NO. 472-2015

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2015 TERM

SIHEEM KELLY

Petitioner,

v.

KANE ECHOLS, WARDEN OF TOUROVIA CORRECTIONAL CENTER AND **SAUL ABREU,** DIRECTOR OF THE TOUROVIA CORRECTIONAL CENTER CHAPLAINCY DEPARTMENT

Respondent.

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

BRIEF FOR THE RESPONDENT

Attorneys for the Respondent
Team Number: 5

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QUESTIONS PRESENTED

I. Under 42 U.S.C. § 2000cc-1, does Tourovia Correctional Center's prayer policy put valid limits on group prayer times when the policy allows three collective prayer times a day, prayer times in the prisoners' cells are unlimited, and lax restrictions on prayer meetings have undermined prison security in the past?

II. Under 42 U.S.C. § 2000cc-1, is the Tourovia Correctional Center's Religious Diet Policy valid when the policy allows inmates to observe religious dietary laws as long as prisoners consistently adhere to their chosen religious diet?

JURISDICTIONAL STATEMENT

The United States District Court for the Eastern District of Tourovia ("district court") gained jurisdiction after Siheem Kelly filed a complaint against an employee and an official of the Tourovia Correctional Center under 42 U.S.C. § 2000cc-1. R. at 2. The district court entered final judgment for Kelly as a matter of law, and the Tourovia Correctional Center appealed to the United States Court of Appeals for the Twelfth Circuit ("Twelfth Circuit"). *See* r. at 15–16. The Twelfth Circuit had jurisdiction over this appeal under 28 U.S.C. § 1291 (2012) because the appeal was taken from the district court's final order. R. at 15. The Twelfth Circuit vacated summary judgment on June 1, 2015. R. at 22. Kelly filed petition for a writ of certiorari under 28 U.S.C. § 1254(1) (2012); this Court granted certiorari on July 1, 2015. R. at 23. [1]

STATEMENT OF THE CASE

Statement of Facts

The Tourovia Correctional Center ("TCC") is a maximum security prison. R. at 3. Prior to 1998, TCC had a religious services policy that allowed inmates the option of petitioning for night prayer services with prison service volunteers. R. at 4. In August 1998, however, TCC officials were forced to make the prison's open religious services policy a more restrictive one when a Christian religious service volunteer began relaying gang orders from incarcerated members of the Christian faith group to gang-affiliated individuals outside of prison walls. R. at 4.

The new policy, Tourovia Directive #98, curbed dangerous gang communications by allowing faith groups at TCC to engage in group religious activity only under the supervision of

[1] The record appears to contain a typographical error by asserting the writ was granted on July 1, 2014, a year prior to the Twelfth Circuit's holding. With the understanding this Court granted certiorari on July 1, 2015, Kelly's appeal would be timely under Supreme Court Rule 13.1 and 28 U.S.C. § 2101 (2012).

an official chaplain. R. at 4, 25. Official chaplains are provided at three designated prayer times every day, the last of which is prior to the evening meal at 7:00pm. R. at 24. Inmates are not allowed to go anywhere but their cells between the evening meal and the final headcount at 8:30pm. R. at 5. Inmates may conduct evening prayers in their cells. R. at 4.

Siheem Kelly ("Kelly") was admitted to TCC in 2000 after being convicted of drug trafficking and aggravated robbery. R. at 3. After being institutionalized for two years, Kelly decided to convert to the National of Islam ("NOI"). R. at 3. Kelly's decision to convert after two years of practicing no religion placed him on a "watch-list" of inmates who might have assumed a religious identities to cloak illicit or gang-related conduct. R. at 7. Upon converting, Kelly changed his name to "Mohammad" and immediately filed a "Declaration of Religious Preference Form" with the prison in order to receive the benefits of belonging to a faith group. R. at 3. The "Declaration of Religious Preference Form" made Kelly eligible for participation in Muslim prayer services and a vegetarian (Halal) diet. R. at 3. Only seven inmates identify as NOI, which is less than one percent of the prison population and below the requisite number of members needed to form a "faith group" at TCC. R. at 3, 24. However, Kelly was still given the opportunity to participate in a Halal diet, fast for the month of Ramadan (as well as two other special holidays recognized by the NOI), and attend three daily prayer services. R. at 3.

Despite these generous accommodations, Kelly, on behalf of himself and the other six members of NOI, filed a written prayer service request for an additional congregational prayer service each night after dinner. R. at 4–5. The requested prayer service was to be held at 8:00 P.M., only thirty minutes before final head count. R. at 5. Saul Abrea, Director of TCC's Chaplaincy Department, denied the request due to the prison's strict regulations prohibiting any inmates from going anywhere except their cells during that time of night. R. at 5. Kelly made a second request

for a nightly prayer service, specifically that the prayer service be conducted away from non-NOI inmates and with a Chaplain only of NOI religious affiliation. R. at 5.

Having already denied Kelly's first request, the prison did not respond to his second request. R. at 5. Kelly continued to insist on the extra prayer times by filing a formal grievance, citing the Qu'ran, and complaining that he was unable to pray in his cell for the remaining two required prayer times. R. at 5. According to Kelly's uncorroborated testimony, it was impossible for him to pray in his cell because it was too dirty and his cellmate would engage in distracting behavior when he was praying. R. at 5. He alleged other NOI members had the same experience. R. at 5. Prison administrator, Kane Echols, suggested that Kelly make a request to transfer to a new cell where his new cellmate might be more respectful. R. at 6.

Two weeks after Kelly filed his third grievance, he received a new cellmate. R. at 6. Kelly's new cellmate informed the superintendent that Kelly had threatened him with violence if he did not give Kelly his meatloaf dinner. R. at 6. The prison commenced an investigation into the cellmate's allegations, and a search of Kelly's cell revealed meatloaf, wrapped in a napkin, under Kelly's mattress. R. at 6. As a result of being caught with food outside of his religious diet plan, Kelly was removed from TCC's Halal diet plan pursuant to Tourovia Directive #99. R. at 6, 26. This policy provides TCC with a mechanism for removing inmates from religious diets and restoring normal meals when they have stopped adhering to the diet. R. at 26. Also, in order to discipline Kelly for making violent threats against his cellmate, Kelly was removed from group worship services for one month. R. at 6.

Kelly refused to eat food off of the standard menu and engaged in a hunger strike. R. at 6. In order to provide Kelly with adequate nutrition during his hunger strike, the prison fed Kelly

through a tube. R. at 6. Soon afterward, Kelly ended his hunger strike and began eating the food provided to him. R. at 6.

Procedural History

Kelly sued TCC for declaratory and injunctive relief alleging that his rights were violated under the Religious Land Use and Institutionalized Persons Act (RLUIPA) when the institution denied his request for a fourth group prayer time and removed him from his Halal diet upon discovering meatloaf under his mattress. R. at 2, 6.

TCC moved for summary judgment on the theory that, as a matter of law, the prisoner failed to prove the prison's policies placed a substantial burden on his religious exercise and filed lengthy affidavits supporting its compelling government interest behind the policy. R. at 2, 6–7. On March 7, 2015, after denying the prison's motion, the district court entered *sua sponte* summary judgment for Kelly, concluding that no issues of material fact existed. R. 3, 15. As a matter of law, the district court concluded that the prison's policies regarding the fourth daily prayer meeting and Kelly's removal from a religious diet after backsliding violated RLUIPA. R. at 11, 15.

On June 1, 2015, the Court of Appeals for the Twelfth Circuit vacated the district court's *sua sponte* summary judgment motion, holding that TCC's security policies did not violate RLUIPA. R. at 16, 22. This Court granted Kelly's petition for the Writ of Certiorari on July 1, 2015. R. at 23.

SUMMARY OF THE ARGUMENT

Balancing the need for safety with the ability to exercise one's religious beliefs furthers society's interest in justice. To achieve this balance, proper deference must be given to those who understand and appreciate the challenges of running an effective correctional facility. The Twelfth

Circuit recognized this principle by properly vacating the district court's grant of summary judgment for two reasons.

First, the Twelfth Circuit properly vacated summary judgment for procedural and substantive reasons because of the misapplication of Federal Rule of Civil Procedure 56 and the prison's prayer policy does not violate RLUIPA. Procedurally, there were genuine issues of material fact and the Tourovia Correctional Center as the non-moving party was not notified before the court entered a *sua sponte* summary judgment for Kelly. Courts have found that least restrictive means prongs of the RLUIPA test are questions of fact and cannot be settled as matters of law. Federal Rule of Civil Procedure 56(f) states that the court must give notice to the non-moving party on a *sua sponte* grant of summary judgement to allow the party the opportunity to present any relevant facts. The Tourovia Correctional Center was not given such notice. Substantively, the Tourovia Correctional Center's security policy regarding prayer does not violate RLUIPA because allowing three group prayer times a day does not substantially burden prisoner's religious exercise, and serves a compelling government interest in security through the least restrictive means. The safety policy allowing for three group prayers a day does not do more than inconvenience religious exercise. Additionally, the government's compelling interest in security is furthered by means that are not more restrictive than necessary.

Second, the Twelfth Circuit also properly vacated summary judgment for Kelly because no substantial burden was placed on the prisoner's religious exercise and because the prison's religious diet policy furthers a compelling government interest by using the least restrictive means. The Tourovia Correctional Center's religious diet policy does not violate RLUIPA because it only applies to prisoners who hold a sincere religious belief. The policy only removes prisoners from the diet plan who voluntarily choose to not adhere to their own religious diet. Additionally, the

religious diet policy furthers a compelling government interest in the least restrictive means. The diet policy provides religious meals to any prisoner who chooses to adhere to their religious diet without compromising the prison's interest in security and order. Likewise, the diet policy is the least restrictive means of furthering that interest.

ARGUMENT

A prison's ability to maintain good order by implementing reasonable security and disciplinary measures is an essential part of the government's role as jail-keeper. The goal of the Religious Land Use and Institutionalized Persons Act (RLUIPA) is "to reach a reasonable and constitutionally sound balance between respecting the compelling interests of government and protecting the ability of people freely to exercise their religion." 145 Cong. Rec. S6688 (daily ed. Apr. 12, 1999) (statement of Sen. Kennedy). In keeping with the goal of balance, this Court allows correctional officers leeway in matters of establishing order and security within the correctional system through the implementation of reasonable and necessary guidelines. This deference allows correctional officials to uphold prisoner's religious freedoms protected under RLUIPA.

RLUIPA states that the government may impose a substantial burden on a prisoner's religious exercise if it can show that imposition of the burden is in "furtherance of a compelling government interest; and is the least restrictive means of furthering that governmental interest." 42 U.S.C. § 2000cc-1 (2012). In passing RLUIPA, "Lawmakers anticipated . . . that courts entertaining complaints under [RLUIPA] would accord 'due deference' to the experience and expertise of prison and jail administrators." *Cutter v. Wilkinson*, 544 U.S. 709, 717 (2005). RLUIPA applies to the Tourovia Correctional Center, a state prison, because the statute applies to the States through Congressional authority under the Spending and Commerce clauses. 42 U.S.C. § 2000cc-1(b) (2012). A plaintiff asserting a RLUIPA claim bears the burden of persuasion on the

threshold element of a substantial burden on religious exercise. 42 U.S.C. § 2000cc-2(b) (2012). If the plaintiff meets that burden, then the government has the burden of persuasion on the elements of compelling government interest and least restrictive means. *Id.*

The standard of review in summary judgment cases is *de novo*. *Bienkowski v. Ne. Univ.*, 285 F.3d 138, 140 (1st Cir. 2002). This Court is to construe all evidence and inferences in the light most favorably to the non-moving party, the Tourovia Correctional Center. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The Twelfth Circuit properly vacated the lower court's grant of summary judgment and held that the Tourovia Correctional Center's policies are consistent with RLUIPA for two reasons. First, procedurally, significant errors denied the government an opportunity to meet its burden of proof, and substantively, the prayer policy does not violate RLUIPA because there is no substantial burden on religious exercise and the Tourovia Correction Center's policy furthers a compelling interest using the least restrictive means. Second, the backsliding exception to the religious diet policy does not violate RLUIPA because it does not place a substantial burden on the prisoner's religious exercise and furthers the compelling government interests of security and oreder through the least restrictive means.

I. THE TWELFTH CIRCUIT PROPERLY VACATED THE LOWER COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE SIGNIFICANT PROCEDURAL ERRORS EXIST, THE TOUROVIA CORRECTIONAL CENTER'S SECURITY POLICY ALLOWING THREE GROUP PRAYERS DAILY DOES NOT SUBSTANTIALLY BURDEN THE PRISONER'S RELIGIOUS EXERCISE, AND THE POLICY FURTHERS A COMPELLING GOVERNMENT INTEREST THROUGH THE LEAST RESTRICTIVE MEANS.

The Twelfth Circuit Court of Appeals correctly vacated the lower court's *sua sponte* grant of summary judgment for three reasons. First, significant procedural errors render the district court's grant of summary judgment improper. Second, TCC's prayer policy does not substantially

burden religious exercise. Third, the policy furthers a compelling government interest through the least restrictive means.

A. The Twelfth Circuit Correctly Vacated the Lower Court's Grant of Summary Judgment Because of Procedural Errors in the Case.

A *sua sponte* grant of summary judgment may be properly vacated when there is a genuine dispute of material fact or the requisite notice has not been provided to the losing party. Fed. R. Civ. P. 56. Appellate courts "may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation, of judicial proceedings." *United States v. Atkinson,* 297 U.S. 157, 160 (1936). The Twelfth Circuit properly vacated the district court's *sua sponte* grant of summary judgment for two reasons. First, genuine disputes exist as to issues of material fact. Second, the district court did not meet the notice requirement.

1. Summary Judgment Was Inappropriately Granted Because Genuine Issues of Material Fact Exist.

The lower court erred by inappropriately granting summary judgment when there were genuine issues of material fact. The Federal Rules of Civil Procedure state, "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56. The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). Furthermore, "because summary judgment is a final adjudication on the merits, courts must employ the device cautiously." *Hulsey v. Texas*, 929 F.2d 168, 170 (5th Cir. 1991). Additionally, the least restrictive means prong is an exacting standard and requires the government to show that it lacks other means of achieving its desired goal. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014).

In *Shakur v. Schriro*, the court asserted that the prison policy presented a factual dispute as to the extent of the burden on Shakur's religious activities. *Shakur v. Schriro*, 514 F.3d 878, 891 (9th Cir. 2008). Furthermore, the record in *Shakur* contained no information about what alternative policies exist similar prisons and the court found a comparative analysis of other prison's policies to be a necessary part of the least restrictive means analysis. *Id.* Because of lingering questions as to the extent of the burden and the existence of less restrictive alternatives, the court concluded that it was inappropriate to grant summary judgment on the RLUIPA claim. *Id.*

In the present case, there are genuine issues of material fact that make a grant of summary judgment under Federal Rule of Civil Procedure 56(f) inappropriate. Similar to *Shakur*, where it was impossible for the Ninth Circuit to affirm the lower court's conclusion because of an underdeveloped record, the court of appeals in this case made its decision without seeing any evidence of alternative regulations at similar maximum security prisons. Additionally there is a dispute as to whether removing the prisoner from his diet after he voluntary broke his diet was a substantial burden. R. at 6. The present case involves a factual dispute as to what is the least restrictive means of advancing TCC's security policy. R. at 6–7.

The least restrictive means prong of RLUIPA requires a fact-intensive showing. Thus, a genuine issue of mater fact exists and a grant of summary judgment was improper.

2. Summary Judgment Was Inappropriate Because No Notice Was Given Before the *Sua Sponte* Grant of Summary Judgment.

The Court of Appeals properly vacated the lower court's grant of summary judgment after the district court failed to give notice prior to granting summary judgment *sua sponte*. The Federal Rules of Civil Procedure state that "[a]fter giving notice and a reasonable time to respond, the court may . . . grant summary judgment for a nonmovant." Fed. R. Civ. P. 56(f)(1). "Strict

enforcement of the notice requirement is necessary because a summary judgment is a final adjudication on the merits." *Powell v. United States*, 849 F.2d 1576, 1579 (5th Cir. 1988).

This Court held in *Celotex Corporation v. Catrett* that "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986). This rule "must be construed with due regard only for the rights of persons asserting claims and defenses . . . but also for the rights of persons opposing such claims and defenses to demonstrate . . . that the claims and defenses have no factual basis." *Id.* at 327. When the court believes that a nonmoving party is entitled to summary judgment against an original summary judgment movant, "great care must be exercised to assure that the original movant has had an adequate opportunity to show that there is a genuine issue and that his opponent is not entitled to judgment as a matter of law." *Ramsey v. Coughlin*, 94 F.3d 71, 74 (2d Cir. 1996) *rev'd on other grounds by Swatch Grp. Mgmt. Servs., Ltd. v. Bloomberg, L.P.*, 742 F.3d 17 (2d Cir. 2014).

In *Ramsey v. Coughlin*, Ramsey filed a motion for summary judgment on a constitutional claim and the district court granted *sua sponte* summary judgment for the defendants. *Id.* at 73. The Second Circuit reasoned that even though discovery had been concluded, Ramsey had only made a submission in support of his own motion for summary judgment and there was no way for the court to have known whether all evidence had been presented to the court for its consideration. *Id.* The court held that summary judgment would have been appropriate against Ramsey only if he had been given a chance to amend his complaint before summary judgment was granted. *Id.*

Powell v. United States is also illustrative because the Fifth Circuit held that the court had no basis on which to hold an error harmless because it did not have an affidavit from the losing

party explaining what additional evidence he would have provided if given the chance to amend the complaint. *Powell*, 849 F.2d at 1580. The court distinguished this situation from one where an affidavit of additional evidence had been submitted and the court was able to discern whether the error was harmless to the non-movant's case. *Id.*

The present case involves a *sua sponte* motion for summary judgment without notice. *See* r. at 2, 15. This case takes a similar posture as *Ramsey*, where one party moved to dismiss on one theory and the court incorrectly granted summary judgment for the other party without notice. *See* r. at 2, 15. TCC moved for summary judgment on the grounds that the prisoner did not meet his burden of proving that his religious exercise was substantially burdened. R. at 2. However the government was not on notice that it would need to bring all of its evidence to meet its burden of proof as a matter of fact with regard to second and third prongs of RLUIPA. *See* r. 2, 15. The government was blindsided by the district court's ruling that it had failed to meet its exacting burden of proof when it had only argued the issues as a matter of law. *See* r. at 2. Similarly, there is no basis in this case for a holding that the failure to provide notice was harmless error. Just as the court in *Powell* did not have affidavits describing what additional evidence would have been presented if given a chance to amend its complaint, the court in this case did not solicit or examine any such affidavit from TCC. *See* r. at 2, 15. Furthermore, as the lack of notice in *Powell* denied the losing party an opportunity to amend its complaint, the lack of notice in this case denied TCC the opportunity to meet RLUIPA's exacting burdens of proof by disclosing any and all additional evidence that it had not yet presented in making its motion for summary judgment. *See* r. at 2, 15.

Summary judgment was improper in this case because without notice to the non-movant that the judge was planning to grant summary judgment *sua sponte*, the government was unable to bring forth all fact-based evidence of the type that it would have brought to trial.

B. Allowing the Prisoner to Conduct a Fourth and Fifth Daily Prayer in His Cell Does Not Substantially Burden the Prisoner's Religious Exercise Because the Policy Does Not Coerce Him into Violating His Faith.

The prisoner's religious exercise was not substantially burdened because he was not coerced into violating his beliefs. Policies that do not coerce an inmate into violating his beliefs are not substantial burdens on his religious exercise. *Burwell*, 134 S. Ct. at 2779. Courts have held that regulations do not impose a substantial burden on religious exercise when they do not cause more than an inconvenience. *See, e.g.*, *Muhammad v. Sapp*, 388 Fed. App'x 892, 896 (11th Cir. 2010); *Washington v. Klem*, 497 F.3d 272, 279 (3d Cir. 2007). Moreover, a prisoner "need not be afforded his preferred means of practicing his religion as long as he is afforded sufficient means to do so." *See Hammons v. Saffle*, 348 F.3d 1250, 1256 (10th Cir. 2003).

This Court specifically rejected "the position that 'incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, require government to bring forward a compelling justification for its otherwise lawful actions." *Washington*, 497 F.3d at 279 (citing *Lyng v. Nw. Indian Ceremony Protective Ass'n*, 485 U.S. 439, 440 (1988)). The RLUIPA claimant must demonstrate that the denial was more than an inconvenience to inmate's religious practice. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). In addition, a "prison must permit a reasonable opportunity for an inmate to engage in religious activities but need not provide unlimited opportunities." *Van Wyhe v. Reisch*, 581 F.3d 639, 657 (8th Cir. 2009).

In *Jihad v. Fabian*, where an inmate requested to pray five times a day outside of his cell, the court held that two Islamic services per week afforded "a reasonable opportunity to practice his faith." *Jihad v. Fabian*, 680 F. Supp. 2d 1021, 1027 (D. Minn. 2011). The inmate requested

permission to make additional prayers outside of his cell because the proximity of a toilet in his cell diminished the sacredness of the area. *Id.*

TCC's security policies do not substantially burden the prisoner's religious exercise. Like *Jihad*, where two Islamic services a week were considered a reasonable opportunity to practice one's faith, the present case involves a policy that allows three group prayers a day. R. at 4. If two Islamic services a week were considered a reasonable opportunity to practice one's faith in *Jihad,* then a policy allowing three group prayers every *day* is also a reasonable opportunity. Like the prisoner in *Jihad*, where there was no substantial burden when an inmate was accommodated twice a week and required to conduct the remainder of his weekly prayers in his cell near a toilet, Kelly's religious exercise is not substantially burdened by a policy that permits him to pray in his cell near restroom facilities. R. at 5.

In *Greene v. Solano County Jail*, the court concluded that preventing a maximum security prisoner from attending any religious services constituted a substantial burden on the exercise of his religion. *Greene v. Solano Cty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008). The present case is distinguishable from *Greene* because TCC makes wide accommodations for Kelly and NOI members to worship and pray daily in a group. R. at 4–5. Had TCC denied all petitions for group worship and demanded that all prayers take place within the confines of a prisoner's cell, there might be a substantial burden. That is not the case here. *See* r. at 4–5.

The security policy at TCC does not substantially burden Kelly's religious exercise because of the reasonable accommodations that are provided to practice his faith.

C. Even if a Substantial Burden Exists, Tourovia Correctional Center Has a Compelling Government Interest in Safety and Efficient Administration and Uses the Least Restrictive Means of Achieving that Purpose.

Even if a substantial burden exists, RLUIPA permits the government to substantially burden religious exercise when it can demonstrate that the policy in question furthers a compelling state interest and is the least restrictive means. 42 U.S.C. § 2000cc-1(a) (2012).

1. The Tourovia Correctional Center Has a Compelling Government Interest in the Security of the Prison and the Safety of the Inmates and Staff.

TCC's prison policy allowing three communal prayer times is based on the compelling government interest of security through the efficient administration of resources and is the least restrictive means of achieving that purpose. This Court confirmed that "lawmakers supporting RLUIPA were mindful of the urgency of discipline, order, safety, and security in penal institutions." *Cutter*, 544 U.S. at 723. The security interest has been seen as the most compelling government interest in the prison setting. *Goff v. Graves*, 362 F.3d 543, 549 (8th Cir. 2004). In considering the welfare of both inmates and prison staff, "[S]ecurity is particularly important in dealing with group activities because of the potential for riots and the extensive damage resulting therefrom." *Murphy v. Mo. Dep't of Corrs.*, 372 F.3d 979, 983 (8th Cir. 2004). While "the mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement," *Washington*, 497 F.3d at 283, the government may satisfy its burden by establishing some "basis for their concern," *Murphy*, 372 F.3d at 989 (indicating that a prison's citation to prior security breaches would evidence a compelling interest).

Underlying the fact that security is a compelling government interest is the acknowledgment that correctional centers have limited resources. *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008) (noting that "[p]rison administors . . . have limited resources to provide the services they are called upon to administer"). This Court noted that deference to prison

administrators in establishing necessary procedures to maintain good order should be "consistent with consideration of costs and limited resources." *Cutter*, 544 U.S. at 722–723.

The court in *Jova v. Smith* noted that the prison officials demonstrated a compelling interest when the volume of affidavits and exhibits evidenced the prison's "powerful" security interests. *Jova v. Smith*, 582 F.3d 410, 416 (2d Cir. 2009). In *Jihad v. Fabian*, the court noted that "the safety of prison inmates and staff would be jeopardized by the increased movement of prisoners if inmates were allowed to leave their cells five times a day to pray." *Jihad*, 680 F. Supp. 2d at 1027.

In *Ochs v. Thalacker*, the court held that even if the government substantially burdened an inmate's religious exercise when it denied his request for racially segregated living quarters, the prison had still satisfied its burden of proving a compelling government interest by citing instance of past racial violence in the prison. *Ochs v. Thalacker*, 90 F.3d 293, 296–97 (8th Cir. 1996).

Security concerns are at the epicenter of TCC's policy. Like *Jova*, where there was evidence supporting the prison's assertions on security concerns, TCC has presented evidence, including a lengthy affidavit, substantiating its security concerns. R. at 6–7. TCC cited safety challenges that occurred when religious groups had previously attended night services and prayer groups, disregarding the last in-cell head count. R. at 4. Like *Jihad*, where the prison had reasonable safety concerns regarding inmates leaving their cells five times a day to pray, the present case involves similar security concerns based on passed incidents with prisoners. *See* r. at 4. Like the prison officials in *Ochs*, who pointed to past security breaches, TCC can cite incidents that demonstrate a compelling security interest. R. at 4. Previously, gang-related communications were passed through volunteers who used to supervise group prayer meetings at night. R. at 4. After the policy was changed by Directive #98, *see* r. at 4, 25, members of different organizations disregarded prison security rules and avoided the final head count by staying in the prayer rooms

together, r. at 4. TCC has a compelling interest in the safety and welfare of the prisoners and staff which would be jeopardized by increased movement of prisoners if inmates were allowed to leave their cells five times a day.

TCC has demonstrated that it has a compelling government interest in the safety and security of both the prisoners and the prison staff.

2. The Tourovia Correctional Center's Policy is the Least Restrictive Means of Accomplishing its Compelling Government Interest of Security.

TCC's prayer policies are narrowly tailored to accomplish its interests in maintaining a secure and orderly facility. A government has used the least restrictive means to accomplish its compelling government interests if its policies are drawn in narrow terms to accomplish those interests. *Church of Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 546 (1993). Additionally, the government must show that it lacks other less restrictive means of achieving the desired goal. *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015).

In *Hoevenaar v. Lazaroff*, the Sixth Circuit refused to consider individualized exemptions as a less restrictive means because individualized exemptions were so problematic in the prison that they could not possibly further the state's compelling interest in safety and security. *Hoevenaar v. Lazaroff*, 422 F.3d 366, 371 (6th Cir. 2005). Testimony from the prison warden indicated that individualized exemptions cause a "copycat effect" among prisoners as well as problems with enforcement of the regulation. *Id.*

The court in *Jihad v. Fabian* concluded that allowing prayer during the designated times or, alternatively, within a prisoner's cell was the least restrictive means of achieving the compelling government interest of safety and security. *Jihad*, 680 F. Supp. 2d at 1027. Additionally, the court held that the policy of having approved persons to supervise group prayer times was appropriate in order to accomplish the security interests. *Id.*

In this case, TCC's security policy regarding group prayer allows prisoners to exercise their religion to the extent possible due to safety concerns. Just as the court in *Hoevenaar* properly recognized that individualized exemptions are problematic, the Twelfth Circuit properly identified problems inherent in exempting a single faith group. R. at 21–22. Exempting seven NOI members from the general policy prohibiting prayers after dinner and before headcount would create enforcement problems and ignite rebellion among prisoners who feel entitled to similar treatment. *See* r. at 4. TCC has created plentiful opportunities for any and all religious prisoners to engage in group prayer services that provide a reasonable opportunity for religious exercise without making individualized exemptions. *See* r. at 24.

Furthermore, where the policy in *Jihad* allowing two group prayer meetings a week was the least restrictive means of accomplishing the safety concerns of the prison, TCC's policy allowing three daily group prayers (21 times a week) is the least restrictive means of maintaining a secure and orderly facility. R. at 4–5. The prisoner may conduct any and all additional prayers inside his cell. R. at 4–5.

While Kelly petitioned for nightly prayer services with a chaplain of the same religion, these requests are opposed to the safety and security concerns of TCC. *See* r. at 5. The previous policy, which allowed volunteers to supervise group services for prisoners of the same religion, was suspended because gang-related orders were being communicated to members through the religious services. R. at 4. Like the policy in *Jihad*, where the use of approved persons during specified hours to supervise group prayer times was appropriate to accomplish the compelling government interest of safety, TCC's policy also involves requiring approved persons to lead group prayers, to better protect inmates and staff. R. at 4, 25.

TCC has no less restrictive alternatives available to meet the compelling interest in security. Hiring more chaplains or adding additional working hours to accommodate more prayer time does not take into account the prison's staffing and financial concerns. R. at 7. Using volunteers has already jeopardized prison security in the past. R. at 4. Also, moving headcount to a later time would not solve any of the staffing and financial concerns raised. R. at 7. Last, having the prisoners pay for the chaplain would present a conflict of interest and invoke the same security concerns that led to the adoption of Direction #98. *See* r. at 4, 22.

TCC's prayer policy allowing three group prayer times daily is the least restrictive means of the accomplishing the compelling government interest of security and order within the prison's available resources.

II. THE TWELFTH CIRCUIT PROPERLY VACATED THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT BECAUSE THE TOUROVIA CORRECTIONAL CENTER'S RELIGIOUS DIET POLICY DOES NOT SUBSTANTIALLY BURDEN THE PRISONER'S RELIGIOUS EXERCISE AND THE POLICY FURTHERS A COMPELLING GOVERNMENT INTEREST IN THE LEAST RESTRICTIVE MEANS.

Under RLUIPA, a substantial burden on a prisoner's religious exercise is permissible if the burden furthers a compelling government interest by using the least restrictive means. 42 U.S.C. § 2000cc-1. In upholding the statute's constitutionality this Court stated that an accommodation under RLUIPA "must be measured so that it does not override other significant interests" and must be applied in an "appropriately balanced way." *Cutter*, 544 U.S. at 722. The Court went on to acknowledge that Congress intended for courts to apply RLUIPA with "due deference" to prison officials' expertise in establishing necessary policies that further their interests in order and discipline. *Id.* at 723.

The Twelfth Circuit correctly vacated the district court's grant of summary judgment on Kelly's RLUIPA claim for three reasons. First, TCC's diet policy only applies to prisoners who hold sincere religious beliefs in adhering to religious diets. Second, TCC's diet policy removing

Kelly from the diet plan after he was found in possession of food violating his religious diet, did not substantially burden Kelly religious exercise. Third, even if the policy did place a substantial burden on Kelly's religious exercise, TCC's policy furthers the compelling government interests of discipline and order in the least restrictive means.

A. The Tourovia Correctional Center's Religious Diet Policy Does Not Substantially Burden the Prisoner's Religious Exercise Because the Prisoner Demonstrated a Lack of Sincerity by Failing to Adhere to His Religious Diet.

TCC's diet policy did not burden Kelly's religious exercise because Kelly did not demonstrate a sincerely held religious belief that adhering to a Halal diet was important to his religious exercise. RLUIPA governs restrictions on prisoners' religious exercise, and the burden of persuasion is on the claimant to prove that religious exercise is implicated by the policy at issue. 42 U.S.C. § 2000cc-1(a), 2(b); *Holt*, 135 S. Ct. at 862. In order for religious exercise to be implicated, "a prisoner's request for an accommodation must be sincerely based on a religious belief and not some other motivation." *Holt*, 135 S. Ct. at 862. Although RLUIPA prohibits an inquiry into the centrality of a religious practice, 42 U.S.C. § 2000cc-5(7), the statute "does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter*, 544 U.S. at n.13.

A sincerely held religious belief is one where the adherent has "an honest belief that the practice is important to his free exercise of religion." *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1316 (10th Cir. 2010). If a person regularly changes religious beliefs, breaks from his religious belief, or cannot demonstrate his belief due to non-adherence, the actions are not protected by RLUIPA or any free exercise claim. *Gardner v. Riska*, 444 F. App'x 353, 355 (11th Cir. 2011) (holding a prisoner failed to show a religiously held belief when the prisoner regularly ate non-Kosher items outside of the religious diet plan); *Lindell v. Casperson*, 360 F. Supp. 2d 932, 952–53 (W.D. Wis. 2005) *aff'd sub nom. Lindell v. Govier*, 169 F. App'x 999, 999 (7th Cir. 2006)

(holding that a prisoner who regularly changed religious dietary requests did not hold a sincerely religious belief in religious dietary restrictions).

In *Berryman v. Granholm*, the Sixth Circuit upheld a district court's decision removing a prisoner from a religious diet plan due to the prisoner's lack of sincerely held religious belief. *Berryman v. Granholm*, 343 F. App'x **1, **5 (6th Cir. 2009). Berryman, a prisoner on a strict religious kosher diet, violated prison policy by purchasing non-kosher food. *Id.* at **2. The court held, "only those with sincere beliefs" were protected by the prison meal policy, *id.* at **4, and that by purchasing the non-kosher meat Berryman showed a lack of sincerity by not adhering to a strict kosher diet, *id.* at **2. The court affirmed the district court's finding that the policy removing Berryman from the religious diet plan did not impose a substantial burden on Berryman's religious exercise because he could not show a sincerely held religious belief that the religious diet plan was important to his religious exercise. *Id.* at **2, **5. Because Berryman did not hold a sincere religious belief in the importance of his religious diet, the policy removing him from his religious diet could not place a substantial burden on his religious exercise under RLUIPA.

Similar to the policy in *Berryman*, that allowed a prison to remove a prisoner from a religious diet due to the lack of a sincerely held religious belief, TCC's diet policy only applies to prisoner's who continually adhere to the dietary restrictions of their faith. R. at 26. Like *Berryman*, who purchased meat outside of the religious diet plan, Kelly threatened a fellow prisoner in order to obtain food outside of his Halal diet. R. at 6. By forcing a fellow prisoner to give Kelly food outside of the Halal diet plan, Kelly displayed a lack of sincerity in this particular expression of his Islamic faith. TCC's policy does not substantially burden Kelly's religious exercise because Kelly's failure to adhere to the religious diet indicated a lack of sincerity. R. at 6. Therefore, Kelly

has failed to meet his initial burden of proving that TCC's policy implicated religious exercise protected by RLUIPA.

B. The Religious Diet Policy Does Not Substantially Burden Prisoners' Religious Exercise Because the Policy Does Not Pressure or Coerce Them to Modify or Alter Their Religious Behavior.

Under RLUIPA a government may not place a substantial burden on a prisoner's sincerely held religious exercise. 42 U.S.C. § 2000cc-1. A substantial burden is one where the government "coerce[s] individuals into acting contrary to their belief(s)," or "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs." *Lyng*, 485 U.S. at 450; *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 717–18 (1981). TCC's religious diet policy does not substantially burden prisoners' religious exercise because the policy only applies to prisoners who voluntarily choose to remove themselves from their religious diet policies. *See* r. at 26. Since Kelly's own actions deviated from his religious dietary requirements, r. at 6, Kelly's religious exercise was not burdened.[2]

Circuit courts are split regarding whether a prison must continue providing religious diets for prisoners who lapse in their adherence to their religious dietary practices. *Colvin v. Caruso*, 605 F.3d 282, 296–97 (6th Cir. 2010); *Daly v. Davis*, No. 08-2046, 2009 WL 773880 *1, *2 (7th Cir. Mar. 25, 2009); *Lovelace v. Lee*, 472 F.3d 174, 189 (4th Cir. 2006). This question is a matter of first impression for this Court.

This Court should adopt the precedent set by the Third, Sixth, Seventh, and Eighth Circuits which hold that a policy removing a prisoner from a religious diet due to the prisoner's voluntary deviation from the diet does not substantially burden a prisoner's religious exercise. *Contant v.*

[2] Only the validity of TCC's diet policy under RLUIPA is at issue, per the writ of certiorari granted in this case. R. at 23. However, the policy was also properly applied to Kelly in this instance.

Lowe, 450 F. App'x 187, 190 (3d Cir. 2011); *Berryman*, 343 F. App'x at 6 (6th Cir.); *Daly*, 2009 WL 773880, at *2 (7th Cir.); *Brown-El v. Harris*, 26 F.3d 68, 69–70 (8th Cir. 1994).

In *Daly v. Davis*, the Seventh Circuit held that a prison program did not substantially burden a prisoner's religious exercise by suspending the prisoner from the kosher program after he was caught with non-kosher food items. *Daly*, 2009 WL 773880, at *2. The court held that since the program only removed prisoners from their kosher diets after evidence of backsliding, the program did not "compel" the prisoners to engage in conduct contrary to religious beliefs. *Id.* Instead, the diet program in *Daly* reflected an agreement where "participants agree to purchase and consume only religiously certified foods; [and] those who violate the rules are suspended." *Id.* Since the prisoner in *Daly* chose to breach the policy voluntarily, the Seventh Circuit held the policy did not place a substantial burden on his religious exercise. *Id.*

The Eighth Circuit similarly held in *Brown-El v. Harris* that a policy, which removed a prisoner who deviated from his religious diet during Ramadan, did not substantially burden the prisoner's religious exercise. *Brown-El*, 26 F.3d at 69–70. The court stated that, since the religious diet policy did not coerce members into violating their religious beliefs, there was no substantial burden. *Id.* The Eight Circuit held that Brown-El, the prisoner, "placed himself outside the group of worshippers accommodated by [the policy's] procedures" when he voluntarily broke a Ramadan fast. *Id.* Therefore, since Brown-El voluntarily chose to eat items not within his religious dietary restrictions, the court held the policy did not coerce or pressure Brown-El to modify religious behavior in any way. *Id.* Since the prison policy placed no coercive force on Brown-El to break his religious diet, no substantial burden was placed on his religious exercise. *Id.*

Similar to the policy in *Daly*, TCC's policy is only implicated once prisoners voluntarily deviate from their own religious exercise. R. at 26. The policy does not compel prisoners to

conform or modify their religious dietary behavior in any way. The policy merely provides that prisoners who voluntarily deviate from their religious diets will no longer be provided with a religious exemption. R. at 26. A prisoner can only be removed from the religious diet plan by choosing to voluntarily remove themselves from the program by not adhering to their own religious precepts. R. at 26.

Unlike the circuit courts in *Daly* and *Brown-El,* the Second, Fourth, and Tenth Circuits have held that removing a prisoner from a religious dietary restriction substantially burdens the prisoner's religious exercise. *Lovelace*, 472 F.3d at 189 (4th Cir.); *McEachin v. McGuinnis*, 357 F.3d 197, 204 (2d Cir. 2004); *Makin v. Colo. Dep't of Corrs.*, 183 F.3d 1205, 1215 (10th Cir. 1999). However, all the policies that have been struck down in these circuits are distinguishable because the policies remove prisoners from religious diet plans (or worship privileges) despite the prisoners not voluntarily breaking their own religious beliefs.

In *Makin v. Colorado Dep't of Corrs.*, the Tenth Circuit held that a policy which did not allow prisoners in segregation to participate in any religious diets substantially burden a prisoner's religious exercise. *Makin*, 183 F.3d at 1215. The policy in *Makin* pertained not to prisoners who voluntarily chose to break their religious diets, but to prisoners who were being disciplined for any improper conduct. *Id.* at 1208. Since any prisoner who was put into segregation as a result of unrelated disciplinary action was no longer able to participate in any religious diet plan, the court found the policy burdened prisoner's religious exercise. *Id.* at 1214.

Similarly, in *Lovelace v. Lee,* a policy, which barred a prisoner from participating in all religious activity after he broke a religious fast, was held to be overbroad and a substantial burden on his religious exercise. *Id.* at 181. Although the prison's policy did target Lovelace's backsliding from a religious diet, the court held the policy to be a substantial burden because the policy broadly

disqualified Lovelace from being able to participate in any Ramadan services even though he only lapsed in one tenant of his faith. *Id.* at 187. The court stated that an inmate, "could decide not to be religious about fasting and still be religious about other practices, such as congregational services or group prayer." *Id.* at 188. By removing Lovelace from all Ramadan services the court held the policy significantly modified Lovelace's religious behavior and therefore placed a substantial burden on his religious exercise. *Id.*

The policies in both *Makin* and *Lovelace* are distinguishable from TCC's policy because they were overbroad and were not specific to prisoners who voluntarily chose to deviate from their religious diets. The policy in *Lovelace* overstepped its bounds by forbidding Lovelace from participating in any other expressions of his faith that he never voluntarily gave up. *Lovelace,* 472 F.3d at 188. In contrast, TCC's policy removes prisoners from their religious diet plans, without forbidding them from participating in all religious activities, only if they are caught deviating from their religious diets. *See* r. at 26. Likewise, the policy in *Makin* is distinguishable because it was applied to prisoners who did not voluntarily backslide from their religious diet. The prison in *Makin* denied a religious diet to any prisoner who was put in segregation, thereby forcing these prisoners to modify their religious behavior. This is distinguishable from TCC's policy which only precludes prisoners from staying on their religious diet plans after they choose to voluntarily deviate from their religious diets. R. at 26. Therefore these cases are also distinguishable from the Third, Sixth, Seventh, and Eight Circuit's cases, where the diet policies at issue only removed prisoners from their religious diets in response to the prisoners' own non-conformity.

TCC's policy only modifies the behavior of prisoners who have already voluntarily removed themselves from their diets. After investigating allegations by Kelly's cellmate, TCC officials treated Kelly like any other prisoner who modifies his own religious behavior by breaking

a religious diet. Furthermore, Kelly's temporary removal from participation in prayer services was due to his threatening violence against his new cellmate and not as a result of his backsliding.[3] This Court should adopt the precedent set by the Third, Sixth, Seventh, and Eight Circuits and hold that TCC's diet policy did not create a substantial burden on Kelly's religious exercise because the policy did not coerce or pressure him to change his religious behavior.

C. Even if the Religious Diet Policy Does Place a Substantial Burden on Prisoners' Religious Exercise, the Policy Does Not Violate RLUIPA Because it Furthers a Compelling Government Interest in the Least Restrictive Means.

Even if this Court were to hold that TCC's religious diet policy places a substantial burden on prisoners' religious exercise, the policy furthers the compelling government interests of security and order in the least restrictive means. "Although prisoners retain their constitutional rights, limitations may be placed on the exercise of those rights in light of the needs of the penal system." *Murphy*, 372 F.3d at 983. RLUIPA protects the integrity of the prison system by allowing the government to place necessary restrictions on prisoners' religious exercise when it has a compelling government interest in doing so and these restrictions are the least restrictive means of furthering that interest. 42 U.S.C. § 2000cc-1(a).

This Court held in *Cutter* that, "[w]hile [RLUIPA] adopts a compelling interest standard "[c]ontext matters" in the application of that standard." *Cutter*, 544 U.S. at 710. This Court, along with numerous circuit courts, have traditionally considered security, discipline, and order as

[3] Although the trial court stated that the "prison barred Kelly from attending any worship services for one month as punishment *for the threats against the inmate* and for deviating from his religious diet program," r. at 6 (emphasis added), TCC's policy explicitly states that a religious diet may only be revoked upon evidence of non-adherence to the religious diet, r. at 26. Furthermore, the trial court states that the prison removed Kelly from his diet plan for "one specific infraction," referring to the single instance of backsliding and *not* the threats against his cellmate. R. at 9–10. Neither the trial court nor the appellate court cite Kelly's threats against his cellmate as the cause of his removal from the diet plan. *See* r. at 9–10, 20.

compelling government interests in running an efficient and effective penal institution.[4] Moreover, while the least restrictive means test is an "exceptionally demanding" element to overcome, *Holt*, 135 S. Ct. at 861, courts have continued to hold that it is possible for prisons to meet this standard.[5]

Even if TCC's prison policy does place a substantial burden on prisoners' religious exercise, the policy still does not violate RLUIPA for two reasons. First, TCC's policy furthers the compelling government interests of discipline and order. Second, TCC's policy is the least restrictive means of enforcing these compelling government interests.

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[4] *Holt*, 135 S. Ct. at 866 (acknowledging prisons have an interest in maintaining security); *Cutter*, 544 U.S. at 722–23 (stating RLUIPA should be applied to, "maintain good order, safety, and security in penal institutions); *Banks v. Sec'y Pa. Dep't of Corrs*., 601 F. App'x 101, 107 (3d Cir. 2015) (holding that a prison policy barring indigent Muslims prisoners in high security and general population units from participation in Islamic feasts was reasonably related to penological objectives of inmate security); *Riley v. DeCarlo*, 532 F. App'x 23 (3d Cir. 2013) (holding a prison had legitimate security and cost reasons for not providing a Halal meat diet to all Muslim inmates while still providing a kosher diet for Jewish inmates); *Kuperman v. Wrenn*, 645 F.3d 69, 79–80 (1st Cir. 2011) (noting prison security is, "undoubtedly a compelling state interest".); *Jova*, 582 F.3d at 410 (stating prison's restrictions on prisoners' practice of the Tulukeesh religion served prison officials' compelling security and administrative interests).

[5] *Allah v. Virginia*, 601 F. App'x 201, 204 (4th Cir.) *cert. denied*, 136 S. Ct. 255 (2015) (noting that "due to staff limitations and safety risks to staff and inmates, a complete ban on a religious communal meetings for a specific faith group is the least restrictive means of furthering a compelling state interest in prison safety"); *Alamiin v. Morton*, 528 F. App'x 838, 844 (10th Cir. 2013) (holding that not allowing prisoner's to have prayer oils was the least restrictive means to further government interest of security); *Kuperman v. Wrenn*, 645 F.3d 69, 80 (1st Cir. 2011) (holding a regulation requiring beards to be shaved to a certain length was the least restrictive means of furthering a compelling state interest of security); *Muhammad v. Sapp*, 388 F. App'x 892, 895–96 (11th Cir. 2010) (holding a prison policy forbidding inmates to wear clothing of their choosing in their cells was least restrictive means of furthering compelling government interest of security and order); *Jova*, 582 F.3d at 410 (limiting prisoners from serving as facilitators of meetings and prohibiting martial arts training was least restrictive means of furthering officials' compelling interests in security); *Baranowski v. Hart*, 486 F.3d 112, 125–26 (5th Cir. 2007) (holding that not providing prisoner with kosher meals was the least restrictive means of furthering the compelling government interest of maintaining good order in the prison).

1. The Tourovia Correctional Center's Diet Policy Furthers a Compelling Government Interest in Security by Maintaining Order in the Correctional Facility.

"A prison's interest in order and security is always compelling." *Fowler*, 534 F.3d at 939. In upholding RLUIPA's constitutionality, this Court cited security as a compelling government interest of "particular sensitivity." *Cutter*, 544 U.S. at 722. Order and discipline in a prison system are also compelling government interests that aid in securing prison systems. *Id.* at 723.

In *Baranowski v. Hart*, the Fifth Circuit upheld a policy that did not provide kosher meals for prisoners of the Jewish faith, stating the policy furthered a compelling government interest of maintaining security and order in the prison. *Baranowski*, 486 F.3d at 125. Baranowski, a prisoner at the Huntsville Unit of the Texas Department of Criminal Justice ("TDCJ"), was not given a kosher meal option despite his Jewish religion. *Id.* at 117. The court held that while not supplying Baranowski with a kosher meal did substantially burden his religious exercise under RLUIPA, the policy "[maintained] good order" in the prison and therefore furthered a compelling government interest. *Id.* at 125. The court held that granting Baranowski's request for a special kosher diet and deviating from the established prison policy could jeopardize TDCJ's ability to run meal services efficiently and could lead to the perception that certain inmates were favored over others. *Id.* at 121–22. This would have an "adverse impact on prison morale" and lead to heightened security concerns. *Id*. The court concluded that although TDCJ's policy burdened Baranowski's religious exercise, it furthered the compelling state interest of security by maintaining order.

Similar to the policy in *Baranowski* that furthered the compelling state interest of security and order, TCC's policy furthers the compelling government interests of security by maintaining order. R. at 26. For TCC to permit a prisoner who violates his diet to remain on his religious diet plan jeopardizes TCC's interest in preserving order in the penal system. Similar to the risks of preferential treatment in *Baranowski*, if TCC is unable to discipline prisoners who break policy,

TCC could be seen as showing favoritism to certain inmates. Likewise if a prisoner at TCC can regularly break his diet without any repercussions, TCC's ability to maintain an orderly prison system would be compromised.

TCC's policy only removes prisoners from their religious diet plans when doing so furthers the prison's ability to maintain institutional order.

2. The Tourovia Correctional Center's Diet Policy is the Least Restrictive Means of Furthering a Compelling Government Interest.

A regulation does not substantially burden a prisoner's exercise of religion if the government's compelling interest is accomplished by using the least restrictive means. 42 U.S.C. § 2000cc-1(a).

In *Holt v. Hobbs*, this Court held that a policy, which restricted the length of prisoners' beards, was not the least restrictive means of furthering a compelling government interest in security. *Holt,* 135 S. Ct. at 860. This Court held that since other prisoners were able to have longer beards for health reasons, and since prison officials still could have maintained security while allowing prisoners to have long beards, forcing prisoners to keep their beards at a certain length was not the least restrictive means of ensuring security. *Id.* at 860, 866. Likewise, in *Lovelace v. Lee* the Fourth Circuit held a policy that removed prisoners from all religious activity for breaking one tenant of their faith was not the least restrictive means of achieving order. *Lovelace*, 472 F.3d at 191.

TCC's policy is distinguishable from both *Holt* and *Lovelace* because the policy applies without exception and only applies to prisoners who voluntarily choose to deviate from their religious diets. While this Court held the *Holt* policy was not the least restrictive means because it allowed other prisoners to participate in the restricted behavior, TCC's policy does not have an exception. R. at 26. Furthermore, where the prison in *Holt* had other alternative mechanisms by

which to accomplish its interest in security, TCC has no alternative options that would maintain institutional order. Were TCC to allow prisoners to remain on their religious diets even after they have demonstrated non-adherence, this would compromise TCC's ability to consistently enforce any of its policies. Any prisoner who violates the policy is automatically removed from the religious diet, r. at 26, and to make exceptions would jeopardize order within the prison.

Although this Court held in *Holt* that other prisons were able to maintain security without such a strict policy, other circuit courts have implemented a policy much like TCC's in order to maintain order and discipline. *See Brown-El v. Harris*, 26 F.3d at 69 (removing an inmate from a Ramadan fast list when he broke his fast). Moreover, while the policy in *Lovelace* was not the least restrictive means because it was overbroad, TCC's policy only reaches the particular offense of a prisoner breaking his religious diet. R. at 26.

Therefore, because the policy furthers the compelling government interests of security, order and discipline in the least restrictive means, the policy does not violate RLUIPA.

CONCLUSION

Prison policies that allow for reasonable accommodation without compromising prison security achieve a proper balance between safety and religious exercise. This Court should hold that (1) the Tourovia Correctional Center's security policy regarding prayer does not violate RLUIPA, and (2) the Tourovia Correctional Center's religious diet policy does not violate RLUIPA. Therefore, this Court should affirm the Twelfth Circuit's decision and vacate the district court's grant of summary judgment.

Respectfully submitted,

/s/ *Team 5*
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