such burden is not substantial because it does not impose any coercive choice on Kelly.

This case is also similar to *Ben-Levi v. Brown*. Like in *Ben-Levi*, the denial of the prisoner's request was simply the enforcement of the prison's policy requiring prisoners to be in their cells for the last headcount. This case however differs from *Ben-Levi* because TCC does not completely prevent NOI members to pray in congregation. To the contrary, TCC guarantees NOI members three congregational prayer-times a day. Therefore, Justice Alito's concerns in *Ben-Levi* are not present here because TCC does not prevent NOI members from congregating. Accordingly, TCC's policy and denial of Kelly's request has incidental effects on his religious exercise and are therefore, not a substantial burden.

B. TCC's policy prohibiting nightly prayer services and denial of Kelly's request are the least restrictive means to further TCC's interests of security, discipline, and financial concerns.

RLUIPA prevents the government from taking any action that substantially burdens the religious exercise of an institutionalized person unless the government demonstrates that the action constituted the least restrictive means of furthering a compelling government interest. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). In examining TCC's compelling interests, this Court should engage in a focused inquiry on "the asserted harm of granting specific exemptions to particular religious claimants" and "look to the marginal interest in enforcing" the challenged government action in that particular context. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014).

Context matters in the analysis of the governmental interest; when enacting RLUIPA, lawmakers were mindful of the urgency of discipline, order, safety, and security in penal institutions. *Cutter v. Wilkinson*, 544 U.S. 709, 722-23 (2005). Congress anticipated that courts entertaining RLUIPA challenges would give "'due deference to the experience and expertise of prison and jail administrators.'" *Id.* at 716-17 (quoting 146 Cong. Rec. 16698, 16699 (2000) (join statement of Sens. Hatch and Kennedy on RLUIPA). However, such deference cannot amount to unquestioning acceptance because the RLUIPA standard requires the government to prove that denying the exemption sought by the claimant is the least restrictive means of furthering a compelling governmental interest. *Holt*, 135 S. Ct at 864.

In other words, federal courts would not grant deference to policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations. *Knight v. Thompson*, 723 F.3d 1275, 1283 (11th Cir. 2013) ("Knight I") *cert. granted, judgment vacated*, 135 S. Ct. 1173 (2015) and *opinion reinstated in part, superseded in part*, 797 F.3d 934 (11th Cir. 2015) ("Knight II"). Nonetheless, within this framework of deference, prison officials are experts in running prisons and

evaluating the likely effects of alerting prison rules, and courts should respect that expertise. *Holt*, 135 S. Ct at 864.

In *Holt*, the Court focused on whether foregoing the enforcement of the prison's grooming policy to protect the prisoner's asserted religious belief, growing a 1/2–inch beard, would comprise the prison's interest in staunching the flow of contraband into and within its facilities. 135 S. Ct. at 863. The Court in *Holt* concluded that accepting the government's position that prohibiting the beard was a way to root out contraband would amount to unquestioning deference when the trier of fact already observed that the government's position was "almost preposterous." *Id.* at 863, 864 ("It is hard to swallow the argument that denying petitioner a ½-inch beard actually furthers the Department's interest in rooting out contraband.").

Additionally, in *Knight I*, the Eleventh Circuit held that the prison offered more than speculation, exaggerated fears, or post-hoc rationalizations when it provided evidence of a reasoned and fairly detailed explanation of how the prison's short-hair policy addressed genuine security, discipline, hygiene, and safety concerns grounded on testimonies of prior incidents of health and hygiene hazards. 725 F.3d at 1279, 1284. On remand from the Supreme Court, the Eleventh Circuit in *Knight II* was called to consider the impact of *Holt* on its prior decision. 797 F.3d 934. The *Knight II* court reinstated the compelling governmental interest analysis in its entirety reasoning that *Knight I* satisfied *Holt*'s focused inquiry and lacked the unquestioning deference concerns because the prison provided concrete evidence rather than conjectural or hypothetical concerns. *Id.* at 936.

Here, TCC's prohibition of nightly prayer services has been implemented in response to previous incidents Accordingly, TCC's interest is not supported by mere conjectural or hypothetical concerns. *Cf. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 432

(2006) (the Government's mere invocation of the general characteristics cannot carry the day under the strict scrutiny standard). Furthermore, TCC's denial of Kelly's requests is the least restrictive means to further TCC's compelling interests of security, discipline, and financial concerns.

First, unlike in *Holt* where the prison's concerns were preposterous, TCC's security interest is based on real and concrete concerns of gang-related activities. In 1998, TCC discovered that during prayer services, the service volunteer was relaying gang orders from prisoners to the gang-affiliated individuals outside of the prison. Like the prison in *Knight*, TCC is offering reasoned and detailed evidence of prior incidents in support of its concerns. Indeed, unlike in *Holt*, here TCC's security interest is supported by the factual findings of the district court regarding the 1998 incident and therefore it does not require unquestioning acceptance from this Court.

Second, the record also supports TCC's discipline interest. Prior to implementing the blanket ban on all nightly services, members of two religious groups violated the security policy regarding the last in-cell daily evening headcount by staying in their prayer rooms longer than authorized. TCC's interest in making sure that the prisoners follow the prison's rules is compelling due to this previous occurrence of disobedience. The aggregate effect of these two incidents motived the prison to change the policy and to effectively ban the nightly prayer services. Unlike in *Holt* where prison provided only conclusory and speculative testimony to justify the grooming policy, here TCC's concerns are not exaggerated because it has provided concrete evidence of its concerns and therefore it is entitled of deference.

Lastly, TCC's financial concerns support the denial of granting an exception to Kelly. Like in *Knight*, TCC's interest is not just a post-hoc rationalization. The record shows that TCC has provided an addendum to with the prison's documented cost containment stratagems. Like the

prison in *Knight*, TCC's policy is a calculated decision on risk and cost allocation and is not merely speculative as in *Holt*.

III. Kelly does not have standing to challenge TCC's dietary policy, which does not violate RLUIPA

Kelly does not have standing to challenge TCC's dietary policy because he did not exhaust all of his administrative remedies. Kelly's claims are subject to PLRA, which requires that prisoners shall bring no action regarding prison conditions until he has exhausted available administrative remedies. In any event, TCC's dietary policy does not violate RLUIPA because it does not burden Kelly's religious exercise. Kelly did not adequately prove how his diet is a religious exercise but, even if accepted, TCC removing him from that diet did not substantially burden it.

A. Kelly does not have standing to challenge TCC's dietary policy because he did not exhaust TCC's administrative remedies.

This Court should dismiss Kelly's claim challenging TCC's dietary policy because he did not exhaust all administrative remedies of the prison. RLUIPA does nothing to amend or repeal the Prison Litigation Reform Act ("PLRA"). 42 U.S.C. § 2000cc–2(e). As such, RLUIPA claims are subject to the PLRA, which requires that

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

42 U.S.C. § 1997e(a). In interpreting the PLRA, courts have determined that prisoners must exhaust all administrative remedies before they can bring a claim in federal court. This is the case regardless of the relief offered through administrative procedures. *Booth v. Churner*, 532 U.S. 731, 741 (2001). In *Booth*, an inmate sought monetary damages for a claim alleging excessive force. *Id*. at 731. The prison's administrative procedures did not allow for monetary damages so

the inmate brought an action in federal court. *Id*. The court held that even if the administrative procedure could not provide the remedy sought, the inmate must still exhaust all administrative procedures. *Id*. Additionally, courts have also held that failure to exhaust all administrative remedies requires a mandatory dismissal. *Johnson v. Jones*, 340 F.3d 624, 627 (8th Cir.2003).

In the present case, Kelly has not only failed to exhaust all the procedural remedies as it relates to the vegetarian diet before filing this suit, he pursued no remedies. Similar to the prisoner in *Booth*, after Kelly was removed from the vegetarian diet, his first legal or administrative action was to bring this suit. The record further shows that Kelly is familiar with the administrative process, as reflected in his administrative appeals regarding his prayer. Since he failed to exhaust any administrative procedures regarding the vegetarian diet, the appropriate action would be a mandatory dismissal of his claim. The Court should reason here, like in *Booth*, that regardless of whether Kelly believes that the prison would have provided the remedy he sought, he still needed to exhaust all administrative remedies.

B. Kelly also failed to adequately prove his diet is a religious exercise, but even if accepted, his removal from it was still not a substantial burden.

Kelly must provide evidence that his religious exercise is grounded in a sincerely held belief to be able to demonstrate that TCC substantially burdened his religious exercise. *Piscitello v. Berge*, No. 02-C-0252-C, 2003 WL 23095741, at *5 (W.D. Wis. Apr. 17, 2003). Indeed, removing a prisoner from his religious diet would impose a substantial burden only if the diet qualifies as a religiously motivated conduct and, while TCC may not question whether Kelly's religious expression is central to his religion, TCC may, and should, question the sincerity of the professed religiosity. *Cutter v. Wilkinson*, 544 US 709, 733, n. 13 (2005). In determining Kelly's sincerity, TCC may look at his actions, such as acquiring other food that is not part of that diet. *Daly v. Davis*, 2009 WL 773880 (7th Cir. 2009).

1. Kelly failed to prove that his diet request is grounded in a sincerely held religious belief.

Kelly failed to provide evidence that the behavior burdened by the prison's policy is an expression of the prisoner's religious beliefs. *Piscitello v. Berge*, No. 02-C-0252-C, 2003 WL 23095741, at *5 (W.D. Wis. Apr. 17, 2003). In *Piscitello*, the prisoner claimed that the prison posed a substantial burden on his religious exercise by prohibiting him to participate in a bible study course *Id*. at 1. The prisoner stated "in one sentence" that the policy violated RUILPA but, he did not provide any evidence to show how the inability to take a bible study course substantially burdened the exercise of his religious beliefs. *Id*. at 5. Since the prisoner failed to provide any evidence supporting his claim under RLUIPA, the court held in favor of the prison *Id*. at 5.

Similar to the prisoner in *Piscitello*, Kelly only stated that not participating in a vegetarian diet compels him to violate his religious practices. As the court stated in *Piscitello*, merely stating it is so does not make it so. Kelly has not provided evidence to prove how participating in a vegetarian diet is a religious exercise grounded on his sincerely held belief. Most importantly, he has provided no evidence that a vegetarian diet is related to the practice of his particular faith. Even if there might be a general understanding that many members of the Islamic faith participate in vegetarian diets, this Court should not accept a statement asserting so without proof. *See Jones v. Shabazz*, 352 F. App'x 910, 916 (5th Cir. 2009) (where the court granted summary judgment on behalf of the defendant because the prisoner "provided absolutely no evidence that the alternative foods offered to NOI inmates are prohibited by his faith").

2. Kelly failed to show that TCC's policy substantially burdened his religious exercise because his removal was based on his own actions.

A prison revoking a prisoner's religious diet imposes a substantial burden only if it prevents religiously motivated conduct and, while the prison may not question whether the prisoner's religious expression is central to the prisoner's religion, the prison may, and should, question the sincerity of the professed religiosity. *Cutter v. Wilkinson*, 544 US 709, 733, n. 13 (2005). In short, if the religiosity asserted as the basis for the accommodation is not sincere, then removing the accommodation does not impose a substantial burden on the prisoner's religious exercise. Further, in determining a prisoner's sincerity, the prison may look at the prisoner's actions, such as acquiring other food that is not part of that diet. *Daly v. Davis*, 2009 WL 773880 (7th Cir. 2009). In *Daly*, a prisoner was removed from his kosher diet after not observing the diet. *Id*. He was seen eating, purchasing, and trading non-kosher food for his kosher food. *Id*. The court in *Daly* held that there was no substantial burden because it was the prisoner's own actions, not the prison's, which caused him to be removed from the diet. *Id*.

Similar to *Daly* where the court found that it was not a substantial burden for the prison to remove the prisoner from his diet because of his own actions of acquiring non-kosher food, Kelly's actions of threatening his cellmate for non-kosher food should also be an appropriate reason to remove Kelly from his religious diet. Kelly's actions are worse than the prisoner's in *Daly's* because being in possession of the meatloaf is not only evidence that Kelly was backsliding from this vegetarian diet, it also indicates that Kelly's cellmate was telling the truth about being threatened by Kelly for his food. In *Daly*, the prisoner traded for his food, but Kelly threatened someone which is a direct threat to security at TCC.

Therefore, the Court here should hold that there was no substantial burden to Kelly's religious exercise of eating a vegetarian diet because, like the prisoner in *Daly*, his actions were

the cause of his removal. Additionally, his actions offer additional proof that his request for a vegetarian diet is not based on a sincerely held belief.

Kelly may argue that finding the meatloaf in his cell is not evidence he broke his diet because there is no evidence that he ate the food. However, although the prison in *Daly* had evidence that its prisoner did eat the non-kosher food, the court made no statements that it was required to have it. The point is whether Kelly's actions are an indication of religious insincerity and there is much evidence to conclude this.

First, Kelly has not provided any evidence that the vegetarian diet is important to his religious practice. Kelly also threatened his cellmate to obtain meatloaf which is inconsistent with his vegetarian diet and that meatloaf was found under his bed. TCC's investigation determined that Kelly had voluntarily broken his religious diet. All of these things taken in the context that the prisoner was a late convert to the NOI, and was on a watch list for persons suspected of using religion as a cover to advance illicit activities, makes it appropriate for TCC to determine that the prisoner's request for a vegetarian diet was not motivated by a sincerely held religious belief. Once that determination is made, TCC's policy to remove this benefit from Kelly poses no substantial burden on his religious expression because there is not a sincere religious expression.

C. TCC's dietary policy and removal of Kelly from his vegetarian diet is the least restrictive means to further its compelling interests in security and discipline

A prison's policy removing a prisoner from a religious diet must be the least restrictive means of furthering a compelling government interest. *Lovelace v. Lee*, 472 F.3d 174, 189 (4th Cir. 2006). In *Lovelace*, a prisoner who was a member of the NOI was participating in a daytime fast as a part of his observation of Ramadan. *Id*. at 182. It was reported that the prisoner was observed taking a lunch tray during the daytime and as a result he was refused his nighttime meal. The prisoner was removed from participating in the Ramadan program which also included

participation in any group prayer sessions. *Id*. The court in *Lovelace* held that the prison did not adequately demonstrated that its policy was the least restrictive means of furthering a compelling governmental interest. *Id*. at 190.

This case is different than *Lovelace* because in *Lovelace* removing the prisoner from the program because of evidence of his backsliding had further reaching implications than just his meals. In addition to being refused the nighttime and early morning meals, the prisoner was not allowed to participate in the group prayer sessions held before or after the morning meals. The regularly scheduled group prayers sessions were cancelled so, by removing the prisoner from the Ramadan program, he was also removed from his ability to participate in group prayer. In essence, the prisoner was restricted from participating in group prayers because he broke his fast. The court observed that "the policy works to restrict the religious exercise of any NOI inmate who cannot or does not fast, but who still wishes to participate in group services or prayers." In *Lovelace*, the prison policy meant that if you did not fast during Ramadan, you could not participate in other, unrelated NOI religious exercise. This was an important factor in the court determining that the prison's policy violated RLUIPA. From *Lovelace* we can conclude that, if you are prevented from participating in group prayer because you abandon your diet, that action would violate RLUIPA.

However, in this case, Kelly was removed from participating in group prayer sessions, but not because he abandoned his religious diet. In addition to abandoning his diet, Kelly also threatened his cellmate. The threats of physical violence were the cause of his removal from the prayer services, consistent with TCC's policy on religious services. TCC's actions may not have been the least restrictive means had Kelly been removed him from prayer services for abandoning his diet but, Kelly's punishment for abandoning his diet was only removal from the religious diet

program. A prison must maintain order related to all its prisoners' activities, including religious diet programs, and one way to do that is to remove prisoners who have violated the rules of the program. Indeed, in some circumstances, courts have determined that refusing all religious diet requests was the least restrictive means to enforce the prison's compelling interest. *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007). In this case, only one prisoner was removed from the religious diet program and, for only one month, and this only after he abandoned the diet himself. Like the court in *Lovelace*, this Court should also hold that this evidence indicates that TCC's policy and its actions were the least restrictive means to enforce their compelling interest of order and security in a maximum security prison.

As a matter of public policy, RLUIPA is not meant to "elevate accommodation of religious observances over an institutional need to maintain good order, safety, and discipline or to control costs." See *Lovelace,* 472 F.3d at 190. This is especially important because context matters in applying the compelling governmental interest standard. *Cutter*, 544 U.S. at 723. Further, note from above that due deference should be given to institutional officials' expertise in maintaining good order and safety in a prison. *Cutter*, 125 S. Ct. at 2124 n.13. Security deserves particular sensitivity. *Cutter*, 544 U.S. at 722. Therefore, the Court should determine that TCC has expertise in understanding how jealousy and envy among prisoners can lead to security problems in a prison. Religious based diets are a benefit to the prisoners that receive them which is not available to other inmates. These diets are often more expensive, of better quality and contain food that is not available to other inmates. TCC allowing one set of prisoners on one meal option and another set of prisoners on another, better quality, meal option can also create illicit markets for trade surrounding those meals. For all of these reasons, it is incumbent on TCC to closely monitor religious meal programs to ensure that the participants are actually motivated by

religious concerns. To this end, TCC sets rules regarding participation in the religious diet program. Since Kelly broke the rules of the religious diet program, removing him from the program for one month was the least restrictive way to enforce TCC's compelling interest of maintaining safety and order in its prison.

CONCLUSION

Based on the foregoing, this Court should affirm the ruling of the United States Court of Appeals for the Twelfth Circuit.

Respectfully submitted,

Team 22

Counsel for the Respondents

Dated: March 7, 2016