No. 472-2015

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IN THE

SUPREME COURT OF THE UNITED STATES

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SIHEEM KELLY,

Petitioner,

v.

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

TCC.

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

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# BRIEF FOR PETITIONER

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Team 7
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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 when it outright prohibits Muslim inmates from performing night prayer, TCC fails to demonstrate that its alleged concerns are grounded on any sound basis, and TCC failed to consider other less restrictive means?

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 when it prohibits Mohammed from participating in his religious diet and thirty days of prayer services, it is grounded on a conclusory affidavit, and TCC failed to consider and reject least-restrictive means?

## JURISDICTIONAL STATEMENT

This Court has jurisdiction to review this case under 28 U.S.C. § 1254(a), which provides that "[c]ases in the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . ." This Court granted the petition for a writ of certiorari, in Kelly v Echols, Docket No. 472-2015

## STATEMENT OF THE CASE

### Statement of Facts

The Tourovia Correctional Center ("TCC") was once very accommodating to the diverse religious backgrounds of its inmates. However, it changed its open religious-services policy in August of 1998. R. at 4. That year, TCC banned the use of religious services volunteers and availability of night services. R. at 4. This policy change is reflected in Tourovia Directive #98 ("TD #98"). R. at 25. TD #98 has the effect of banning *all* religious night services. R. at 4. TCC's extreme curtailment on the religious exercise of its inmates was a response to the illicit conduct of a few Christian and Sunni Muslim inmates. R. at 4. TD #98 works in conjunction with TCC's nightly 8:30 p.m. head count. R. at 4. Inmates not found within their cell before the final head count risk being locked in solitary confinement. R. at 4.

In 2000, Siheem Mohammed[1] began serving his sentence at TCC. R. at 3. Two years later, Mohammed converted to the Nation of Islam ("NOI"). R. at 3. He immediately notified TCC of his conversion by filing a Declaration of Religious Preference Form. R. at 3. Under TCC's policy, inmates become acknowledged members of a religious group eligible for services by filing the form with the prison. R. at 3. In accordance with his faith, Mohammed elected to change his last name to "Mohammed" and asked TCC officials to address him as such. R. at 3. He attends all available NOI services and has no history of physical violence with any other inmates. R. at 5, 14.

Similarly, the other NOI members at TCC have maintained good behavioral standing with the prison during the last five years. R. at 3. In fact, none of TCC's current NOI inmates have a record or history of violence within the prison. R. at 3. Still, TCC remains oddly

[1] The lower courts chose to refer to Mohammed by his birth name, "Siheem Kelly." Out of respect to our client's religious beliefs, we will reference our client by his preferred name, "Mohammed."

suspicious of the group and "monitors them to make sure they are not engaging in illicit or gang activity." R. at 3.

The NOI requires a high level of devotion from its adherents. R. at 3. It requires that they pray five times a day. R. at 3. NOI prayer times, termed "Obligatory and Traditional Prayers," are to be performed at: (1) dawn, (2) early afternoon, (3) late afternoon, (4) sunset, and (5) late evening. R. at 3-4. NOI adherents require a very clean and solemn environment—they must wash themselves and their clothes, secure a clean surface on which to kneel, and face Mecca. R. at 4. The faith mandates that adherents pray without any interruptions, and most adherents prefer group prayer. R. at 4. Importantly, NOI requires that its adherents maintain a strict vegetarian diet, or "Halal." R. at 3.

Mohammed quickly claimed a leadership role within TCC's NOI community. R. at 4. In February of 2013, in a liaison capacity for all of TCC's Mohammed, he filed a written prayer-service request for a congregational nightly prayer service to be held at 8:00 p.m. R. at 4. He specifically asked that the prayer service be held after the last meal, but before the final head count. R. at 4. A week later, Saul Abreu, Director of TCC's Chaplaincy Department, notified Mohammed that the request was denied due to TCC's head-count policy. R. at 5. He also indicated that current policy was more than adequate to fulfill their prayer requirements. R. at 5.

Mohammed subsequently filed a grievance with TCC. R at 5. He asserted that he and his brothers were unable to pray in their cells because the environment was distracting and disrespectful to their faith. R. at 5. He stated that his cellmate intentionally ridiculed him and engaged in lewd behavior while he attempted to pray. R. at 5. He also specified that several NOI brothers were facing similar problems. R. at 5. TCC denied the grievances on grounds that Mohammed failed to prove the conduct occurred. R. at 5. Undeterred, Mohammed filed a second

grievance with Abreu, explaining that praying in his cell, within feet of a toilet, violated the cleanliness requirements of his faith. R. at 5. This grievance was also denied. R. at 5.

Thereafter, Mohammed filed a third, formal grievance that included his previous claims. R. at 5. Again, he requested a nightly congregational service for his NOI brothers to be held outside of a cell. R. at 5. The grievance included a verse from *The Holy Qu'ran* that explained why his faith requires a nightly congregational service.[2] Again, Mohammed's grievance was denied. R. at 5. TCC's warden, Kane Echols, responded that Mohammed's requests violates TD #98 and his cellmate allegations could not be verified. R. at 5-6.

Two weeks later, Mohammed's new cellmate reported that Mohammed bullied him for his meatloaf dinner. R. at 6. The cellmate provided a written statement attesting to his allegations. R. at 7. A formal investigation failed to provide any evidence or allegations that Mohammed actually perpetuated any violence. R. at 6. Sometime later, a search of Mohammed's cell revealed meatloaf wrapped in a napkin under his mattress. R. at 6. Mohammed persistently denied that the meatloaf was his. R. at 6. As a result of the meatloaf being found, TCC removed Mohammed from its vegetarian diet program. R. at 5. Additionally, he was barred from attending any worship services for an entire month. R. at 5.

The punishments were rendered pursuant to Tourovia Directive #99 ("TD #99"). R. at 26. TD #99 reserves TCC the option of removing an inmate off a religious diet program if he is caught breaking religion's diet. R. at 26. Moreover, TCC may suspend an inmate's right to attend religious services, for any amount of time, if it finds evidence of violence or threat of violence. R. at 5.

[2] R. at 5; see The Holy Qu-ran, 17:78, 20:130 ("Keep up prayer from the declining of the sun till the *darkness of the night*, and the recital of the Quran. Surely the recital of the Quran at dawn is witnessed" (emphasis added); "[C]elebrate the praise of the Lord before the rising of the sun and before its setting, and glorify [Him] *during the hours of the night* and parts of the day, that thou mayest be well pleased." (Emphasis added.)

Maintaining strict adherence to his religious beliefs, Mohammed responded to his treatment through a hunger strike. R. at 6. After only two days, however, prison employees began to forcibly tube-feed Mohammed. R. at 6. The invasiveness and pain forced Mohammed to end his hunger strike and consume food that violates his religious beliefs and practices. R. at 6.

**Procedural History**

Mohammed sued Kane Echols, in his capacity as Warden of TCC and Saul Abreu, in his capacity as director of the TCC Chaplaincy Department (collectively, "TCC"), for violating his religious rights under RLUIPA. R. at 6. ON March 7, 2015, the District Court for the Eastern District of Tourovia granted Mohammed's motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure, holding that both of TCC's policies substantially burdened Mohammed's religious exercise and were not the least-restrictive means of advancing compelling governmental interests. R. at 15. TCC appealed to the Twelfth Circuit Court of Appeals. R. at 16. On June 1, 2015, the Twelfth Circuit reversed the District Court, granting summary judgment in favor of TCC on the basis that the policies did not substantially burden Mohammed's religious exercise. R. at 23.

## SUMMARY OF THE ARGUMENT

This Court should affirm the District Court and the Twelfth Circuit Court of Appeals insofar as those courts uniformly held that Mohammed's night prayers and religious diets are religious exercises under RLUIPA. This has not been a contentious issue because this Court has clearly established that participation in prayer and special religious diets constitute religious exercises.

This Court should reverse the Twelfth Circuit by holding that TD #98 substantially burdened Mohammed's religious exercise. Under RLUIPA, even rules of general applicability, like TD #98, may substantially burden a religious exercise. TD #98 substantially burdens Mohammed's religious exercise because it places an outright ban on his ability to congregate and pray at night. Furthermore, TCC should not have inquired into whether nightly congregational prayers are "central" to Mohammed's religious practice.

This Court should reverse the Twelfth Circuit by holding that TD #99 substantially burdened Mohammed's religious exercise. Mohammed has demonstrated that his beliefs are sincere. Circuit courts have erred in holding that a policy restricting a sincere but imperfect believer from a religious diet does not create a substantial burden. TD #98 substantially burdens Mohammed's religious exercise because it suspended him from group prayer for thirty days and because it banned him from his religious diet, despite his sincerely held beliefs.

This Court should reverse the Twelfth Circuit by holding that TCC failed to meet its burden of showing that TD #98 advances a compelling governmental interest. TCC's claim that TD #98 furthers security interests is grounded in speculation and exaggerated fears, and a mere assertion of security interests, without evidence, is not enough to establish a compelling interest. Further, TCC relied on a faulty, conclusory affidavit when attempting to demonstrate that TD #98 advances compelling governmental interests.

This Court should reverse the Twelfth Circuit by holding that TCC failed to meet its burden of showing that TD #99 advances a compelling governmental interest. The affidavit TCC submitted has little evidentiary value because Abreu was unqualified to create the affidavit. Moreover, TCC failed to provide specific evidence in support of the compelling interests it asserted.

This Court should reverse the Twelfth Circuit by holding that TCC failed to meet its burden of showing that TD #98 is the least-restrictive means of achieving the compelling interests that it claims. The Twelfth Circuit erred in placing the burden of proving least-restrictive means on Mohammed. Further, TCC failed to consider and reject alternative, less-restrictive means of advancing its interests.

This Court should reverse the Twelfth Circuit by holding that TCC failed to meet its burden of showing that TD #99 is the least-restrictive means of achieving the compelling interests that it claims. TCC failed to consider and reject less-restrictive alternatives. Further, removing an inmate from group prayer as a punishment for breaking a religious diet is more restrictive than necessary.

## ARGUMENT

Congress enacted the Religious Land Use and Institutionalized Persons Act ("RLUIPA")[3] "to provide very broad protection for religious liberty." Holt v. Hobbs, 135 S.Ct. 853, 859 (2015) (quoting Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2760 (2014). Section 3 of RLUIPA provides that "[n]o government shall impose a substantial burden on the religious exercise" of an institutionalized person unless the government demonstrates that the burden "is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). RLUIPA applies to state prisons, 42 U.S.C. § 1997(1)(B)(ii) and prisons that receive federal financial assistance. 42 U.S.C. § 2000cc-1(b). Thus, RLUIPA consists of four elements: The prisoner must make a prima facie case that (1) the prison policy burdens a religious exercise and (2) the burden is substantial; then, the burden shifts to the government to

[3] RLUIPA allows prisoners "to seek religious accommodations pursuant to the same standard as set forth in [the Religious Freedom Restoration Act] [("RFRA)]." Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 436 (2006).

show that the substantial burden (3) furthers a compelling governmental interest and (4) is the least restrictive means of achieving that interest. Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 37-38 (1st Cir. 2007).

This Court should reverse the Twelfth Circuit Court of Appeals and hold that TD #98 and TD #99 are violations of RLUIPA. First, there is no question that praying and eating a religious diet are religious exercises under RLUIPA. Cutter v. Wilkinson, 544 U.S. 709, 715 (2005). TD #98 substantially burdens Mohammed's religious exercise because it prohibits him from participating in congregational night prayer. R. at 4. TD #99 substantially burdens Mohammed's religious exercise because it prohibits him from participating in his religious diet and removed him from all congregational prayer for thirty days. R. at 6. Moreover, neither policy is the least restrictive means of advancing a compelling governmental interest.

## I. DENIAL OF A NIGHTLY PRAYER AND A RELIGIOUS DIET IS UNDOUBTEDLY A RELIGIOUS PRACTICE UNDER RLUIPA.

A "religious exercise is defined by RLUIPA as any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7). This Court stated that the "exercise of religion" often involves "physical acts," such as "assembling with others for a worship service" and "abstaining from certain foods." Emp. Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 877 (1990) (internal quotations omitted).

TCC's TD #98 and TD #99 burdened Mohammed's religious exercise by keeping him from nighttime congregational prayer, by banning him from his religious diet, and by excluding him from all prayer services for thirty days. R. at 4, 6. NOI requires members to partake in five daily prayers, and it requires them to participate in a vegetarian diet, known as "Halal." R. at 3-4. Prayer and special diets fit neatly within the categories of physical acts this Court has described as the "exercise of religion." Smith, 494 U.S. at 877. Moreover, the issue has not been

contentious in the lower courts, as the Twelfth Circuit affirmed the District Court's "reasoning and conclusion that both practices involved in this case are undoubtedly religious practices and, therefore, subject to RLUIPA." R. at 17.

## II. TD #98 AND TD #99 SUBSTANTIALLY BURDENS MOHAMMED'S RELIGIOUS EXERCISES.

The inmate must establish the prima facie case that the challenged policy constitutes a substantial burden under RLUIPA. § 2000cc–2(b). While courts have disagreed when trying to define "substantial burden,"[4] this Court has found a substantial burden when the government put "substantial pressure on an adherent to modify his behavior and to violate his beliefs." Hobbie v. Unemployment Appeals Comm'n of Fla., 480 U.S. 136, 141 (1987).

TD #98 puts substantial pressure on Mohammed's religious practice because it forces him to violate his beliefs by not congregating with his fellow believers for a solemn prayer at night. R. at 4. TD #99 substantially burdens Mohammed's religious exercise because it forces him to violate his beliefs by eating food inconsistent with a Halal diet. R. at 6.

### A. This Court Should Reverse The Twelfth Circuit And Hold That TD #98 Places A Substantial Burden On Mohammed's Exercise Of Religion Because It Flatly Prohibits Him, By Means Of Physical Punishment, From Participating In Congregational Night Prayers.

Under RLUIPA, a substantial burden on the religious exercise of an inmate may include the application of a rule of general applicability. § 2000cc-1(a). RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." § 2000cc-5(7)(A). A substantial burden occurs when "the government puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007). Because TD #98 places

[4] See generally *Jonathan Knapp, Making Snow in the Desert: Defining a Substantial Burden Under RFRA*, 36 Ecology L.Q. 259 (2009) (discussing controversy over the standard).

substantial pressure on Mohammed to substantially modify his behavior and violate his religious beliefs, it substantially burdens his exercise of religion.

### 1. TD #99, a rule of general applicability, creates a substantial on Mohammed's religious exercise.

A prison cannot substantially burden a person's exercise of religion "even if the burden results from a rule of general applicability."[5] In O Centro, a religious organization sued to protect its use of hoasca, a substance with religious importance. Id. at 425-26. This Court unanimously rejected the government's argument that the Controlled Substances Act, a law of general applicability, could accommodate no exceptions under RFRA. Id. at 439. Instead, the Court commented that RFRA allows for judicially crafted exceptions to laws of general applicability. Id. at 434.

RLUIPA requires that TCC provide Mohammed with night services regardless of whether it may be granting benefits not generally available to others. In O Centro, this Court dismissed the idea that laws of general applicability cannot accommodate religious exceptions under RFRA. Id. at 439. Yet, here, the Twelfth Circuit found that denying Mohammed's request was not a substantial burden because he was asking for benefits not generally available to other inmates. R. at 17, 18. RLUIPA was specifically designed to carve exceptions to rules of general applicability to protect the religious exercise of prison inmates. The Twelfth Circuit's reasoning is particularly puzzling because RLUIPA's text explicitly protects religious exercise in the face of "rule[s] of *general applicability*." § 2000cc-1(a) (emphasis added). Similar to the prison in O Centro, TCC does not seem to comprehend RLUIPA's purpose.

### 2. TD #98 Policy flatly prohibits Mohammed from performing in a religious exercise.

[5] Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal, 546 U.S. 418, 424 (2006) (quoting 42 U.S.C. § 2000bb-1(a)); see also 42 U.S.C.A. § 2000cc-1(a).

An outright ban of a religious practice that is motivated by a sincerely held religious belief is a substantial burden under RLUIPA. Yellowbear v. Lampert, 741 F.3d 48, 56 (10th Cir. 2014). In Yellowbear, a Native American inmate sued under RLUIPA to gain access to his prison's sweat lodge. Id. at 53. The prison had refused access on grounds that the extra security needed to transport the inmate to and from the sweat lodge was "unduly burdensome." Id. The court remanded, holding that a reasonable fact finder could conclude that the prison substantially burdened the inmate's religious exercise through its outright prohibition. Id. at 56.

Under RLUIPA, a prison may not investigate whether an inmate's particular practice is "central" to his religion. Greene v. Solano Cty. Jail, 513 F.3d 982, 986 (9th Cir. 2008).[6] In Greene, an inmate challenged a prison policy prohibiting maximum security inmates from participating in group worship. Id. at 984. The court explained that RLUIPA protects "any exercise of religion, whether or not compelled by or central to, a system of religious belief." Id. at 986. The court held, with "little difficulty," that banning group prayer is a substantial burden under RLUIPA. Id. at 988.[7]

TD #98's outright prohibition on night prayer, backed by physical punishment, is a substantial burden on Mohammed's exercise of religion. Mohammed's faith requires that he pray five times a day in a clean, solemn environment. R. at 3-4. Similar to the prison in Yellowbear, 741 F.3d at 53, TD #98 substantially burdens Mohammed's religious exercise through an outright prohibition on his right to night prayer. If Mohammed disobeys TD #98 and misses the

[6] See also Cutter v. Wilkinson, 544 U.S. 709, 715 (2005) (explaining that RLUIPA defines "religious exercise" to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief"); Yellowbear, 741 F.3d at 54) ("[n]either must the religious claimant prove that the exercise at issue is somehow 'central' or 'fundamental' to or 'compelled' by his faith").

[7] See also Murphy v. Mo. Dep't of Corrs., 372 F.3d 979, 988 (8th Cir.2004) (concluding that a ban on "communal worship" substantially burdened inmate's religious exercise, thereby precluding summary judgment); Meyer v. Teslik, 411 F.Supp.2d 983, 989 (W. D. Wis. 2006) (holding that ban on group worship substantially burdened inmate's religious exercise and noting that, "[i]t is difficult to imagine a burden more substantial than banning an individual from engaging in a specific religious practice").

final head count, he faces solitary confinement. R. at 4, 12. Contrary to RLUIPA's intent, TCC's policy forces Mohammed to choose between: (1) following his religious beliefs and facing solitary confinement; or (2) praying in his cell, within feet of a toilet and a distracting cellmate and denigrate his religion. The fact that Mohammed is allowed to pray in his cell does not alter the fact that TD #98 violates his rights under RLUIPA.

TCC wrongly inquired into whether the NOI faith compels its adherents to conduct nightly congregational prayers. Plainly put, RLUIPA protects all "religious exercise[s]," irrespective of "whether or not [they are] compelled by . . . a system of religious belief." § 2000cc-5(7)(A). TCC had no business inquiring whether nightly congregational prayers are mandatory or merely preferred under the NOI faith. R. at 19. Still, regardless of whether they are mandated by Islam, "they are important to the sacred ritual of prayer." R. at 12.

The record further demonstrates that TCC's denial of Mohammed's night service request places a substantial burden on his exercise of religion. First, praying a few feet away from his cell toilet would violates the tenets of the NOI. R. at 5. Second, a disrespectful cellmate and his usage of the cell toilet during prayer undercuts the sanctity of NOI prayer. R. at 12. Denying members of the NOI faith a nightly service derogates from the protections set forth for institutionalized persons under RLUIPA.

### B. This Court Should Reverse The Twelfth Circuit And Hold That TD #99 Places A Substantial Burden On Mohammed's Religious Exercise Because It Prohibits Him From Participating In His Religious Diet And Thirty Days Of Prayer Services, Despite His Sincere Beliefs.

In the context of dietary backsliding, the substantial-burden issue requires a two-part inquiry. See Moussazadeh v. Texas Dep't of Criminal Justice, 703 F.3d 781, 792 (5th Cir. 2012). First, courts must determine whether an inmate's belief is sincere. Id. Next, assuming the belief is sincere, courts must determine whether the challenged dietary policy substantially burdens that

sincere belief. See Lovelace v. Lee, 472 F.3d 174, 188-90 (4th Cir. 2006). This Court should hold that Mohammed's beliefs are sincere as a matter of law and that TD #99 substantially burdens his beliefs.

**1. Mohammed's behavior establishes the sincerity of his beliefs.**

Embedded within the substantial-burden inquiry is the question[8] of whether the inmate's beliefs are sincere. Moussazadeh, 703 F.3d at 790. However, a single violation of one's religious tenets does not establish insincerity. Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988).[9] Rather, sincerity is generally presumed and easily establish by an inmate's behavior. Moussazadeh, 703 F.3d at 791. Therefore, this Court should hold Mohammed's behavior establishes that his beliefs are sincere.

Sincerity does not require steadfast adherence to one's religion. Reed, 842 F.2d at 963. In Reed, the district court concluded that Reed was insincere based on evidence that he ate meat and shaved his beard, both acts contrary to his professed beliefs. Id. The Seventh Circuit Court of Appeals disagreed, reasoning that "the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere." Id. The court emphasized that "backsliding" could be treated as "mere[] evidence of insincerity," but that treating it as conclusive evidence of insincerity would be improper. Id.

Sincerity of belief is easily established based on an inmate's "words and actions." Moussazadeh, 703 F.3d at 791. In Moussazadeh, although Moussazadeh explained to the district court that he grew up in a Jewish household and that he consistently bought kosher food in the

[8] This is a question of law that can be determined by this Court. See Moussazadeh, 703 F.3d at 792 (reversing the district court and finding Moussazadeh's beliefs sincere as a matter of law).

[9] See also Moussazadeh, 704 F.3d at 791 ("A finding of sincerity does not require perfect adherence to beliefs expressed by the inmate, and even the most sincere practitioner may stray from time to time."); Grayson v. Schuler, 666 F.3d 450, 454 (7th Cir. 2012) ("A sincere religious believer doesn't forfeit his religious rights merely because he is not scrupulous in his observance; for where would religion be without its backslider, penitents, and prodigal sons?").

commissary, the court held that his beliefs were insincere as a matter of law because he purchased non-kosher food multiple times. Id. The Fifth Circuit Court of Appeals reversed the district court, explaining that sincerity is "generally presumed or easily established" by the "words and actions of the inmate," and holding that the evidence Moussazadeh submitted, along with his continued prosecution of the lawsuit, demonstrated that his beliefs were sincere. Id. (quoting McAlister v. Livingston, 348 Fed. App'x 923, 935 (5th Cir. 2005)).

Even assuming Mohammed violated his religious diet, that single violation does not render his beliefs insincere. Reed, 842 F.2d at 963. TCC removed Mohammed from his religious diet based on limited evidence that he obtained meatloaf by threatening his cellmate. R. at 6. Similarly, in Reed, the prison removed Reed from his religious diet based on evidence that he ate meat and shaved his beard contrary to his claimed beliefs. Reed, 842 F.2d at 962. However, the court in Reed held that Reed's acts did not render his beliefs insincere because sincerity does not require steadfast adherence to one's religion. Id. at 963. This Court should adopt the reasoning from Reed—namely, that sincerity does not require perfection—and hold that Mohammed's supposed backsliding does not render his beliefs insincere. Id.; R. at 6.

On the contrary, Mohammed's words and actions establish that his beliefs are sincere. Mohammed converted to NOI fourteen years ago and requested that his last name be changed to "Mohammed." R. at 3. He attends all available prayer services, has filed three grievances requesting more prayer services, and serves as liaison to the six other NOI members. R. at 5. Mohammed consistently denied his cellmate's allegations and insisted the meatloaf found under his mattress was not his. R. at 5. He even went on a two-day hunger strike that ended only after TCC painfully force-fed him through a tube. R. at 6. Finally, Mohammed has pursued this lawsuit all the way to the Supreme Court. R. at 23. Thus, the evidence of Mohammed's sincerity

is even more compelling than the evidence in Moussazadeh, where the court determined Moussazadeh's Jewish beliefs were sincere—despite three clear violations of his religious diet—because he grew up Jewish, bought kosher food at the commissary, and persisted in the prosecution of his lawsuit up to the Fifth Circuit Court of Appeals. Moussazadeh, 703 F.3d at 790-91. Thus, this Court should hold that Mohammed's "words and actions" establish that his beliefs are sincere as a matter of law. Id.

**2. This court should resolve a circuit split and hold that TD #99 substantially burdens Mohammed's religious exercise by suspending him from group prayer and by removing him from his religious diet.**

Courts have disagreed about whether a prison's dietary policy violates RLUIPA when it removes the prisoner from a religious diet for backsliding. Kuperman v. Warden, New Hampshire State Prison, No. 06-cv-420-JL, 2009 WL 4042760, at *6 (D.N.H. Nov. 20, 2009). This Court should resolve the circuit split by determining that a policy creates a substantial burden when its consequence prevents a prisoner from having a diet he sincerely believes is required by his religion. Regardless of how this Court resolves the circuit split, it should determine that TD #99 substantially burdens Mohammed's religious practice because it removed him from prayer services for thirty days and because it has prevented him from having a diet consistent with his religion. R. at 6.

*i. This Court should resolve the circuit split and hold that a policy substantially burdens a believer's religious exercise when it removes him from a religious diet for backsliding*

Courts are split on whether prison officials must continue to accommodate prisoners who are imperfect in their religious practice. Kuperman, 2009 WL 4042760, at *6. Some courts have held that inmates voluntarily remove themselves from a religious diet by violating dietary policies and that the violating inmates therefore experience no substantial burden, while other

courts have held that such policies create a substantial burden because they prevent imperfect but nonetheless sincere believers from participating in their religious diets. Compare Daly v. Davis, No. 08-2046, 2009 WL 773880, at *2 (7th Cir. March 25, 2009); Brown–El v. Harris, 26 F.3d 68, 69-70 (8th Cir. 1994) with Lovelace, 472 F.3d at 187 (4th Cir. 2006); Kuperman, 2009 WL 4042760, at *6.

The Seventh and Eighth circuits have upheld policies that allow prison officials to remove a prisoner from a religious diet after a single dietary violation. See Daly, 2009 WL 773880, at *2; Brown–El, 26 F.3d at 69-70. In Daly, the court upheld the prison's policy that punished dietary violations with temporary suspension and reevaluation by the prison's chaplain. Daly, 2009 WL 773880, at *1. When officials suspended the plaintiff from his kosher diet program on three separate occasions, the Seventh Circuit upheld[10] the policy, reasoning that "Daly was forced to eat non-Kosher meals only because he turned down the Kosher ones." Id. at *2. Similarly, in Brown–El, prison officials removed the plaintiff from a Ramadan meal plan pursuant to a policy that mandated removal after a single dietary violation. Brown–El, 26 F.3d at 69. The Eighth Circuit Court of Appeals upheld the prison's policy under the Free Exercise Clause,[11] reasoning that it did not coerce worshippers into violating their religious beliefs because it removed from the procedures only those worshippers who chose to break the fast. Id. at 70.

Conversely, the District Court for the District of New Hampshire explained that a policy creates a substantial burden when it removes a sincere believer from a religious diet. Kuperman, 2009 WL 4042760, at *6. In Kuperman, the court analyzed a policy that allowed discretionary

[10] The relevant challenge was under the Religious Freedom Restoration Act ("RFRA"), rather than RLUIPA; however, for purposes of the substantial burden inquiry, the analysis is the same. *See Kevin Brady, Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA?*, 78 U. Chi. L. Rev. 1431, 1436 (2011).

[11] Const. Amend. I

suspension of a prisoner's religious diet only after a prisoner violated the diet four times within a two-year period. Id. at *2-3. The court determined that the policy could violate RLUIPA, reasoning that "[w]hile it is true . . . the policy imposes no burden on the hypothetical prisoner who adheres perfectly to his religious diet, few religious believers—especially imprisoned believers—would lay claim to perfection." Id. at *5. Thus, the policy could "allow the prison to suspend an inmate's religious diet based on a limited number of dietary violations, even if the inmate has sincere religious beliefs." Id.

Similarly, the Fifth Circuit Court of Appeals held that a policy created a substantial burden when it removed a prisoner from a religious diet, along with morning prayers, after a single dietary violation. Lovelace, 472 F.3d at 187. In Lovelace, prison staff removed Lovelace from a Ramadan diet "pass list"—and, by extension, morning group prayers—for twenty-four of the thirty days of Ramadan when a prison official claimed he saw Lovelace violating his diet. Id. at 181. The court held that the prison's removal policy substantially burdened Lovelace's religious practice because once the policy took effect it excluded him from his religious practices. Id. at 187. The court explained that removing Lovelace from morning prayer was a critical deprivation because it restricted "the religious exercise of any NOI inmate who cannot or does not fast, but who still wishes to participate in group services or prayers." Id. at 188.

The courts in Daly and Brown-El fail to account for the effect the removal policies have on sincere believers. These courts have reasoned as follows: A policy removing a prisoner from a religious diet for backsliding does not create a substantial burden because it is the prisoner's choice, rather than the policy's compulsion, that causes the prisoner to eat food inconsistent with the prisoner's religious beliefs. Daly, 2009 WL 773880, at *2. This reasoning does not account for the application of the policy once triggered. See Kuperman, 2009 WL 4042760, at *6. That

is—while an imperfect but sincere believer may initially succumb to temptation and violate his religious diet, thereafter, the policy coerces the sincere believer into a sustained inability to choose a religious diet. See Kuperman, 2009 WL 4042760, at *6. Because the courts' reasoning from Daly and Brown–El is incomplete, this Court should adopt the courts' reasoning from Lovelace and Kuperman. Lovelace, 472 F.3d at 187 (4th Cir. 2006); Kuperman, 2009 WL 4042760, at *6.

*ii. Regardless of how this Court resolves the circuit split, TD #99 is more burdensome than the policies in Daly and Brown–Ela and therefore constitutes a substantial burden*

TD #99 is distinguished from the policies in Daly and Brown-El. In Daly, the prison's policy mandated temporary suspension and reevaluation of the prisoner's suitability for the special diet when they violated the diet. Daly, 2009 WL 773880, at *2. Conversely, TD #99 "reserves the right to revoke . . . for any designated period of time or revoke the privilege permanently" and has no provision for reevaluation. R. at 26. Thus, while the policy in Daly required reevaluation and would reinstate the religious diet once the chaplain verified the prisoner was suitable for the program, TD #99 does nothing to ensure that sincere believers have their religious diets reinstated after a violation. R. at 26. Further, TD #99 is distinguished from the policy in Brown-El because the policy in Brown–El survived a challenge under the Free Exercise Clause, which offers less protection of prisoners' free exercise rights than RLUIPA. See generally Smith, 494 U.S. 872. Finally, in neither case was there any act approaching the vulgarity exhibited by the prison staff at TCC when they forcibly tube-fed Mohammed, thereby injecting him with food he believed to be blasphemous. R. at 6.

*iii. TD #99 creates a substantial burden because it caused Mohammed's suspension from prayer services and forced him to consume food inconsistent with his sincere beliefs*

TD #99 is more similar to the policy in Kuperman because it substantially burdened Mohammed's religious exercise by preventing him from participating in the religious diet required by his sincerely held religious beliefs. Kuperman, 2009 WL 4042760, at *6. Not only did TD #99 prevent Mohammed from eating food consistent with his beliefs, it forced him—by means of painful tube feeding—to consume food prohibited by his religion. R. at 6. Similarly, but significantly less burdensome, in Kuperman, the prison's policy gave the prison discretion to remove a prisoner from a religious diet only after four violations within a two-year period. Kuperman, 2009 WL 4042760, at *2. The court in Kuperman noted that the policy could create a substantial burden if it removed a sincere but imperfect believer from his religious diet. Id. at *5. Because TD #99 is significantly more burdensome than the policy in Kuperman, this Court should hold that the policy substantially burdens Mohammed's religious exercise.

Similar to the policy in Lovelace, TD #99 substantially burdens Mohammed's religious exercise because it punishes him by excluding him from his religious diet while also preventing him from participating in group prayer. Lovelace, 472 F.3d at 187-88; R. at 6. TCC's policy removed Mohammed from his religious diet indefinitely and from prayer services for thirty days. R. at 6. Similarly, in Lovelace, the prison's policy effectively excluded Lovelace from participating in the Ramadan fast and morning group prayer. Lovelace, F.3d at 187. The court in Lovelace held that removing Lovelace from group prayer as a consequence of a dietary violation constituted a substantial burden because those choosing not to fast may still want to pray. Id. at 188. This Court should follow the sound reasoning from Lovelace and hold that banning Mohammed from group prayer in addition to removing him from his religious diet amounts to a substantial burden under RLUIPA.

## III. TD #98 AND TD #99 DO NOT ADVENCE ANY COMPELLING INTERESTS.

Under RLUIPA, once the prisoner establishes that a government policy has substantially burdened a religious exercise, the burden shifts to the government to show that the policy furthers a compelling governmental interest. Holt, 135 S. Ct. at 863. This Court should reverse the Twelfth Circuit Because TD #98 and TD #99 do not advance compelling interests.

### A. This Court Should Reverse The Twelfth Circuit And Hold That TD #98 Furthers No Compelling Interests Because It Is Grounded On Speculation And Exaggerated Fears And A Conclusory Affidavit Devoid Of A Sound Basis For TCC's Asserted Concerns.

Under RLUIPA, prison policies "grounded on mere speculation [and] exaggerated fears" cannot establish the presence of a compelling state interest. 146 Cong. Rec. at 16699 (quoting S. Rep. 103-111 at 10). When establishing the presence of a compelling interest, prisons have the burdens of "going forward with the evidence and of persuasion." § 2000cc-5(2). TD #98 is grounded on speculation and exaggerated fears. Moreover, TCC fails to meet its evidentiary and persuasive burdens. Therefore, TCC fails to demonstrate that TCC's Night Prayer Policy advances any compelling interests.

#### 1. TCC fails to show that TD #98 furthers security interests.

Prison policies grounded on "speculation [and] exaggerated fears" do not satisfy RLUIPA's compelling state interest requirement. Spratt v. Rhode Island Dep't Of Corr., 482 F.3d 33, 39 (1st Cir. 2007).[12] In Spratt, an inmate challenged a prison's blanket ban on inmate preaching. Id. at 34-35. State officials defended the policy through an affidavit which explained that inmate preaching could pose security concerns. Id. at 36. The affidavit stated that "placing an inmate in a position of actual or perceived leadership before an inmate group threatens security, as it provides the perceived inmate leader with influence within the administration." Id.

[12] See 146 Cong. Rec. at S7775 (the Congressional sponsors of RLUIPA stated that "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements") (internal quotation marks omitted).

The inmate argued that the affidavit's conclusions were "exaggerat[ions] and speculati[ve]." Id. at 37. The court held that the prison failed to establish that the blanket ban furthered prison security interests. Id. at 43.

Prisons substantially burdening inmates' religious exercise must do more than assert security concerns. Murphy v. Mo. Dep't of Corrs., 372 F.3d 979, 988 (8th Cir.2004). In Murphy, an inmate was a member of a religious group only open to Caucasians that demanded separation from non-Caucasians. Id. at 981. The inmate sought formal recognition and accommodations for the group. Id. at 982. The prison denied the group congregational worship accommodations. Id. The prison argued the decision was necessary to reduce the likelihood of racial violence. Id. Besides, the prison argued, it had acted in accordance with its policy of forbidding racial-based exclusions from religious services. Id. The court sided with the prisoner, commenting that RULIPA compels the prison to provide "some basis" for their concern that group worship may trigger racial violence. Id. at 989.

TD #98 is grounded on speculation and exaggerated fears that do not satisfy RLUIPA's compelling-interest requirement. In Spratt, a prison failed to demonstrate that its blanket ban on inmate preaching, grounded on "speculation [and] exaggerated fears," served a compelling state interest. 482 F.3d at 43. The record shows that TD #98 is similarly grounded on speculation and exaggerated fears. As the district court correctly found, TD #98 is predicated on a fear of inmates conducting illicit conduct during night prayer services. R. at 13. The district court also found that TCC offer no support for the legitimacy of its security concerns, especially as it pertains to NOI inmates. R. at 13. TCC produced an affidavit, defending TD #98, which cites events that occurred almost eighteen years ago. R. at 4, 14. These events occurred prior to Mohammed arriving at TCC. R. at 3. Although TCC staff monitors members of the NOI to ensure that "they

are not engaging in illicit or gang activity," NOI members maintain a satisfactory behavioral standing with the prison. R. at 3. Moreover, none of the current members of the NOI have a record of violence within the prison. R. at 3. Other than the unsubstantiated allegations of his new cellmate, Mohammed does not have any history of physical violence at TCC. R. at 14. RLUIPA forces TCC to show that a compelling interest is served by applying its policy to Mohammed. They cannot do so. Mohammed and his NOI brothers are low-security, peaceful inmates wishing to exercise their religion.

TCC must do more than assert security and administrative concerns before substantially burdening Mohammed's exercise of religion. In Murphy, a prison failed to demonstrate a compelling interest in denying group worship privileges to members of a Caucasian separatist religion. Murphy, 372 F.3d at 989. The prison argues that its decision was based on racial violence and fairness concerns. Id. Here, TCC argue that TD #98 is grounded on security and management concerns. R. at 7. However, similar to the prison authorities in Murphy, TCC fail to provide any basis for its concerns. TCC argue that providing a small religious group a chaplain for night services imposes "heightened staffing burdens." R. at 6. That is untrue—the prison already employs a Muslim chaplain. R. at 4. TCC has done no more than assert unfounded security concerns. For example, TCC stated that Mohammed's conversion to the NIO, after two years of not practicing a religion, "placed him on a watch-list of inmates who might potentially assume religious identifies to cloak illicit conduct and assimilate into gang activity." R. at 7. This is the type of illogical, exaggerated thinking that RLUIPA was crafted to confront.

Additionally, the Twelfth Circuit commented that creating a night services exception for Mohammed would cause resentment among other inmates, "pos[ing] serious security, financial and staffing problems for the prison." R. at 18. However, RLUIPA recognizes that religions have

differing requirements and demands that must be accommodated to the extent practicable. Here, existing TCC policy provides special diets to certain inmates, and procures the services of chaplains of only four faiths. R. at 4, 26. Permitting Muslim inmates to pray non-disruptively in a small group at a time required by their faith would be harmonious with fairness concerns.

**2. TCC relied on a faulty, conclusory affidavit when attempting to demonstrate that TD #98 advances administrative and personnel interests.**

Conclusory affidavits cannot meet a prison's burden of proving the existence of a compelling state interest. Shakur v. Schriro, 514 F.3d 878, 890 (9th Cir. 2008). In Shakur, a Muslim inmate requested a kosher diet to prevent flatulence during prayer, which interfered with the cleanliness requirements of his faith. Id. at 882. The prison's Pastoral Administrator denied his request because Islam does not require a kosher diet. Id. To support its decision, the administrator provided an affidavit explaining that granting the plaintiff's request could lead other inmates to request diets not required by their religions, which in turn would increase the prison's meal costs by $1.5 million a year. Id. at 886-87. The court held that the prison failed to demonstrate a compelling interest, pointing out that the affiant's testimony was not solely based on personal knowledge. Id. at 890.

Mr. Abreu's conclusory affidavit fails to meet TCC's burden of demonstrating that TD #98 furthers a compelling state interest. Similar to the prison affidavit in Shakur, Id. at 889, TCC relies on an affidavit that fails to demonstrate a compelling interest. The affidavit, attested to by Abreu states that its denial of night services was proper because accommodations would impose heightened staffing burdens on the prison. R. at 7. However, it remains unclear whether Mr. Abreu is suitable to opine on whether TD #98 furthers any compelling interests. The policy was prompted by "generalized and unsubstantiated accounts of suspicious behavior of Sunni Muslim

and Catholic groups" that occurred almost eighteen years ago. R. at 4, 14. Further, it is entirely unclear whether Mr. Abreu was even employed by TCC when the events occurred.

### B. This Court Should Reverse The Twelfth Circuit And Hold That TD #99 Furthers No Compelling Interests Because The Affidavit Abreu Submitted Provides No Competent Evidence And Because TCC Has Provided No Specific Evidence To Support Its Interests.

An affidavit submitted by a non-specialist is inadequate to establish a compelling interest. Shakur, 514 F.3d at 890. Moreover, prison officials must provide specific evidence to support the existence of the compelling interests they claim. Koger v. Bryan, 523 F.3d 789, 800-01 (7th Cir. 2008). This Court should hold that TCC has failed to meet its burden of showing a compelling interest because Abreu's affidavit is of little or no evidentiary value and TCC has failed to offer any specific evidence to support its compelling interests.

Only a specialist should submit an affidavit attesting to a compelling interest. Shakur, 514 F.3d at 890. In Shakur, the Arizona Department of Correction's Pastoral Administrator submitted affidavit arguing that there was a compelling interest in "avoiding the prohibitive expense" of providing all Muslim prisoners with Halal meat. Id. 889 (internal quotations omitted). The court determined the affidavit provided "no competent evidence" because the Pastoral Administrator prepared it, "rather than an official specializing in food service or procurement." Id. The court therefore held that the prison failed to demonstrate a compelling governmental interest. Id. at 890.

Prison officials must provide, on the record, specific evidence to support assertions of compelling interests. Koger, 523 F.3d at 800-01. In Koger, the prison argued that its clergy-verification policy advanced two compelling interests: (1) "good order," which requires verification of prisoners' religious affiliation; and (2) orderly administration of the prison's dietary system. Id. at 800. The court explained that deference to prison officials is warranted only

when "officials have set forth those positions and entered them into the record." Id. Applying this standard, the court held that the prison failed to demonstrate a compelling interest because it offered no evidence of what effort it would take to provide a meatless diet to Koger, how this would hamper prison diet administration, or why it needed to make extra efforts to verify Koger's religion. Id. at 800-01.

Like the affidavit in Shakur, TCC's affidavit provides very little competent evidence in support of the interests it claims to be compelling. Shakur, 514 F.3d at 890. The affidavit, prepared more than a decade ago by Abreu—Director of The Chaplaincy Department—attests to "reasons for the prisons . . . diet policies" and an "addendum with the prison's documented cost containment stratagems." R. at 6, 7. The affidavit in Shakur provided "no competent evidence" about the feasibility of a diet program because the Pastoral Administrator who prepared it was not an "official specializing in food service or procurement." Shakur, 514 F.3d at 890. Similarly, the affidavit Abreu submitted provides little or no competent evidence of a compelling interest because Abreu is not someone who specializes in "prison safety, personnel, [or] financial concerns"—the compelling interests TCC claims. R. at 13.

Similar to the prison in Koger, TCC has provided very little evidence to support the vague interests it has asserted. TCC suggested that "prison safety, personnel, and financial concerns for the prison, its inmates and employees constitute compelling interests." R. at 13. TCC submitted an affidavit "that influenced the change in their prior policy, which were predicated on events that occurred over a decade ago," and it submitted an affidavit from Mohammed's former cellmate alleging that Mohammed threatened him for meatloaf. R. at 13, 14. However, similar to the prison in Koger, TCC has failed to establish a relationship between the interests and the denial of Mohammed's religious diet. Thus, similar to Koger—where there

was no compelling interest when the prison provided no specific evidence of the problems with placing Koger on a religious diet—TCC has failed to establish a compelling interest because it has offered no specific evidence of the problems associated with allowing Mohammed to remain on his religious diet after the alleged violation.

## IV. EVEN ASSUMING THIS COURT FINDS THAT TCC DEMONSTRATES ANY COMPELLING INTERESTS, TD #98 AND TD #99 ARE NOT THE LEAST RESTRICTIVE MEANS TO FURTHERING THOSES INTERESTS.

Even if the government establishes a compelling interest, it must also demonstrate that its challenged policy is the least-restrictive means of achieving that compelling interest. Holt, 135 S. Ct. at 864. "'The least-restrictive means standard is exceptionally demanding.'" Id. (quoting Burwell v Hobby Lobby Stores, Inc., 134 S.Ct. 2751 (2014). This Court should reverse Twelfth Circuit and hold that—even assuming TCC has some compelling interests—TD #98 and TD #99 are not the least-restrictive means to furthering those interests.

### A. The Twelfth Circuit Erred In Finding that TD #98 Is The Least Restrictive Means Of Furthering Any Asserted Interests Because it Erroneously Placed The Burdens Of Evidence and Persuasion On Mohammed And TCC Failed To Consider Other Means Of Advancing Its Asserted Interests.

In determining the least restrictive means, prisons must consider and reject other means before concluding that its policy is the least-restrictive means. Washington, 497 F.3d at 284. Here, the Twelfth Circuit incorrectly burdened Mohammed with demonstrating that TD #98 was not the least restrictive means of advancing any of TCC's asserted interests. Further, the record shows that TCC failed even to consider other means. As such, TCC cannot demonstrate that TD #98 is the least restrictive means of furthering any of its asserted interests.

#### 1. TCC has the burden of proving that TD #98 was the least restrictive means of furthering any of its asserted interests.

Prisons have the burden to show that their policies are the least restrictive means of

furthering an asserted compelling interest. Washington, 497 F.3d at 285. In Washington, an inmate's religion required that he read four books per day about Africa and African people. Id. at 282. However, prison policy limited inmates to ten books in their cell at a time. Additionally, inmates were restricted to one library visit and were limited to checking out four books a week. Id. at 275-76. The district court held that the inmate failed to suggest a less restrictive means of advancing the prison's interests. Id. at 285. The Ninth Circuit reversed the district court, reasoning that the district court incorrectly assumed the inmate had the burden of proving that there were no other less restrictive means available. Id. at 285-86.

The Twelfth Circuit erred in burdening Mohammed with proving that TD #98 was not the least-restrictive means of furthering any of TCC's asserted interests. Similar to the overturned district court in Washington, the Twelfth Circuit incorrectly burdened Mohammed with proving that TCC's policy was not the least restrictive means. Id. at 285. The Twelfth Circuit commented that since Mohammed failed to identify "any less restrictive, viable means of dealing with the issues described in this case, we find that banning night congregational services is . . . the only way in which the prison can serve its compelling interests." R. at 22. Because the Third Circuit rejected this precise reasoning in Washington, this Court should hold that the Twelfth Circuit erred in placing the burden on Mohammed. Washington, 497 F. 3d at 285.

**2. TCC failed to consider other means of furthering its interests.**

A prison must demonstrate that it considered less-restrictive alternatives for achieving its interests. Holt, 135 S. Ct. at 864. In Holt, a Muslim inmate challenged a prison's ban on growing beards. Id. at 859. The prison argued that it was the least-restrictive means of preventing contraband concealment and misidentification. Id. at 863-64. This Court rejected this argument, reasoning that inmates are allowed to maintain much longer hair on their heads and that the

prison could simply search the inmates' beards. Id. 683 Furthermore, this Court stated that the prison failed to establish why it viewed a half-inch beard as such a security risk, yet permitted mustaches, head hair, or short beards. Id. at 865.

Prisons must demonstrate that they have truly considered and rejected the effectiveness of less restrictive measures substantially burdening an inmate's exercise of religion. Shakur, 514 F.3d at 890. In Shakur, a prison, citing cost-containment interests, denied a Muslim inmate's request for a kosher diet. Id. The court found that the prison had failed to actually consider creating an exemption for the inmate. Id. The court commented that the record contained only conclusory assertions that denying the inmate's request was the least restrictive means of furthering the prison's interest in cost containment. Id.

Similar to the prison in Holt, TCC never actually considered *any* alternative means of furthering its asserted interests. The only alternative TCC seems to have considered is allowing NOI inmates to pray in their cells. R. at 6. But, as Mohammed indicated, this is not a less-restrictive alternative because prayer occurring in unclean and potentially distracting environments is not the prayer that is mandatory or strongly preferred. R. at 5. Similar to the prison in Holt, TCC failed to establish that obvious measures cannot satisfy its alleged security and administrative concerns. For example, TCC fails to address why individualized night prayer exceptions would cause security problems but individualized dietary exceptions and daytime services do not. R. at 6. As the district court noted, TCC can schedule a final head count during night prayers or after NOI inmates return to their cells. R. at 14. Similarly, TCC can group NOI inmates into the same or adjacent cells, allowing for a quick, efficient final head count. R. at 14. Lastly, TCC's reasoning is arbitrary because the potential for illicit conduct that exists in night services also exists during the daytime services.

TCC fails to demonstrate that they ever truly considered and rejected the effectiveness of less-restrictive measures. Analogous to the prison in Shakur, TCC never actually considered creating a night services exemption for their Muslim inmates. R. at 14. As the Twelfth Circuit mentioned, TCC could allow NOI inmates the option of funding their own chaplain and service. R. at 22. It should be noted that other institutions allow Muslim inmates to pray together for their daily prayers. Lindh v. Warden, Fed. Corr. Inst., Terre Haute, Ind., No. 2:09-CV-00215-JMS, 2013 WL 139699, at *15 (S.D. Ind. Jan. 11, 2013). Evidence that similar institutions accommodate daily prayer for their Muslim inmates reveals the availability of other alternatives that TCC should have considered. Id. Lastly, TCC could alter its policy and allow thoroughly vetted volunteer chaplains to assist in night prayer.

### B. This Court Should Reverse The Twelfth Circuit And Hold That TCC Failed To Meet Its Burden Within The Least-Restrictive-Means Inquiry Because It Failed To Consider And Reject Alternatives And Because Its Thirty-Day Prayer Suspension Is Unnecessary.

Removing an inmate from group prayer as punishment for breaking a religious diet is not the least-restrictive means of advancing a compelling interest. Lovelace, 472 F.3d at 191-92. Furthermore, a prison must consider and reject alternative, less restrictive means of achieving its interests. Warsoldier v. Woodford, 418 F.3d 989, 999 (9th Cir. 2005). Thus, this Court should hold that TCC failed to meet its burden to show that TD #99 is the least-restrictive means of achieving its interests.

Removing an inmate from his prayer group is not the least-restrictive means of remedying a violation of a religious diet. Lovelace, 472 F.3d at 191-92. In Lovelace, a prison removed Lovelace from his Ramadan diet and from morning group prayers because he was accused of violating his diet. Id. at 188. The court held that the policy was not the least-restrictive means of advancing an assumed compelling interest, reasoning that the removal

provision was "far reaching" to the extent that it "prohibit[ed] both special meal and group prayer access" because it excluded Lovelace from his only opportunity for congregational prayer. Id. 191.

A prison must demonstrate "that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." Warsoldier, 418 F.3d at 999. In Warsoldier, the prison required inmates to keep their hair from growing longer than three inches, a practice that was contrary to Warsoldier's religious beliefs. Id. at 991. To support its position that the grooming policy was the least-restrictive means of advancing a compelling governmental interest, the prison simply stated that it "must enforce the grooming policies upon all inmates regardless of their religious convictions." Id. at 999. The court held that the prison failed to meet its burden because it failed to consider "the efficacy of less restrictive measures before adopting the challenged practice." Id.

Similar to the policy in Lovelace, TCC's policy is "far reaching" and therefore not the least-restrictive means to achieving any of the compelling interests it has claimed. Id. TCC barred Mohammed from participating in any worship services for one month, in part, as punishment for deviating from his religious diet. R. at 6. In Lovelace, the prison similarly removed Lovelace from group prayers because it thought he deviated from his religious diet, and the court held that the practice was not the least-restrictive means of advancing any compelling interest because it excluded him from his only opportunity for congregational prayer. Lovelace, 472 F.3d at 191. Following this reasoning, this Court should hold that excluding Mohammed from worship services is "far reaching" and not the least-restrictive means to advancing a compelling interest. Id.

Similar to the prison in Warsoldier, TCC has failed to consider and reject the efficacy of less restrictive measures. Warsoldier, 418 F.3d at 999. While TCC submitted an old affidavit supporting the validity of the TCC's policies, it never addressed alternative means to achieving its vaguely stated interests. R. at 6-7. TCC should have considered various alternatives: It could have refrained from placing Mohammed and other religious converts on a watch-list (R. at 7); it could have allowed Abreu to assess Mohammed's religious sincerity; it could have allowed four violations within a two-year period; it could have required more evidence that Mohammed threatened his cellmate[13] or that he actually ate the meatloaf[14] (R. at 6); or it could have chosen not to keep Mohammed out of group prayer as punishment for violating his diet (R. at 6). Unfortunately for TCC, similar to the prison in Warsoldier that failed to meet its burden when it did not consider less-restrictive alternatives, TCC failed to consider the efficacy of these less-restrictive alternatives. Warsoldier, 418 F.3d at 999. Therefore, this Court should hold that TCC has not met its burden of showing that TD #99 is the least-restrictive means of advancing any compelling interest.

## CONCLUSION

For the reasons set forth above, Petitioner respectfully requests this Court to REVERSE the judgment of the Twelfth Circuit Court of Appeals.

Respectfully submitted,

March 7, 2016 Attorneys for Petitioner

[13] Ironically, Mohammed's grievances containing similar allegations about his cellmate's lewd behavior were denied because "Mohammed had not proven that his cellmate was actually engaging in the negative conduct described in the grievance." R. at 5.

[14] Mohammed's cellmate could have placed the meatloaf under his mattress just as easily as Mohammed. Moreover, a prison's policy of removing a prisoner for "mere possession" of food inconsistent with a religious diet "may be overly restrictive." Colvin v. Caruso, 605 F.3d 282, 295 (6th Cir. 2010).