No. 985-2015

In the

Supreme Court of the United States

SIHEEM KELLY,

Petitioner,

- against –

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 RESPONDENT

TEAM 3

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QUESTIONS PRESENTED

1. Whether Tourovia Correctional Center's prison policy prohibiting night services to members of the Islamic faith violates RLUIPA?

2. 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

The judgment of the United States District Cornt for the Eastern District ofTomovia was entered on March 7, 2015 by District Cornt Judge Montelle (985 F. Supp.2d 123). Circuit judges, Grady, Vaughn and Montisanti ofthe United States Comt of Appeals for the Twelfth Circuit reversed the District Court on June 1, 2015. The petition for writ of cettiorari was granted to Petitioner on July 1, 2015. This Cornt has appellate jurisdiction in this matter pursuant to 28 U.S.C. 1254 (1). Standard of review is de novo.

STATEMENT OF THE CASE

Statement of the Facts

In the year 2000, Petitioner Kelly (Petitioner) was convicted of several drug trafficking charges and one count of aggravated robbery. Petitioner was sentenced to Tourovia Conectional Center Maximum Secmity Ptison (TCC). Record. R. at 3. Two years after being institutionalized, Petitioner converted to the National oflslam (NOI). Petitioner filed a required Declaration of Religious Preference form to officially change his affiliation with the religious group. Petitioner also requested that his name be changed to Mohammed and that prison officials address him by his new name. These steps are required in order to participate in any special religious services or religious diets.

The NOI is a minority group in the prison population and makes up less than 1% of the general population. R. at 3. The population of this group has never exceeded more than ten inmates and cutTently the group is comprised of only seven inmates. The members of the group choose to follow strict halal diets and attend prayer services. For the past five years there have generally been no behavioral issues.

NOI requires that their members pray five times per day as outlines in the Salat or prayer guide. The prayer times are termed "obligatory and traditional prayers," scheduled for dawn, early afternoon, late afternoon, sunset, and late evening. R. at 4. Adherents believe they should wash themselves and their clothes (as best they can) and have a clean place to kneel and face Mecca. Prayer is not to be interrupted once started. Members prefer to pray in the company of other members, but this is not required.

Petitioner first complained about prison policies in 2013 (twelve years after arriving at the facility and fifteen years after the policies were implemented). However, in 1998, prior to his anival, the prison changed its policies from a more open religious service to a more restrictive one by banning the option to petition for prayer services at night with a prison volunteer. R. at 4. The change in policy was due to safety concerns regarding volunteers relaying gang orders to and from Christian prisoners to those gang-affiliated individuals outside of the prison. Additionally, both Christian and Muslim prisoners, who participated in night prayer services, attempted to disregard TCC policy which required inmates to be in their cells in time for the evening head count. Tourovia Directive #98. Since the change in policy, no official chaplain and no evening services are available. Prison policy also clearly states that TCC will punish any inmate who is not in their cell before head count and or if there is any misconduct regarding daily meals or their religious diet. R. at 4.

In 2013 (twelve years after being at the prison and being under the 1998 rules), Petitioner, acting also on behalf of the other NOI inmates, filed a written prayer service request for an additional congregational prayer service after the last meal at 7:00PM in the evening. This request was denied by prison officials, indicating that the three services provided were adequate and additional prayers in the cell were permitted. R. at 5. Petitioner cunently attends the three

services offered and contends that he is entitled to additional worship accommodations -five services instead of three, outside his cell, with other members ofNOI. Petitioner offered verbally to compromise one of the other services during the day for a later service away from non-NOI inmates. He also requested that the services be headed by a NOI chaplain. The Petitioner received no response to this verbal request. R. at 5.

Petitioner filed two grievances from the written denial stating that he was unable to pray in his cell any longer because it was distracting and disrespectful. Petitioner did not claim in these grievances that lack of communal prayer at the time requested somehow prevented him from exercising his religion. Petitioner stated that his cellmate ridiculed him and engaged in lewd behavior while he attempted to pray in the cell. R. at 5. He also added that his fellow NOI members were experiencing the same ridicule and distraction when they also prayed in their cells. This grievance was denied because Petitioner lacked evidence to show that his cellmate was actually engaging in the behavior described.

Petitioner next filed a second grievance. This time he stated that praying by a toilet in his cell was a "disgrace to Allah's preference" that he pray in a clean and solemn environment with other members of the faith. R. at 5. This grievance was again denied. When Petitioner filed a formal grievance stating the claims of both of the previous grievances, this time including verses from the Qur'an explaining why nightly congregational prayer was obligatory but no mention of the effects of praying near a toilet, prison officials responded in writing that the requests for additional prayer violated the TCC policy and that allegations regarding his cunent cellmate could not be verified but also suggested that Petitioner request a new cellmate so that his personal prayer time would not be disturbed R. at 6.

Two weeks after this grievance was denied, TCC granted Petitioner a new cellmate. This cellmate reported to prison officials that Petitioner was "threatening him with violence" if he did not give Petitioner his meat from the non-religious diet. R. at 6. Prison officials searched the cell and found the cellmate's meatloaf wrapped in a napkin under Petitioner's mattress. Finding this violation ofTourovia Directive#99 to evidence an insincerity in his religious beliefs, TCC removed Petitioner from the special religious diet and barred him from religious worship services for one month.

Petitioner responded by refusing to eat anything and resorting to a hunger strike. R. at 6. After two days of the strike, prison officials took steps to tube-feed Petitioner due to concerns for his health and safety. Petitioner then chose to end his strike and continued to eat the food provided to the general population.

Petitioner filed a complaint in Federal District Court ofTourovia for the Twelfth Circuit challenging the validity of the prison policies and claiming that these policies violated his First Amendment rights as reflected in the Religious Land Use and Institutionalized Persons Act (RLUIPA)

PROCEDURAL IDSTORY

Siheem Kelly("Petitioner") filed a complaint in the United States District Comt for the Eastern District ofTourovia against the Warden ofTourovia Correctional Center, Mr. Kane Echols and the Director of the Tourovia Correctional Center's Chaplaincy Depattment, Mr. Saul Abreu (collectively, "TCC"). Petitioner sought declaratory and injunctive relief for alleged violations of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), when TCC denied his request for a nightly congregational service after the evening meal and deprived him

of his religious diet, which he claims forced him to disobey the dietary laws of the Nation of Islam (NOI).

Respondent moved for summary judgment as a matter of law contending that Petitioner failed to prove that TCC substantially burdened his religious practice. The district court denied Respondent motion for summary judgment and instead granted summary judgment to Petitioner pursuant to Rule 56(f) of the Federal Rules of Civil Procedure finding that there was no dispute of material facts that TCC's policies did in fact violate RLUIPA. Respondent, TCC appealed the district court's decision to the United States Court of Appeals for the Twelfth District, which in turn, reversed the district court, vacated the summary judgment in favor of the plaintiffs, and found that neither TCC'S prayer nor diet restriction policies violated RLUIPA. Petitioner appealed to the United States Supreme Court.

OPINIONS BELOW

The opinion of the Twelfth Circuit is reported at 983 F.3d 1125 (12th Cir. 2015) (indicated in the record at R. 15-22). The opinion of the District Court for the Eastem District of Tourovia is repmted at 985 F. Supp. 2d 123 (E.D.T.O. 2015) (indicated in the record at R. 2-15).

SUMMARY OF THE ARGUMENT

I. The Twelfth Circuit's decision to uphold Tourovia Conectional Center's Prison Policy prohibiting night services should be affirmed because Petitioner has failed to meet his burden of showing that there is a substantial burden to his exercise of religion. In order to prove a substantial burden, Petitioner must show that he has a sincerely held belief that has been violated by the actions or policies of the prison. In order to do this, he must show that his belief is something that he actually adheres to in his daily practice of his religion. Petitioner has failed to

prove his adherence as he has never had the opportunity for additional religious services since being an inmate at the prison and he had not raised the issue until recently.

The prison has a compelling government interest in providing for the safety and security in the least restrictive means in implementing their policies. It is imperative to maintaining order of this population to implement rules that keep the order and promote safety. Tomovia Directive #98 has done this and in the least restrictive means, therefore there has been no violation of RLUIPA.

II. The court should affirm the decision of the Court of Appeals for the Twelfth Circuit that the district comt erred in finding RLUIPA had been violated because removal of a prisoner from a religious diet program was not a substantial burden on the prisoners exercise of religion and even if there was a substantial bmden, the prison had a compelling government interest and it was implemented in the least restrictive manner possible.

A RLUIPA claim in this case is an example of the over-reach of government. RLUIPA's main purpose is to mitigate any possible discrimination based on religious exercise for those that are confined to a government facility. Persons confined to such facilities do not have the same freedoms as those outside of confinement and must rely upon the permission of the government actors to freely exercise their religious faith. This, however, does not come without boundaries. Petitioner has a burden to prove a substantial bmden has been placed upon his exercise of religion, which he has been unable to do and even if he could prove a substantial burden, it must be balanced with the compelling government interest of safety and health of all prisoners. Thus Petitioners claim that his rights have been violated under RLUIPA are unfounded.

ARGUMENT

I. THE TWELFTH CIRCUIT PROPERLY VACATED SUMMARY JUDGMENT, BECAUSE PETITIONER FAILED TO RAISE A GENUINE DISPUTE OF MATERIAL FACTS AS TO WHETHER RESTRICTIONS ON INMATE'S NIGHT SERVICES VIOLATES THE RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA).

Under RLUIPA:

> No Government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a mle of general applicability, unless the govermnent demonsh·ates that imposition ofthe burden on that person--(1) is in furtherance of a compelling governmental interest; and (2) is the least resh·ictive means offmthering that compelling governmental interest. 42 U.S.C. § 2000cc-1(a).

Tourovia CmTectional Center instituted Directive #98 to establish a policy for the practice of faith groups and insure that inmates have an opportunity to pruticipate in congregational services at the Designated Prayer Times. TCC's Directive #98 does not violate RLUIPA. First, although praying five times a day, including evening prayer qualifies under RLUIPA's broad definition of "religious exercise", the inmate has failed to meet his burden of showing that his religious exercise is grounded in sincerely held beliefs. Second, even if the comt does find his alleged beliefs to be sincere, TCC's policy has not substantially burdened him from practicing his faith. Third, Tourovia Directive#98 is the least resh·ictive means offmthering its compelling govemment interests of maintaining order and security in a cost-effective manner. Thus, the Twelfth Circuit decision must be affirmed.

A. Although The Petitioner's Requests Qualify As A Religious Exercise Under RLUIPA, He Has Failed To Prove That Those Requests Are Grounded In A Sincerely Held Belief Necessary In Establishing A Substantial Burden.

Under RLUIPA, the definition of religious exercise is very broad. It includes " any exercise of religion, whether or not compelled by, or central to, a system of religious belief 2000cc-5(7)(A). Since the religious belief is no longer required to be central or mandatory to a particular faith, the inmate's desire to pray five times a day headed only by a Nation of Islam chaplain, away from bathroom facilities and non-NOI inmates qualifies as a religious practice. Petitioner failed to establish consistent and legitimate arguments in order to prove that his requests are based upon a sincerely held belief.

1. Without A Sincerely Held Belief, There Can Be No Substantial Burden On Religious Exercise.

To be substantially burdened, a religious belief must be sincerely held. "[W]hile the 'truth' of a belief is not open to question, there remains the significant question of whether it is 'truly held.' "United States v. Seeger. 380 U.S. 163, 185 (1965). The challenging party bears the initial burden of proving that his religious exercise is grounded in a sincerely held religious belief, see Burwell v. Hobby Lobby Stores, Inc., 573 U.S._ (2014). Admittedly the issue of sincerity of belief has rarely been challenged and has been considered one of "light touch," or "judicial shyness." A.A. ex rei. Betenbaugh v. Needville. 611 F.3d at 262 (5th Cir. 2010). While inquiring whether or not the belief is central to the chosen religion is no longer permitted, "the adherent [must] have an honest belief that the practice is imp01tant to his free exercise of religion." Sossamon v. Lone Star State of Tex., 560 F.3d 316,332 (5th Cir. 2009), Thus, the sincerity in such a belief is most certainly vulnerable to scrutiny. As assetted in United States v. Ballard, The real issue is: (whether the adherent "honestly and in good faith believe [s] those things.") 322 U.S. 78 (1944).

When the courts have inquired as to sincerity, they looked to the "words and actions of the inmate." Sossamon v. Lone Star State of Tex., 560 F.3d 316,332 (5th Cir. 2009). Similar to the

court in Mouzzadeh v. Texas Dep't of Criminal Justice, Petitioner has argued that an inmate's sincerity of belief has been established by his actions of advocating for the other NOI members to get the extra nightly prayer service. 703 F.3d 781, 791 (5th Cir. 2012). This, Petitioner claims "might not" be done by an insincere inmate. Petitioner also points out that he is the only one to file a grievance, which somehow shows leadership in his faith. (R. at 10). These observations hardly show sincerity in faith. Advocacy is *not* an indication of belief and sincerity. The trial comt failed to consider that an insincere inmate actually might provide infmmation as to his other NOI members merely to boost his claim, making it seem more significant. Also, rather than showing his leadership in faith, Petitioner, being the only one to file a grievance from his group, tends to show that this issue wasn't that impmtant to NOI members in general. Arguably, these are the people from which Petitioner learned the tenets of the faith. Thomas v. Review Bd. of Indiana Employment Security Div. suggests RLUIPA claims are "not limited to beliefs which are shared by all of the members of a religious sect." 450 U.S. 707, 715-716 (1981). *See also* Holt v. Hobbs, 135 S. Ct. 853 (2015). Just because the appellant was the sole person to complain, this doesn't somehow blindly translate to a showing of sincerity, especially when these complaints began after 12long years of silence. In addition to looking to the words and actions of Petitioner the comts have found the sincerity inquiry to be one of "almost exclusively a credibility assessment." Kay v. Bemis, 500 F.3d 1214 at 1219 (lOth Cir. 2007). After all, unlike many other instances where a prisoner was found to have a sincere belief (most often this element was unchallenged or conceded), Petitioner waited over a decade before complaining to any prion official and the reasons proffered as to why the requested relief was sought changed and morphed throughout the complaint process. There was a defmite lack of consistency in the profession of his beliefs, which weigh heavily against his credibility.

Absent a specific standard for assessing the sincerity of one's religious beliefs, adhering to the analysis of the conscientious objector can be helpful to the court. Brady, *Religious Sincerity and Jmpe!fection: Can Lapsing Prisoners Recover Under Rfra and Rluipa?,* 78 U. Chi. L. Rev. 1431, 1452 (2011). The line of conscientious objector cases serves a pathway for courts to better determine if there is a sincerely held belief and can serve this court in reaching the same determinations. In conscientious objector cases, the courts relied on certain factors such as delay in asserting beliefs, and inconsistencies, to rule that a person was insincere in his professed beliefs. *See* United States v. Messinger. Sincerity of the belief was crucial to determining whether or not the religious exemption would be upheld and whether a substantial burden exists. 951 F.2d 1256 (5th Cir. 1991).

a. Petitioner's Inaction For More Than A Decade Shows A Lack Of Sincerity In His Belief Regarding The Importance Of Nightly Congregational Prayers.

Delay in asserting belief is an impmtant factor in detetmining sincerity. In United States v. Messinger, conscientious objector status, two years after registering with the Selective Service System, and only after various attempts to be exempted as a student, failed. 951 F.2d 1256 (5th Cir. 1991). The court held that delay in assetting beliefs was evidence of insincerity. Here, Petitioner first came to TCC, a maximum security prison, back in 2000 and two years later convetted to NOI. It's wmth noting that since Petitioner was first incarcerated at TCC, he was always only allowed three prayers outside the cell and two within. Directive #98 took effect in 1998, well before the anival ofthe appellant. Thus, since the beginning of his sentence, this policy has been in place. However, he *never* complained about having to pray near the toilet in his cell or the lack of additional services until twelve years later. R. at 4. In Messinger, the court found that a two-year delay in asserting beliefs was evidence of insincerity. 951 F.2d 1256 (5th

Cir. 1991). Surely, more than a decade of delay for a convicted felon should constitute evidence of a lack of sincerity.

Petitioner may argue that the cases are distinguishable since Messinger concerns an insincerity of belief as to the war, however Petitioner can't deny that the analysis utilized to detetmine the sincerity of a belief, as used in this line of cases, is relevant to the case at bar. Additionally, it is difficult to ignore the huge disparity between two years with regard to objections to the war and twelve silent years of alleged deprivation in a prison. Being confined to a prison would lead one to believe that an objection to a perceived hindrance to a proclaimed sincerely held religious belief would likely occur much earlier than after over a decade of incarceration.

b. Petitioner's Inconsistency Shows A Lack Of Sincerity OfBelief Regarding The Importance OfNightly Congregational Prayers.

Inconsistency is another factor to consider with regards to credibility and sincerity. The Witmer v.U.S. court based its conclusions of the lack of insincerity on a finding of inconsistency. 348 U.S. 375 (1955) (First, he applied for exemption based on his status as a farmer. Then, three months later, when that request was denied, he applied again clain1ing a ministerial exemption. The cowt found that "inconsistent statements in themselves cast considerable doubt on the sincerity of petitioner's claim). Id. at 383. Similarly, Petitioner's inconsistent reasoning for requesting the additional prayer services casts a huge doubt on *his* sincerity, although in a more severe nature, in that the inmate changed his reasoning for the accommodations more than once.

Petitioner's proffering of several inconsistent reasons for requesting additional prayer services shows insincerity. After twelve years in prison, under Directive #98, Petitioner made his first complaint in 2013 when he filed a written request for an additional congregational

nightly prayer service after the last meal at 7:00p.m. He specifically requested that he and his other NOI members be allowed in the service at 8:00p.m. (R. at 5). This first request made no mention that his religion forbade him to pray near a toilet. He was simply requesting one additional congregational nightly prayer service. After this request was denied with the indication that the additional prayers could be made in the cell, although this would've been an oppmtune time for the Petitioner to again mention his religious beliefs concerning prayer near toilets, no such conviction was presented. Next, a verbal request was made to prison officials, during which time Petitioner announced that, although he believed he was entitled to five separate prayer services, he would settle for one. No other reasons or information was provided.

Once the first grievance was filed, Petitioner had another chance to voice his concerns about praying near a toilet. However, he only stated that prayer in the cells was distracting and he first mentioned that doing so was disrespectful to his religion. When pressed for his reasoning, Petitioner only discussed ridicule and lewd actions from his cellmate. (R. at 5). Again, there is no mention of the proximity of a toilet interfering with his ability to pray. In fact, in support of his request, Petitioner mentioned the ridicule and distraction his fellow NOI members were experiencing, but no one mentioned any offense due to the toilet.

The first mention of offensiveness toward praying near a toilet didn't occur until the second grievance, which was actually the fourth request made to the prison officials. In addition, no evidence of support for such an allegation was even presented until the fifth request, which only included references to the Qur'an in reference to why congregational prayers were mandatory but nothing in regards to why praying near a toilet was not allowed by his faith. (R. at 5). This change in reasoning mirrors those in Messinger, where the religious objection to the war was only assetted after several attempts for exemptions due to student status had failed. 951 F.2d

1256 (5th Cir. 1991). The switch in reasoning for the exemption was viewed as evidence of insincerity. Similarly, Petitioner made several attempts at requests for accommodations but never mentioned that praying near a toilet was unacceptable even when told by staff that he could conduct nightly prayers in his cell. However, since each attempt failed, he kept revising the requests, which evidences his insincerity in his beliefs concerning nightly prayers and prayer in the presence of a toilet.

While a finding of sincerity doesn't require strict adherence to beliefs expressed by inmates, when other elements of suspicion are present, this can be an indication of insincerity. It has been held that "evidence of nonobservance is relevant on the question of sincerity, especially ... in the prison setting" See Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988). In contravention, Petitioner did attempt to pray in his cell near a toilet, as evidenced in his first grievance. (R. at 5). According to him, this practice of praying near a toilet is "a disgrace to Allah's preference." If the inmate truly believed it was a disgrace, the fact that he would ever attempt to do so in the first place wreaks of disingenuousness. Thus, in light of evidence of delay and inconsistencies in expressed belief, Petitioner has failed to meet his burden of proof in establishing that he has a sincerely held religious belief.

B. Touriva Directive #98 Does Not Substantially Burden Petitioner's Exercise Of His Religious Beliefs.

Even if the comt does find that there is a sincerely held belief, that alone does not establish the substantial bmden and the inmate still must prove other elements of substantial bmden on religious exercise. 42 U.S.C. § 2000cc-l(a).

TCC'S Directive #98 is not a substantial burden because the rule is merely incidental government action, preventing the inmate from enjoying a benefit that is not generally available. Petitioner requested additional prayer services, a leader of faith in accordance with his beliefs

and accommodations for prayer away from non-NOI inmates and bathroom facilities. There is no constitutional right of an inmate to choose a desired religious leader, so denying a chaplain during nightly sessions is permissible and the inmate's requests are excessive in nature, imposing an unnecessary burden on others and jeopardizing the functionality of the prison making it acceptable for the prison to reject.

1. Incidental Effects Of Government, That Prevent Enjoying A Benefit Or Conduct Not Generally Availability Is Not A Substantial Burden.

As the Appellate comt conectly pointed out, the case of Lyng v. Nmthwest Indian Cemetery Protective Association is a petfect example of interpretation of legislative intent in defining substantial bmden. 485 U.S. 439 (1988). Although the 1.yng Comt was examining the Free Exercise Clause rather than RLUIPA, the Congressional record urges comts to rely on these interpretations. The 1Yng_comt held that "incidental effects of govemment programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [do not] require government to bring forward a compelling justification for its otherwise lawful actions. Id.

Similarly, in this case, TCC's prayer policy of providing three Designated Prayer Times for all religious faiths, may make it more difficult for the inmate to practice his NOI faith, which arguably requires five daily Salat prayers. R. at 3. However, this policy not coercing Petitioner to go against his faith. The TCC prayer policy also allows inmates to pray twice a day in their cells which the inmate has done on several occasions and for many years. As the Fifth Circuit has held, "a governmental action does not rise to the level of substantial burden if it merely prevents enjoying some benefit not otherwise generally available or prevents an inmate from acting in a way that is not generally allowed. Adkins v. Kaspar, 393 F.3d 559 (5th Cir. 2004). Similarly, the comt has held that "at a minimum the substantial bmden test requires that a RLUIPA plaintiff

demonstrate that the government's denial of a particular religious item or observance was more than an inconvenience to one's religious practice." Midrash v. Town of Surfside, 366 F.3d at 1227, 1214 (11[111] Cir. 2004).

Here, TCC's prayer policy applies to all religions. No religious group is allowed to have nightly congregational prayers and no group is allowed to meet for prayer services without the presence of a chaplain. Thus, the policy merely allows for all inmates to enjoy the same religious benefits. "If the word "substantial" ..., is to retain any meaning, it must, at a minimum, be constiued as requiring something more than solely the denial of a request that is sincere." Smith v. Allen, 502 F.3d 1255, 1278 (11th Cir. 2007) (Where prisoner failed to establish a substantial burden on his exercise where prison did not provide him with crystal for use in Odinism faith). Petitioner, similarly must show more than just a denial of his own request that pertains to religious exercise.

2. TCC Prayer Policy Which Does Not Provide A NOI Chaplain For A Nightly Service Is Not A Substantial Burden Where Alternative Opportunities Exist.

Prisoners do not have a constitutional right to the religious advisor of their choice. Blair-Bey v. Nix, 963 F.2d 162, 163-64 (8th Cir.1992), and such an advisor is not required to be provided for every religious faction within a prison. Cmz v. Beta. 405 U.S. 319, 322 n. 2, , 1081-82 n. 2, (1972). Neither must an inmate be provided with a religious advisor whose beliefs are totally in sync with his own. Blair-Bey v. Nix, 963 F.2d 162, 163-64 (8th Cir. 1992).

The only time there may be the possibility that an inmate's religious exercise rights are substantially burdened in this manner is when his only opportunity for group worship occurs under the leadership of someone whose religious beliefs are significantly different. SapaNajin v. Gunter, 857 F.2d 463, 464 (8th Cir. 1988). Here, Petitioner hasn't alleged that his sole opportunity for group worship arises under a non-NOI chaplain. The facts state just the opposite.

Petitioner is afforded three daily prayer services headed by a Muslim chaplain in one chapel and four other classrooms. In the twelve years at TCC, the inmate has not alleged that the beliefs of the Muslim chaplain are significantly different :fi:om NOI beliefs nor has he made specific claims that this has hindered his religious exercise. Additionally, the court has previously held that the lack of a prison volunteer or chaplain does not impose a substantial burden. Jihad v. Fabian, 680 F. Supp. 2d 1021 (D. Minn. 2010). _Also, in Hartman v. California Dep't. ofCmT., prison policy merely deprived prisoners of accommodations beyond those already provided, which included services from staff chaplains and volunteer Wiccan chaplain such that the denial of the prison to hire full-time Wiccan chaplains was not a substantial burden. 707 F.3d 1114 (9th Cir. 2013). At TCC, chaplains are required, not to deny inmates of the ability to worship, but to "protect the integrity and authenticity" of the program. Tourovia Directive#98. In Adkins, the prison had a similar policy requiring prison volunteers to be present during services. , 393 F.3d 559 (5th Cir. 2004) (Adkins complained because, due to this policy, he was not able to have the number of Sabbath services that his faith required, when the prison volunteer was not available. The court held that there was no substantial burden on his religious exercise.) Similarly, Petitioner seeks to have nightly congregational prayer services but is unable to do so since a chaplain must be present. Chaplains are now required to alleviate security concerns due to the mishaps that occurred during the services when previously headed by prison volunteers. Thus, the policy is also linked to peneological interests. However, if this Court finds that there is a substantial burden, TDC contends that compelling government interests exist which outweigh any such burden.

C. In Applying The Compelling Government Interest Standard, This Court Should Give Due Deference To Prison Administrators In Their Establishment Of Restrictions On Nightly Congregational Prayer Policy In Order To Maintain Order And Security While Addressing Financial Concerns Within The Prison.

If and only if the prisoner has established that a substantial burden has been placed on his religious exercise, then the burden shifts to the government entity to prove that there is a compelling government interest that outweighs the burden. (42 U.S. C. 2000cc(a)(1)(B). Only "those interests of the highest order" will constitute a compelling government interest. Wisconsin v. Yoder, 406 U.S. 205,215 (1972). In Cutter v. Wilkinson, which was markedly the first Supreme Comt case to examine RLUIPA, tllis Court held that due deference should be given "to the experience and expertise of prison and jail adnlinish·ators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." 125 S.Ct. 2113 (2005). Prison officials are in the best position to understand the particular needs and concerns of its facilities. The comts should look to these individuals as experts in the field. While it is true that this does not simply mean "rubber stamping" whatever policy they develop, the courts should respect the experience and knowledge of these individuals in analyzing prison policies. Holt v. Hobb, 135 U.S. 853 (2015). In doing so, the comts have held that security, is of the utmost impmtance. Cutter v.Wilkinson, 125 S.Ct. 2113 (2005).

TCC makes an adequate showing of compelling government interests of maintaining security, order, and cost consideration standards evidenced in Lovelace v. Lee, in providing substantial affidavits from prison officials outlining the reasons for the prayer policies, including an addendum that incorporates the prison's cost-saving effmts. R. at 6,7. 472 F.3dl74 (4th Cir. 2006)(where comt held no compelling government interest shown due to lack of sworn affidavits of prison officials outlining the security, safety and cost concerns that justified the prison's contested policies). Government policy or action, that is deemed necessary to prevent some "outbreak of prison violence, such as pointing at some past incidents, and when shown that this

was the least restrictive means to safeguard the inmates and personnel," will survive RLUIPA. Murphy v. Missouri Department of Corrections 372 F.3d 979 (8th Cir. 2004). Here TCC has a compelling interest to maintain the safety and security of a population of dangerous and potentially violent inmates. It is of the utmost importance that prison officials have the ability to control where inmates are at specific times and who they come into contact with during the day, therefore there is a compelling government interest in implementing the TCC policy.

D. TCC'S Prayer Policy Is The Least Restrictive Means Of Promoting Security And Order Within The Prison As Well As Addressing Financial Concerns.

In addition to proving that there is a compelling government interest, prison officials also have the burden of showing that its policies are the least restrictive means of achieving its goals. 42 U.S.C.A. § 2000cc-1(a). This requires a showing of a lack of other means for attaining its objective without imposing a substantial burden on a sincerely held religious exercise and if a less restrictive means is available, then it must be used. Holt v. Hobbs, 135 S. Ct. 853 (2015). However, it is under no obligation to "dream up alternatives that the plaintiff himself has not proposed." Walker v. Beard, 789 F.3d 1125, 1137 (9th Cir.2015).

1. Previous Attempts At Less Restrictive Measures Were Tried But Failed To Meet TCC'S Objective OfMarinating Order And Security

In meeting its bmden, a prison must demonstrate that it has tried other methods in implementing its policies. Shakur v. Schriro, 514 F.3d 878 (9th Cir. 2008). TCC notes that other attempts at providing a more open prayer service policy have been employed but simply failed. Prior to August 1998, TCC allowed prisoners to have prayer services at night with a prison volunteer. However, this resulted in improper communications between prison volunteers and gangs outside the prison. R. at 4. This type of occunence jeopardizes the safety and order within the prison. In addition, prisoners pru1icipating in nightly prayers weren't abiding by the curfew to

be in the cell in time for the evening head count. R. at 4. Without a proper head count, TCC is unable to accurately keep track of its prisoners, hindering them from maintaining safety for prisoners, as well as the staff within the prison. Requiring a chaplain for all services is the least restrictive means of alleviating the foul play that occurred with the prison volunteers. Since chaplains currently work during the three Designated Prayer Times and emergency situations where the prisoner is either ill or near death, requiring them to work additional hours would put a strain on third-party beneficiaries. Thus, TCC's previous, less restrictive prayer policy failed to maintain security and order within the prison.

Although TCC has the burden ofproofto show its practice is the least-restrictive means, it is not obligated to "dream up alternatives that the plaintiff himself has not proposed." Walker v. Beard, 789 F.3d 1125, 1137 (9th Cir.2015). In Walker, the inmate asked for only one form of relief, an exemption from being placed in a cell with non-white cellmates. Similarly, the petitioner's complaint is very specific. He claims his rights were violated when he was denied five prayer services, including additional evening congregational prayer after the evening meal at 7pm, outside his cell and away from non-NOI inmates and bathroom facilities. R. at 2, 6. There is no mention of any other relief requested. Being confined to the evidence presented in the record, this court is must infer that nothing shmt of the granting of all those requests would be accepted by petitioner. Therefore, TCC need only refute the alternatives offered by the petitioner. United States v. Wilgus, 638 F.3d 1274, 1289 (lOth Cir.2011) (holding that, in a least restrictive means inquiry, "the government's burden is two-fold: it must support its choice of regulation, and it must refute the alternative schemes offered by the challenger). If the prison shows that the petitioner's requests aren't feasible in light of its compelling interests, TCC need not grant them. According to Cutter, "should an inmate request for religious accommodation become excessive,

impose unjustified burdens on other institutionalized persons, or jeopardize the effective function of an institution, the facility would be free to resist the imposition." 544 U.S. 709, 725(2005). Thus, TCC need only refute the feasibility of the petitioner's request, rather than address every possible alternative to its current prayer policy.

In properly applying RLUIPA, courts must take adequate account of the burdens a requested accommodation may impose on non-beneficiaries, Estate of Thornton v. Caldor, Inc., 472 U.S. 703, (1985). TCC's current prayer policy requires the coordination ofthree prayer services every day for Catholic, Protestant, Muslim and Jewish inmates, all being conducted within one chapel and four other classrooms. R. at 4. Requiring one or two additional prayer services for the NOI inmates would impose a greater strain on security and order within the prison. RLUIPA does not require officials to make the burdensome alterations to prison scheduling and facility use.

The additional nightly prayer services would cause more inmates to be unaccounted for, thereby placing the safety of both prison staff, and inmates, [ ]at risk because of the logistic difficulties in keeping track of the prisoners as they travel to, and from, the chapel. Jihad v. Fabian, 680 F. Supp. 2d 1021, 1036 (D. Minn. 2010) (where comt held that prison policy of allowing prayer during scheduled worship services or, alternatively, within the confines of an inmate's cell, was the least restrictive means of achieving compelling government interest in safety and security); *See also* Charles v. Verhagen, 220 F. Supp. 2d 937 (W.D. Wis. 2002) (where Prison officials did not violate Religious Land Use and Institutionalized Persons Act by allowing Muslim inmates only one feast opportunity per year, when exercise of religion purportedly required two feasts; it served compelling interest of minimizing strain on prison

staff inherent in staging large number of feasts to accommodate diverse religions represented in prison population, and was least intrusive means).

Additionally, the nightly prayer request would require the use of chaplains at late hours in the night. By prohibiting such nightly prayer services and only providing chaplains for tlu·ee rather than five services, Tourovia Directive #98 helps to minimize staffing concerns. Similarly, in Charles v. Verhagen, the comt held that RLUIPA was not violated by allowing Muslim inmates only one feast oppmiunity per year, when the religious exercise purpmtedly required two feasts; The comi found that it served the compelling interest of minimizing strain on prison staff in staging large number of feasts to accommodate diverse religions represented in prison population, and was least inh·usive means. 220 F. Supp. 2d 937 (W.D.Wis. 2002). Currently, the chaplains at TCC are only required during daily prayer services except in emergency situations where the inmate is ill or when death is inuninent. Directive #98. If required to provide nightly prayer services, the chaplains would be required to work longer hours every day, in addition to the occasional emergency situation, thereby increasing the financial burden for the sake of a small minority, namely seven inmates. In addition, additional supervision by other prison staff would be required to ensure the safety of prisoners and staff. By only providing chaplains for three services and allowing additional prayers in cells, the strain on chaplain staffmg as well as security is reduced.

2. Providing An Additional Nightly NOI Congregational Service Would Favor One Faith Over Another, Thereby Perpetuating Disorder And Lack Of Security.

RLUIPA also requires that it must be administered neutrally among different faiths, Cutter v. Wilkinson, 544 U.S. 709, 720, (2005). The current TCC prayer policy prohibiting nightly prayer sessions with a prison volunteer helps to maintain neuh·ality among all faiths. The foul play among Christian and Sunni Muslims led TCC to change its previous more open

religious service policy. R. at 4. This change is based on actual happenings rather than "exaggerated fears". The service volunteers were relaying gang orders to gang members outside the prison and security was jeopardi zed by Sunni Muslim group members failing to come out of prayer rooms at appropriate times. R. at 4. In order to refrain from singling out these specific faiths, TCC sought to enforce its current policy as to all faiths. If TCC were to allow a nightly congregational service as to NOI members, it would have to do so for all faiths. The prison is not equipped to handle such demands. Providing chaplains for all these services would sh·ain the prison's resources and definitely jeopardize security to have so many prisoners out of their cells during the evening.

3. Adhering To Inmates Outlandish Requests Would Dismpt Prison Order And Result In Unjustified Additional Costs.

If additional nightly prayer time was given to the small group ofNOI inmates, this may lead to complaints from inmates of other religious faiths leading to a perception of favoritism. Even if TCC chose to only provide the nightly setvices to NOI inmates, this would cause an unjustified increase in expenses. In order to provide nightly prayer services, TCC would be forced to employ the additional services of a chaplain and other staff to monitor these extra proceedings, thereby elevating prison expenses. Although, complying with RLUIPA may often times cause the government to incur additional expenses, such expense is not justified for seven NOI inmates, which make up less than 1% of the prison population and less than the requisite amount of members required for recognition at TCC. Since TCC lacks other means to maintain security and order within the prison in a justifiably cost-effective manner, Tourovia Directive#98 is the least restrictive means of achieving its stated goals.

II. THE TWELFTH CIRCUIT PROPERLY VACATED SUMMARY JUDGMENT ON THE ISSUE OF DIETARY RESTRICTIONS BECAUSE PETITIONER FAILED TO RAISE A GENUINE DISPUTE OF MATERIAL FACTS AS TO WHETHER THE RELIGIOUS DIET POLICY WAS REASONABLY RELATED TO A LEGITIMATE PENOLOGICAL INTEREST UNDER THE STANDARDS SET FORTH IN RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT (RLUIPA).

Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA) to provide protection against religious discrimination including the discriminatory treatment of free exercise of religion upon incarcerated individuals by state and local government entities.

RULIPA provides:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution as defined in § 2 of the Civil Rights oflnstitutionalized Persons Act (42 U.S.C. 1997), even ifthe burden results from a rule of general applicability, unless the government demonstrates that the burden is (1) in the furtherance of a compelling government interest, and (2) is the least restrictive means of :ftuthering that compelling government interest. 42 U.S.C. §2000cc-l(a).

In Civil Libetties for Urban Believers v. City of Chicago, the court stated that "in the context ofRUIPA's broad definition ofreligious exercise, a ... regulation that imposes a substantial burden on religious exercise is one that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise...effectively impracticable." 342 F.3d 752, 760-61 (7th Cir. 2003). Respondents will show not only did Petitioner fail to meet his burden of proof, but that there is no substantial burden against the Petitioner because limitations on restrictive diets do not bear direct, primary, and fundamental response to render Petitioner's

religious exercise impracticable and even if the comt finds that there is a substantial burden, there was a compelling government interest in removing the dietary restrictions and that it was done in the least restrictive means possible.

A. Petitioner Has Not Met His Burden Of Showing That The Government Policy To Deny Special Diets Based On "backsliding" Of Prisoners Is A **Substantial Burden To The Petitioner And Therefore There** Is No **Violation OfRLUIPA.**

The threshold inquiry under RLUIPA is "whether the governmental action substantially burdens the exercise of Petitioner, or any p1isoner claiming religious affiliations, exercise of religion?" 42 U.S.C. 2000cc-1(b). Government actors find themselves in a precarious position of balancing between two competing clauses of the Constitution. Officials who act to provide special considerations for inmates in their fi·ee exercise of religion may be challenged for allowing the *establishment* of religion. However, TCC officials who refrain fi·om allowing for special provisions are many times viewed as denying the fi·ee *exercise* of religion. This is a "catch 22" for many jurisdictions and one of the considerations the comts have granted to government officials is giving them broad discretion in making proper decisions for the operations of a prison facility.

The Fifth Circuit in Kahey v. Jones, has mled that prisons need not respond to pmticularized religious dietary requests to comply with the First Amendment. 836 F.2d 948 (5th Cir. 1988). The comt also determined that the inmate's practice of Islam was "not entirely circumscribed in the p1ison, and that this factor, as the [Supreme Court] found in O'Lone, compensates for the prison's failure to satisfy her dietary demand." 482 U.S. 342, 951 (1987). According to Walker v. Beard, the prisoner bears the initial burden of showing that the prison's policies impose a "substantial burden" on his religious exercise; only then will the burden shift to

the prison to demonstrate that the policy fmthers a "compelling government interest" by the "least restrictive means." 789 F.3d 1125, 1134 (9th Cir. 2015).

1. Prison Officials Placed No Pressme On Petitioner To Modify His Diet.

In the case at bar, Petitioner was offered a special diet to conform with his request for religious adherence, but he broke that special diet when he threatened others for non-approved food sources outside of his special restrictions. R. at 6. In Daly v. Davis, the comt found that revoking a religious diet substantially burdens an inmate *only* if it prevents or inhibits religiously motivated conduct *and* renders religious exercise effectively impracticable. (2009 WL 773880 (7th Cir. 2009)). To this point, the Supreme Comt has granted prison staff a broad discretion towards enforcing policies that fall within the health, security, and safety of maintaining a prison facility. Turner v. Safely, 482 U.S. 78 (1987). In Barnowski v. Hart, the Fifth Circuit considered that "for the purposes of applying RLUIPA, a government action that ttUly pressures the adherent to significantly modify his religious behavior and significantly modify his beliefs" is considered a substantial bmden, but a regulation that impinges on an inmate's Constitutional rights is valid if it is reasonably related to a legitimate penological interest. 486 F.3d 112 (5th Cir. 2007). Inthe cunent case, Petitioner's actions of threatening his cellmate and taking food that is not on the special diet provided to him were *his* actions alone and not those of the government. The government provided a special diet for Petitioner-whi ch he chose to remove himself from-upon taking other non-prescribed food. The govemment did nothing in this case to pressure him into significantly modifying his religious behavior- those were Petitioners actions alone. While most comts are split on whether there is a substantial burden to denying an inmate a special diet, one thing is undisputed- they all rely on specific facts of the individual case in order to make a determination and there is no set standard for what constitutes a substantial burden.

2. Prison Officials Seek To Implement Special diet Programs InFair and Orderly Manner .

In San Jose Christian CoiL V. City of Morgan Hill, the ninth circuit stated that under RLUIPA, a "significant burden" exists if it imposes a "significantly great restriction or onus" on a religious exercise. 360 F.3d 1024, I034 (9th Cir. 2004). Under Tourovia Directive #99, if any inmate is found to bully another inmate for their food, or is caught breaking their religious food diets (ie: invoking the action of removing themselves from the special diet program) the prison reserves the right to take the inmate off of the special diet program. Inaddition, the Directive states "If any violence or threat of violence is connected to an inmate on a religious program, the prison may remove them from that program for a time as needed." Tourovia Directive #99. Here Petitioner's new cellmate complained of being threatened by Petitioner with physical harm if the cellmate did not turn over his non-religious diet food to Petitioner. R. at 6. When meatloaf was found wrapped under Petitioner's mattress along with the complaints of violence from his cellmate, it was enough for the prison to suspend those privileges. Resnick v. Adams calls for the prison to be able to administer a special diet program in an orderly manner. 348 F.3d 763, 768-71 (9th Cir. 2003). The Halal diet is very restrictive and only allows for "clean meat" and vegetables, which are prepared in a specific way. (Holy Quran 5:3, 16:115). It is a strict diet and one that Petitioner may have found difficult to adhere to, but the prison, in administering the program in an orderly manner (per the Resnick opinion), cannot allow inmates such as Petitioner to threaten others and take food from inmates in the name of religious backsliding. 348 F.3d 763, 768-71 (9th Cir. 2003). TCC must maintain a sense of security for all inmates, guards and personnel in the facility. If an inmate is tlueatening another becauSe of dietary restrictions, the prison officials should have the discretion to remove that restriction for the safety of all.

While federal and state prison officials are required to make accommodations for a prisoner's religious exercise under 28 C.F.R. §548.20, the coutis are split over whether officials must continue accommodation for those prisoners who lapse in their dietary practices. Reed v. Faulkner, 842 F.2d 960 (7th Cir. 1988). When an inmate fails to follow the specific diets and still receives other benefits from their claim for special religious accommodations, this can cause security problems with other inmates as they see the special benefits, but not the adherence to the restrictive nature of the religion. The Supreme Comt has never decided the issue of revoking special diet programs and the circuit courts are split on the issue, however it has been well established that prison officials have broad discretion in determining best actions for maintaining safety and health. Pell v. Procunier, 417 U.S. 817 (1974).

3. Removal of Petitioner From Special Diet For Backsliding In No Way Creates A Substantial Burden Or Limits Petitioner's Exercise of Religion Because He Chose Not To Follow The Special Diet.

Under RLUIPA the Petitioner alone carries the burden for proving substantial burden and must show that (1) his belief to eat a special halal diet is religious in nature, (2) that this belief is sincerely held, and (3) that the prison's actions cannot be reasonably related to a legitimate penal purpose. 42 U.S.C. §2000cc-l(a).

Petitioner's request for a special diet may be religious in nature, if he *actually practiced* the special diet. The Supreme Comi, in United States v. Ballard, considers that the judiciary can only determine if the beliefs are sincerely held views, not whether they are tlue or false. 322 U.S. 78 (1944). There is culTently no set standard for the measure of that sincerity, however the most convincing proof is that one believes something shown to be true in his own life. Id. While there is a tradition of members of the Nation of Islam observing special diet restrictions (Darse Tirmidhi 4/37 Darul Kitab), religion is not just about the corporate doctrine, it is also about the

individual and personal experience. It has been held that "evidence of nonobservance is relevant on the question of sincerity, especially ... in the prison setting" See Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988). In Reed, where a prisoner's sincerity was questioned due to his failure to adhere to the strict Rastafarian diet, the court went on to say that, although it was not conclusive, the comt should consider that if an inmate is permitted to claim religious exercise inconsistent with a corporate religion's tenets, as in Thomas v. Review Board, 450 U.S. 707 (1981), then the court must also be able to consider the actions of an inmate when they do not follow the doctrines and traditions of the religion that Petitioner claims to be so invested in.

Petitioner's religion does not prohibit him from eating a non-halal diet. Petitioner's choice to eat the special diet is one that he made individually. It was also Petitioner's individual choice to remove himself from that special diet by taking food from his cellmate that was not on the special diet. TCC has a responsibility and a legitimate penal purpose to maintain a safe environment for all inmates and could not allow this type of intimidation to continue in the name of a sincerely held belief. In Mitchell v. Helms, Justice Thomas determined that governments should accommodate religion by treating it the same as nonreligious beliefs and groups. 530 U.S. 793 (2000). No inmate would be allowed to threaten another inmate for any purpose- whether a member of a religious group or not. Therefore, the TCC officials in this situation were acting in a manner that would treat both religious and nonreligious inmates the same and would implement the special diet program in an orderly manner as prescribed in Resnick. 348 F.3d 763 (9th Cir. 2003).

Removal of Petitioner from the special diet in no way limits his exercise of religion or render his religious exercise of following Islam impracticable in that the special diet is not required for him to continue practicing his Islamic faith. The Five Pillars of Islam: 1) Faith, 2)

Prayer, 3) Charity, 4) Fasting, and 5) Mecca, (Holy Quran 2:183-196) in no way prohibit Petitioner from exercise of his religion if he does not maintain a special halal diet. The Five Pillars of Islam are the fundamentals of Muslim life and are considered to be obligatory for all Muslims. The Quran notes the Five Pillars of Islam alone as a sign of commitment to the faith and a sincerely held belief. Under the teachings of the Quran, a Muslim is allowed to eat any food made by a person whose faith and religion is unknown to him (Holy Qur'an 2:173) and the food of non-Muslims is lawful for those living in non-Muslim countries that may not have access to halal meat practices (The Holy Qur'an 5:5), therefore Petitioner has not met his burden of proof showing that there has been a substantial burden to his exercise of religion because the revocation of a special diet does not bear a direct, primary, and fundamental responsibility of rendering his religious exercise impracticable, thus there is no violation of RLUIPA.

B. Even IfThis Court Finds There Is A Substantial Burden, Tourovia Directive #99, Which Provides For Religious Alternative Diets And Revocation Of Those Privileges, Is A Rule Of General Applicability And Done In The Furtherance Of A Compelling Government Interest And Is Therefore Not In Violation OfRLIDPA.

1. Tourovia Directive #99 Is A Rule Of General Applicability With A Non-Religious Purpose.

Following cases like Employment Division v. Smith, the court held that neutral laws of general applicability only had to meet a rational basis test, but that laws that focus on religious exercise must meet a higher standard of strict scrutiny. 494 U.S. 872 (1990). In upholding RLUIPA against a strict scmtiny challenge in Cutter v. Wilkinson, 544 U.S. 709 (2005), the Supreme Court noted that "context matters" in the application of RLUIPA's standards. Those standards are typically, and were meant to be by Congress, interpreted to give "due deference" to the expertise of prison administrators to establish appropriate rules for good order, discipline and security. (S. Rep.No. 111, 103d Cnog., 1st Sess. 10 (1993)). The comts have generally ruled that

public health, safety, protection, and administrative standards sometimes can outweigh religious freedom claims. In O'Lone v. Estate of Shabazz, the comt insisted that a prisoner's rights to free exercise may be infringed if related to a legitimate penological interest. 484 U.S. 342 (1987). Tourovia Directive #99 is not intended to preclude any inmate from practicing their religion; instead it is intended to keep peace and security in the prison by not allowing any inmate (religiously affiliated or not) to threaten other inmates. By applying Tourovia Directive #99, prison officials are applying the directive across the board to the entire population and not showing deference to any particular religious group as opposed to a non-religious group.

2. Should The Court Dete1mine That The Directive Is Not One Of General Applicability, It Is Easy To Discern That Prison Officials Have A Compelling Government Interest In Maintaining The Health, Safety, And Security Of The Entire Population At The Prison.

When a comt finds that actions of a government actor are less impmtant than those of the individual, they are weighing directly against the decisions that have been made by the Tourovia officials in an effort to potentially substitute those decisions for the good of one versus that of a greater community. In order to bring some semblance of order to determining compelling government interest in cases of religious exercise, the comts look to the test outlined in Turner v. Safely as a guide to determining the validity of prison rules and actions. 482 U.S. 78 (1987).

The Tmner Test is a test for validity of prison rules and regulations in which there are four elements that must be met to establish the rules as reasonable and Constitutional: 1) whether there is a connection with rational prison regulations and a legitimate government interest, 2) whether there are other ways of exercising religious rights despite the rules, 3) whether by allowing a prisoner to exercise their right, will there be a "ripple effect" on the others and on allocated resources, and 4) whether the rule is implemented in the least restrictive means for a prison to meet their needs. Id. "A comt 'must dete1mine whether the government objective

underlying the regulation at issue is legitimate and neutral, and that the regulations are rationally related to that objective.'" Freeman v. Texas Dep't of Criminal Justice. 369 F.3d at 860 (5th Cir. 2004) (quoting Thornburgh v. Abbott, 490 U.S. 401,414-15 (1989)); *see also* Scott v. Miss. Dep't of *Con.*, 961 F.2d 77, 80-81 (5th Cir.1992) (explaining that a court need not "weigh evenly, or even consider, each of these factors," as rationality is the controlling standard). While Turner is a lesser level of scrutiny than applied in RLUIPA, there is sufficient case law in the various circuit comts to use this test as a preliminary test to show that government rules have a purpose and validity in maintaining the safety and security of a prison facility. These prongs must then be weighed against the RLUIPA standards to come to a complete determination.

The flrst prong in the Turner Test provides for a need to connect the rules of the prison with a legitimate government interest. 482 U.S. 78 (1987). Tourovia Directive #99 is directly connected to maintaining the health, safety, and security of a prison. Prisons are highly regulated facilities as the need to control the population is of the utmost importance. The difficult position of the TCC officials is to maintain the balance between those nonreligious inmates and those claiming religious affiliation. Inmates that claim the religious affiliation may, depending on their religion, get special food, special time away from prescribed activities for prayer and meditation and special time away from work detail during certain times of the year. Inmates that claim religious affiliation, but do not follow the rules outlines for being a part of that religious group (as in this case when Petitioner took food not on his special diet) may be looked on by the other inmates as "getting away" with something. This can create problems with the other inmates feeling slighted and can create a very dangerous situation.

Coutts should apply the compelling government interest test with broad deference to the experience of the prison administrators in establishing necessary regulations and procedures to

maintain good order, security and discipline, consistent with considerations of costs and limited resources. (Quoting S.REP No. 103-111, at 10 (1993) 1993 U.S.C.C.A.N. 1892, 1899). RLUIPA was not intended to elevate accommodation of religious observances over the institutional needs of the prison. Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006).

Next under the Tumer Test, Petitioner has other ways of being able to perfmm his religious exercise despite the rules. 482 U.S. 78 (1987). Tourovia Directive #99 is a valid use of the government's powers because Petitioner can still freely exercise his religion without the special diet. As discussed earlier, the special halal diet is *not* one of the Five Pillars of the Islamic faith. The Five Pillars of Islam are essential for every Muslim to follow in order to exercise their faith. The comt in Adkins v. Kasper, recognizes this prong of the Turner test that the "pertinent question is not whether the inmates have been denied specific religious accommodations, but whether, more broadly, the prison affords the inmates oppmtunities to exercise their faith." 393 F.3d at 564 (quoting Freeman, 369 F.3d at 861). Eating a special diet is not one of these necessary tenants, although it may be a sincerely held belief, by Petitioner, the lack of a special diet in no way precludes Petitioner from practicing his religion. Just like in the Adkins court, the inmates have alternative means of exercising their religion and therefore are not substantially burdened from practicing their religion even with the rules in place by the prison that may deny the special diet because of behavior violations. Id.

The "ripple effect" noted in the third prong of the Turner Test is extremely important in giving deference to prison officials. 482 U.S. 78 (1987). The prison atmosphere is one of unrest, hostility, and potential threats on a daily basis. Id. The court, in Pell v. Procunier, stated that officials must have the deference to apply rules that help to maintain the safety and security of this type of environment. 417 U.S. 817 (1974). The "ripple effect" could easily happen if other

prisoners see Petitioner not reprimanded for threatening other inmates to get something that he wants. This could bring unrest and dangerous conditions to the prison. Inthis type of atmosphere, it is not mere speculation of potential unrest, and the courts must defer to the prison officials to make these types of determinations. Moreover if Petitioner were allowed to continue with the special diet privileges and not receive punishment for his threatening actions, other inmates would see that Petitioner would appear to be receiving favor from prison official and that could have very negative effects on prison morale and discipline.

In order for the Turner Test to establish the validity of the prison mles, all four elements should be met including the element showing the least restrictive means of implementing the rule. 482 U.S. 78 (1987). While Tourovia officials maintain that Directive #99 is implemented only upon the poor behavior of the inmate and only for the time necessary as to correct the behavior, they still must catTy the burden of proving this element. The record demonstrates that the prison policies at issue here are logically connected to a legitimate penological concern of security and there ru·e no obvious or easy alternatives available other than taking away the privilege for a reasonable time. R. at 20. See *also* Turner, 482 U.S. at 90 (1987) ("Where other avenues remain available for the exercise of assetted rights, courts should be particularly conscious of the measure of judicial deference owed to corrections officials in gauging the validity of the regulation.")

Based on the four elements as outlined in the Turner Test, the prison officials seem to meet each element and in regards to the final element, therefore Tourovia Directive #99 is valid under Turner and has a compelling government interest in maintaining the health, safety and security of all inmates inside the prison. 482 U.S. 78 (1987).

C. Tourovia Directive #99 Does Not Violate RLUIPA Because It Is Done In The Least Restrictive Means Possible To Further That Compelling Government Interest.

1. There Was No Coercion On The Part Of Prison Officials To Remove Petitioner From Special Diet.

Petitioner will claim that he was forcibly removed from the special religious diet and forcibly fed food through an invasive procedure against his will after not eating for several days. Petitioner will also claim that he was coerced- this is not the case. In order to show coercion that Petitioner was forced to leave the special religious diet program and forced to eat, Petitioner must show under the Lee Coercion Test that he was more than merely pressured. Lee v. Weisman, 505 U.S. 577(1992). Under Lee, there are three elements that must be met: 1) there must be action by a government actor, 2) there must have been a forceful action, and 3) coercion must be secular. Id.

Removal from the special diet program was not done by actions of a government actor. Petitioner removed himself when we forcibly took food from other inmates that did not adhere to the restrictions of his religious diet, therefore there was no government action in relation to the removal of the religious diet and the first prong is not met. Our case parallels Brown-El v. Harris, where the court found that the prisoner voluntarily ate food not on the special diet and that the policy of the prison to remove inmates from a program that the inmate was not following anyway, did not coerce worshippers into violating their religious beliefs, nor did it compel them to refrain from religiously motivated conduct. 26 F.3d 68 (8th Cir. 1994).

Secondly, under the Lee Test, there must have been forcible action. If there was no govemment action, then there clearly cannot be any forcible action taken against Petitioner when he is the one who self-precluded himself from the program.

Lastly, Petitioner will argue that the force-feeding by TCC officials after his hunger strike was coercion. The actions of force-feeding Petitioner were separate and apart from his removal

of himself from the special diet program. Petitioner was already out of the program at the time the prison decided it was in his best interest of health and safety to get nourishment into his body during a protest hunger strike. The force feeding of Petitioner at this time has nothing to do with the religious food diet because he was no longer in the program and there was a clear separation between his self-removal from the special diet program and the force feeding attempt by the prison. Since none of the prongs of Lee have been met, there is no coercion found. 505 U.S. 577 (1992). With no coercion being found, the comt must then look to how we can weigh the needs of the prison against the rights of the individual in the least restrictive manner.

2. Courts Must Consider The Needs Of The Prison When Weighing The Rights Of An Individual Against The Needs For Safety And Security.

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."Lovelace v. Lee, 472 F.3d 174, 190 (4th Cir. 2006). The burden that the prison needs to show is that they considered and rejected less restrictive measures that may not have been as effective in meeting the compelling government interest. Wygant v. Jackson Bd. OfEduc., 476 U.S. 267, 280 n. 6 (1986). Under strict scrutiny the means chosen to accomplish the state's asserted purpose must be specifically and nanowly framed to accomplish that purpose. Fullilove, 448 U.S., at 480 (1979) (opinion of BURGER, C. J.). 7. In determining whether something has been implemented in the least restrictive means possible, one must look to the classification at issue and if it "fits" with greater precision than any alternative means. (Ely, *The Constitutionality of Reverse Racial Discrimination,* 41U.Chi. L. Rev. 723,727, n. 26 (1974).

In the case at bar, prison officials have afforded specific privileges upon those prisoners who claim religious affiliation. There is no other secondary program for them to be demoted to if they break the rules. This would set up uncontrollable levels of security and direction on the part

of the prison employees who would find it difficult to determine what specific privileges each individual prisoner received at any patticular time. The way Tourovia has set up the policy-either you are on a special diet or you are not on a special diet-creates an easier mechanism for the prison staff in administering such programs and the rules are clear for all involved. No court requires the government to undertake the "herculean burden" of refuting every conceivable option in order to satisfy the least restrictive means prong ofRLUPIA. Hamilton v. Schriro, 74 F.3d 1545, 1556 (8th Cir. 1986). The prison policy is the least restrictive means possible of maintaining the compelling government interest because it only provides consequences for those inmates who break the rules of "their own accord." R. at 21. Petitioner chose to break the rules, knowing the consequences, thus forcing the prison officials to invoke Directive #99. Here TCC officials provided the special diet requested and has a compelling government interest to maintain safety and security of those inside the prison, balancing this against the rights of religious and non-religious inmates. There is simply no less restrictive way for TCC to further this compelling interest, and its satisfying of these provisions necessitates the actions of the Twelfth Circuit's decision on this issue.

CONCLUSION

This comt should uphold the decision of the Twelfth Circuit because there has been no violation ofReligious Land Use and Institutional Persons Act (RLUIPA) because Petitioner has not met his burden of proof that there has been a substantial burden on his exercise of religion and even if the court finds that there is a substantial burden, the prison directives provide for a compelling govemment interest implemented in the least restrictive means possible.