No. 985-2015

IN THE

SUPREME COURT OF THE UNITED STATES

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

Respondents.

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

BRIEF FOR THE PETITIONER

Competitor #: 8

COUNSEL FOR PETITIONER

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QUESTIONS PRESENTED

The Petitioner has asked the Supreme Court of the United States to answer the following questions:

1. Whether the Twelfth Circuit improperly granted summary judgment by holding that Tourovia Correctional Center's policy prohibiting Nation of Islam members from nighttime group prayer services did not violate the substantial burden provision of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a).

2. Whether the Twelfth Circuit improperly granted summary judgment by holding that the prison policy giving Tourovia Correctional Center the power to indefinitely remove prisoners from their religious diets for one instance of backsliding did not violate the substantial burden provision of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1(a).

JURISDICTIONAL STATEMENT

The District Court for the Eastern District of Tourovia, having jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1346(a)(2), issued its opinion on March 7, 2015. The Twelfth Circuit, with jurisdiction under 28 U.S.C. § 1295(a)(2), issued its opinion on June 1, 2015. Kelly's notice of appeal was filed in a timely manner. This court granted Kelly's Petition for Writ of Certiorari and has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

FACTUAL BACKGROUND

In 2000, Kelly became an inmate at Tourovia Correctional Center ("TCC"), and in 2002 he converted to the Nation of Islam ("NOI") by officially changing his religious affiliation, as required by prison policies. (R. at 3.) Kelly also asked that his name be changed to Mohammed and that he be referenced by the new name. (R. at 3.) Since changing his religious affiliation, Kelly and all the other members of the NOI have had no record of violence or misbehavior. (R. at 3.) In addition, Kelly attends all available religious worship services. (R. at 5.)

The NOI is an officially recognized religious group at TCC. (R. at 3.) As part of their religious practices, NOI members require a strict vegetarian diet, as well as observance of Ramadan and two other religious holidays. (R. at 3.) In addition, NOI members are required to pray five times a day—dawn, early afternoon, late afternoon, sunset, and late evening. (R. at 3-4.) This prayer ritual, known as *Salat*, is one of the five pillars of Islam, making it one of the most sacred Islamic practices. (R. at 3.) During each prayer, NOI members must pray in a clean, solemn environment that is free from distractions. NOI members also prefer praying with other adherents. (R. at 4.)

Two primary directives govern religious practices at TCC. Directive #98, enacted in 1998, contains two pertinent provisions that control worship services in the prison chapel. (R. at 4.) The first provision prohibits anyone but official TCC chaplains from overseeing prayer services. The second provision limits prayer times to (1) before the morning meal at 8:00 A.M., (2) before the afternoon meal at 1:00 P.M., and (3) before the evening meal at 7:30 P.M. (R. at 4.); (App. to Pet.'s Br. 1.) Previously, the prison allowed faith groups to petition for nighttime prayer services in the company of a prison volunteer. (R. at 4.) However, the prison eliminated

this option after two incidents, neither of which involved NOI members. First, members of the Christian group attempted to relay gang orders to individuals outside the prison through one volunteer. (R. at 4.) Second, Christian and Sunni Muslim group members attempted to stay in the chapel longer than authorized. (R. at 4.) NOI members were not involved in any of the events leading up to the implementation of Directive #98. (R. at 4.) Directive #99 governs religious diet programs. Pursuant to Directive #99, TCC has the power to remove an inmate from his religious diet if the inmate is found to have engaged in a single incident of bullying or breaking his religious diet. (R. at 6.) Directive #99 also allows the prison to suspend an inmate from all religious services for an indefinite period of time if any violence or threat of violence is connected to any member of the inmate's faith group. (R. at 6.)

In 2013, Kelly, on behalf of other NOI members, formally requested a nighttime prayer service, which would take place after the last meal at 7:00 P.M. but before the 8:30 P.M. final head count. (R. at 5.) After being denied by the prison chaplain, who told Kelly that the three available prayer times were sufficient, Kelly filed three grievances asserting that praying in his cell was no longer satisfactory. (R. at 5.) In the first grievance, he notified the prison that his cellmate, who was not a NOI member, ridiculed him and engaged in lewd behavior while he prayed. (R. at 5.) His grievance also detailed similar incidents that had occurred to other NOI members. (R. at 5.) His second grievance stated that praying in his cell was not a clean, solemn environment because it contained a toilet. (R. at 5.) For NOI members, praying near a toilet is disgraceful and disrespectful to Allah. Kelly's third grievance reiterated his previous statements. Warden Kane Echols responded by denying Kelly's requests for a nighttime prayer service, and instead, giving Kelly a new cellmate. (R. at 6.)

Two weeks after his grievance was denied, Kelly's new cellmate reported that Kelly had threatened him and taken his dinner, which was non-vegetarian. (R. at 6.) Prison officials found meatloaf underneath Kelly's mattress, but they did not find any evidence indicating who placed it underneath the mattress. (R. at 6.) The prison officials also did not find any evidence that Kelly had threatened his cellmate. (R. at 6.) TCC responded, pursuant to Directive #99, by indefinitely removing Kelly from his religiously required vegetarian diet and banning him from all worship services for one month, despite Kelly's insistent denial that the meatloaf was his. (R. at 6.) After being removed from his religious diet, Kelly refused to violate his religious beliefs by eating non-vegetarian food. (R. at 6.) After two days, TCC responded by forcing Kelly to eat through a feeding tube. (R. at 6.) To avoid enduring the pain of more forced feeding, Kelly began eating the prison's non-vegetarian food. (R. at 6.) Kelly also chose to file a complaint alleging that the Warden, Kane Echols, and the head chaplain, Saul Abreu, violated his rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA") by denying him the worship services required by his religion and removing him from his vegetarian diet. (R at 6.); Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-(1)(a).

PROCEDURAL HISTORY

TCC responded by filing a motion for summary judgment. The District Court for the Eastern District of Tourovia denied TCC's motion for summary judgment, instead granting summary judgment for Kelly. The District Court held that the policies restricting Kelly from vegetarian food and group worship services amounted to a substantial burden. In addition, the District Court held that these policies did not further a compelling governmental interest in the least restrictive manner. The Twelfth Circuit reversed the District Court's holding. The Twelfth Circuit held that both of the contested TCC policies did not impose a substantial burden on

Kelly's religious exercise. In addition, the Twelfth Circuit held that the policies furthered compelling governmental interests in the least restrictive manner.

SUMMARY OF THE ARGUMENT

The TCC policies that prevent Kelly from following the diet prescribed by his religion and bar him from worshipping with other NOI members in a clean, solemn environment both amount to a substantial burden on religious exercise. Preventing an inmate from following a religious diet amounts to a substantial burden by forcing him to make an illusory choice between food and faith. Furthermore, RLUIPA does not allow prisons to remove inmates from religious diets as punishment. Similarly, the TCC policy proscribing additional group prayer services places Kelly in the position of violating his sincerely held religious beliefs by forcing him to worship alone, in the presence of a disrespectful cellmate, and in an unclean environment prohibited by his religion. By preventing Kelly from group worship in a respectful environment, the TCC policy forces him to forego a core religious practice, imposing a clear substantial burden.

TCC has also failed to carry its burden of showing that the contested policies further compelling governmental interests in the least restrictive manner. The prison asserts security, budgetary, and administrative concerns as its compelling interests. (R. at 4.); (App. to Pet.'s Br. 3.) Though these concerns can amount to compelling governmental interests, the prison must substantiate them through competent evidence presented in the record. TCC failed to present evidence that would raise these concerns above a purely speculative level. The prison also failed to consider and affirmatively reject alternatives based on more than hypotheticals, as required by RLUIPA. Thus, the prison has failed to demonstrate that its policies are the least restrictive means. As a result, TCC must fail on summary judgment.

ARGUMENT

I. TCC's CHALLENGED PRISON POLICIES PLACE A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE.

When bringing a RLUIPA claim, prisoners bear the initial burden of proving (1) "the relevant exercise of religion is grounded in a sincerely held religious belief" and (2) the challenged "policy substantially burdened that exercise of religion." *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). At the summary judgment stage, this requires a non-movant prisoner to "establish[] a genuine issue of material fact" as to whether his religious belief is (1) sincere and (2) substantially burdened by the challenged prison policy. *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1315 (10th Cir. 2010); *see also Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008) ("[S]ummary judgment requires the absence of any genuine issue of material fact.").

A. Kelly's Religious Beliefs Are Sincerely Held and Require Dietary and Congregational Accommodations.

Under RLUIPA, the "threshold question of sincerity . . . must be resolved in every case." *Lovelace v. Lee*, 472 F.3d 174, 187-89 (4th Cir. 2006) (quoting *U.S. v. Seeger*, 380 U.S. 163, 185 (1965)). Determining the sincerity of an inmate's religious beliefs is a "case-by-case, fact-specific inquiry," *Adkins v. Kaspar*, 393 F.3d 559, 571 (5th Cir. 2004), directed primarily towards the "words and actions of the inmate." *Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 791 (5th Cir. 2012), *as corrected* (Feb. 20, 2013). Relevant actions and facts include, but are not limited to, filing grievances, exhausting administrative remedies, duration of time seeking accommodation, and participation in religious activities. *See id.* at 791 (approving the district court's review of the inmate's filing of grievances and exhausting administrative remedies as indicative of religious sincerity); *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008) (holding that "the duration of time over which" an inmate has sought accommodation "clearly

demonstrate[d]" that an inmate's "beliefs were sincerely held."). This analysis also must take into account all of the facts relevant to establishing religious sincerity, instead of focusing solely on a subset of the relevant facts or actions. While courts will often inquire into the sincerity of an inmate's beliefs, this inquiry is not demanding and sincerity is usually presumed. *Murphy v. Missouri Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir. 2004) ("[W]e hesitate to make judgments about whether a religious belief is sincere or not."); *Moussazadeh*, 703 F.3d at 791 (holding that the sincerity of an inmate's religious beliefs is "generally presumed or easily established.").

1. Kelly's Religious Beliefs Are Sincere in Light of All the Relevant Evidence.

Applying this case-specific, fact-driven analysis to Kelly, it is clear that his religious beliefs are sincere. Kelly took the effort to formally change his religious affiliation as well as his last name, as required by prison procedures (R. at 3.); he had perfect attendance at all available religious services (R. at 5.); he filed a written prayer service request on behalf of all the members of his religion (R. at 5.); he filed three grievances when he could not exercise his religion (R. at 5.); he has practiced his religion otherwise perfectly since formally changing his religion in 2002 (R. at 3.); and, perhaps most notably, he endured a hunger strike and forced tube-feeding in an attempt to avoid violating his religious beliefs. (R. at 6.) In light of *all* the actions taken by Kelly, there is no question he has carried the burden of demonstrating the sincerity of his religious beliefs. In the very least, these facts "establish[] a genuine issue of material fact [as to] whether" Kelly's beliefs are sincere, precluding a grant of summary judgment. *Abdulhaseeb*, 600 F.3d at 1315.

2. The Twelfth Circuit Failed to Analyze All Relevant Facts and Actions Taken by Kelly.

The Twelfth Circuit concluded that there was "no basis, in the record, to determine the sincerity of an individual's beliefs." (R. at 20.) The numerous facts cited above disprove this

conclusion. In addition, the Twelfth Circuit held that "the prison's findings" called Kelly's "religious sincerity into question." (R. at 20.) However, the prison's findings only included one piece of evidence: a statement by Kelly's cellmate alleging that Kelly threatened him and took his non-religious food. (R. at 20.) By examining a single piece of evidence, instead of all relevant facts and actions, the Twelfth Circuit impermissibly stacked the cards in favor of a finding of religious insincerity. In addition, focusing only on the prison's findings caused the Twelfth Circuit to place excessive emphasis on a single, unproven instance of backsliding.

3. One Instance of Backsliding Does Not Establish Insincerity of an Inmate's Religious Beliefs.

Establishing that an inmate's beliefs are sincere "does not require perfect adherence to beliefs expressed by the inmate." *Moussazadeh*, 703 F.3d at 791-92. Even "the most sincere practitioner may stray from time to time." *Id.* ("Though Moussazadeh may have erred in his food purchases and strayed from the path of perfect adherence, that alone does not eviscerate his claim of sincerity."); *see also Reed v. Faulkner,* 842 F.2d 960, 963 (7th Cir. 1988) (recognizing "the fact that a person [who] does not adhere steadfastly to every tenant of his faith" may still be sincere about participating in some religious practices). Furthermore, RLUIPA does not allow prisons to take away prisoners' religious rights merely because they imperfectly adhered to their beliefs. *See, e.g.*, *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 backsliders, penitents, and prodigal sons?"). RLUIPA was intended to protect religious practice to the fullest extent, and taking away a prisoner's statutory rights for a single violation would frustrate this goal, not further it. § 2000cc–3(g) (mandating that RLUIPA "be construed in favor of broad protection of religious exercise").

Moreover, in Kelly's case, his single alleged transgression is accompanied by a variety of other actions that evince clear religious sincerity. *See Wall v. Wade*, 741 F.3d 492, 500 (4th Cir. 2014) (holding that removing an inmate from a Ramadan feast list because he did not possess approved religious items was unconstitutional). This point is particularly salient at the summary judgment stage, when "all reasonable inferences must be construed in favor of the non-movant." *Abdulhaseeb*, 600 F.3d at 1316.

4. The Twelfth Circuit Improperly Drew Factual Inferences in Favor of the Movant.

Besides improperly analyzing the actions relevant to Kelly's religious sincerity, the Twelfth Circuit also incorrectly applied summary judgment procedure. The Twelfth Circuit deferred "to the prison's findings that Kelly's action . . . call[ed] his religious sincerity into question." (R. at 20.) Deferring to the prison's findings of fact is improper at the summary judgment stage, undermining the Twelfth Circuit's ruling. At summary judgment, the court is required to "view the evidence in the light most favorable to the non-movant." *Moussazadeh*, 703 F.3d at 791 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)) ("The district court improperly weighed the evidence proffered by TDCJ more heavily than it did Moussazadeh's."). In addition, courts are required to draw factual inferences in favor of the non-movant.

The Twelfth Circuit failed to properly apply these requirements in two ways. First, the court improperly viewed the evidence in the light most favorable to the movant. The court determined that Kelly did not hold sincere religious beliefs based on one piece of evidence: a "written statement" from Kelly's cellmate. (R. at 20.) This ruling fails to view the evidence in the light most favorable to the non-movant by overlooking all of the religiously motivated actions taken by Kelly, such as attending all available prayer services. Second, the court drew factual inferences in favor of the movant. The single piece of evidence relied on by the Twelfth

Circuit is insufficient to determine that Kelly holds insincere religious beliefs, particularly in light of Kelly's "insistent" denial that he threatened his cellmate. (R. at 6.) The only way that a single piece of contested evidence could be seen as proving the insincerity of Kelly's religious beliefs is if the court drew factual inferences in favor of the movant. However, drawing factual inferences in this way is a clear violation of summary judgment procedure. When factual inferences are appropriately drawn in favor of Kelly, as required at summary judgment, this single alleged instance of misconduct stands out as a clear irregularity. In light of all of the actions taken by Kelly, he has more than raised a factual question concerning the sincerity of his religious beliefs.

B. Any Prison Policy that Results in Prisoners Being Forced or Pressured to Violate Their Religious Beliefs Imposes a Substantial Burden.

The Twelfth Circuit's flawed reasoning and misuse of summary judgment procedure extends beyond the analysis of the sincerity of Kelly's religious beliefs. The Twelfth Circuit also failed to correctly analyze the burden the TCC policies place on Kelly's religious exercise. In addition, the Twelfth Circuit incorrectly applied summary judgment procedure to the burden placed on Kelly's religious exercise.

A prison policy amounts to a substantial burden under RLUIPA when "1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates . . . OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Washington v. Klem*, 497 F.3d 272, 280 (3d Cir. 2007). Other circuits have formulated similar disjunctive tests that find a substantial burden when a prison policy (1) places pressure on an inmate to modify or abandon his religious beliefs or (2) forces a prisoner to forego generally available benefits in order to practice his religion. *See, e.g.*, *Adkins*, 393 F.3d at 570 (defining a substantial burden as

one that "truly pressures the adherent to significantly modify his religious behavior and significantly violate his religious beliefs" by either (1) influencing "the adherent to act in a way that violates his religious beliefs," or (2) forcing "the adherent to choose between . . . enjoying some generally available, non-trivial benefit, and . . . following his religious beliefs."); *Abdulhaseeb*, 600 F.3d at 1315 (holding that a substantial burden occurs when an inmate is required to violate his religious beliefs by (1) engaging in prohibited activity or being prohibited from engaging in required religious practices, or (2) the inmate is forced into "an illusory choice where the only realistically possible course of action trenches on an adherent's sincerely held religious belief.").

In addition, when assessing whether a prison policy amounts to a substantial burden under RLUIPA, the correct inquiry focuses on the *effects* of the policy. Policies that result in undue pressure on a prisoner's religious practice or force a prisoner to choose between generally available benefits and religious adherence produce *effects* amounting to a substantial burden. While such a policy might be justified, the general justifications for the policy, as well as the particular reasons for the policy being imposed on a prisoner, are not relevant at the substantial burden stage; instead, these considerations are reserved for the narrow tailoring inquiry.

1. Tourovia's Dietary Program Amounts to a Substantial Burden by Forcing Kelly to Choose Between Food and Faith.

Prison policies that remove inmates from religious diet programs impose a burden on religious practice. Certain religions require adherents to follow strict dietary demands, and any policy preventing prisoners from acquiring foods required by their faith results in the burdensome choice between "religious practice and adequate nutrition." *Nelson v. Miller*, 570 F.3d 868, 879 (7th Cir. 2009) (holding that denial of a non-meat diet during forty days of Lent constituted a substantial burden). This forced choice between faith and food amounts to a

substantial burden by requiring prisoners to make the illusory choice between the nutrition necessary for life and their religious beliefs. *See, e.g.*, *Shakur*, 514 F.3d at 889; *Baranowski v. Hart,* 486 F.3d 112, 125 (5th Cir. 2007). Critically, it is of no importance why a prisoner is prevented from following his religious diet—the only important factor in determining whether the policy amounts to a substantial burden is the existence of a forced choice between nutrition and sincere religious practice. Differently put, if a prison policy has the *effect* of forcing a prisoner to choose between violating his beliefs and starving, the policy amounts to a substantial burden.

TCC's policy forces Kelly to make this same choice. By preventing Kelly from acquiring the foods required by his religion, the policy forced Kelly into "an illusory choice where the only realistically possible course of action" was to violate his "sincerely held religious belief." *Abdulhaseeb*, 600 F.3d at 1315. In order to acquire the nutrition necessary to survive, Kelly was forced to consume non-vegetarian food, in violation of his sincere religious beliefs. Moreover, contrary to the Twelfth Circuit's holding, the fact that the policy was imposed on Kelly as punishment is irrelevant at the substantial burden stage.

2. The Fact that Kelly Was Removed from His Religious Diet as Punishment Is Not Important at the Substantial Burden Stage.

The Twelfth Circuit held that removing Kelly from his religious diet was not a substantial burden because the prison did not "force Kelly's hand into threatening other inmates." (R. at 20.) By voluntarily breaking his vegetarian diet, they reasoned, Kelly was responsible for violating his religious beliefs—the prison policy "did not compel" him to violate his religious beliefs. (R. at 20.) However, this holding is flawed, both as a matter of logic and law.

Logically, Kelly's alleged voluntary violation of his religious beliefs on one occasion does not release the prison from responsibility for forcing Kelly into further violations of his

religious beliefs. In the absence of the prison policy, Kelly would not choose to violate his religious beliefs in perpetuity because of one alleged transgression. Furthermore, as a matter of law, it does not matter that a prisoner was removed from his religious diet as punishment when assessing whether the policy amounted to a substantial burden. *See Lovelace*, 472 F.3d at 188 ("It makes no difference to this analysis that the burden on Lovelace's religious exercise resulted from discipline (punishment for his alleged infraction), rather than from the prison's failure to accommodate his religious needs in the first instance."). RLUIPA does not create a carve-out for impositions of substantial burdens when they are the result of punishment. Nor does RLUIPA allow misbehaving inmates to be stripped of their statutory rights, signaling that punishments are subject to the same analysis as any other burden. In fact, punishing a religious inmate by requiring him "to defile himself . . . by doing something that is completely forbidden by the [his] religion" cannot be a consequence the drafters of RLUIPA intended. *Beerhide v. Suthers*, 286 F.3d 1179, 1192 (10th Cir. 2002) (citation and internal quotation marks omitted); *see also* § 2000cc-3 ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by . . . the Constitution.").

This position is further supported by First Amendment jurisprudence. RLUIPA's protections exceed those of the First Amendment. *Holt*, 135 S. Ct. at 859-60 (holding that Congress enacted the Religious Freedom Restoration Act (RFRA) to "provide greater protection for religious exercise than is available under the First Amendment" and RLUIPA follows "the same standard as set forth in RFRA"). Additionally, punishments forcing prisoners to break their religious beliefs violate the Free Exercise Clause. *McEachin v. McGuinnis*, 357 F.3d 197, 204 (2d Cir. 2004) ("Courts have . . . found free exercise violations in cases where generally applicable prison policies were designed to accommodate inmates' religious dietary

requirements, but the same allowances were not made for inmates subjected to disciplinary restrictions."); *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1211-14 (10th Cir. 1999) (holding that denial of Ramadan meals to inmates confined in punitive segregation violated the Free Exercise Clause). If these punishments violate First Amendment free exercise rights, then they must necessarily violate rights under RLUIPA.

As applied to Kelly, the fact that the prison's policy only came into effect after his alleged misconduct is unimportant. Both RLUIPA and the First Amendment forbid prisons from stripping prisoners of their right to religious exercise for misbehavior. Even though Kelly was deprived of the ability to practice his religion as punishment, he was still forced to "significantly modify his religious behavior." *Adkins,* 393 F.3d at 570. By forcing Kelly to choose between adhering to his religion and acquiring the nutrition he needed to live, the prison policy amounted to a substantial burden on his RLUIPA right to religious exercise.[1]

While at least two courts held that backsliding prisoners could be removed from dietary programs without imposing a substantial burden, both cases are distinguishable from the current case. In *Daly*, the prisoner had engaged in a consistent pattern of non-adherence, suggesting his religious beliefs were not sincere. *Daly v. Davis*, No. 08-2046, 2009 WL 773880, at *1 (7th Cir. Mar. 25, 2009) ("Daly was suspended three times" for breaking his religious diet). Kelly, however, only had one *alleged* violation of his religious beliefs. Even if this action occurred, which is contested, it does not amount to the consistent pattern seen in other cases, undermining the Twelfth Circuit's reliance on *Daly*. In *Brown-El*, the court reviewed a zero-tolerance prison policy under First Amendment standards, withholding judgment under RFRA. *Brown-El v.*

[1] The Twelfth Circuit was not entirely incorrect in addressing Kelly's *alleged* wrongdoing at the substantial burden phase. Poor behavior plays a role in the substantial burden phase by serving as a sign of insincere religious belief; and without sincere religious belief, prison policies cannot amount to a substantial burden.

Harris, 26 F.3d 68, 69 (8th Cir. 1994) ("[W]e need not consider the new standard because Brown–El failed to raise or otherwise bring his claim under [RFRA]."). Given that RFRA and RLUIPA protect religious exercise to a greater degree than the First Amendment, *Brown-El* would have presumably come out differently under a more stringent standard.

3. TCC's Zero-Tolerance Policy Amounts to a Substantial Burden by Setting a Standard that Inmates Cannot Be Expected to Meet.

TCC's policy also amounts to a substantial burden by erecting an impossible standard that must be met to continue receiving religiously required meals. As previously noted, religious sincerity does not require perfect adherence to religious beliefs—every religion has "backsliders" and "prodigal sons." *Grayson*, 666 F.3d at 454. In addition, RLUIPA does not allow a prison to take away the religious rights of "a sincere religious believer . . . merely because he is not scrupulous in his observance." *Id.* Furthermore, one failure to adhere to a religious practice does not imply that future misbehavior will occur or that the inmate is no longer sincere in his religious beliefs. *Cf. Reed*, 842 F.2d at 963 (recognizing "the fact that a person [who] does not adhere steadfastly to every tenant of his faith" may still be sincere about participating in some religious practices).

These points demonstrate the flaws of the TCC's zero-tolerance policy. Perfect religious adherence is too high a standard for imperfect human beings to meet. Some allowance must be given for mistakes. *Colvin v. Caruso*, 852 F. Supp. 2d 862, 868 (W.D. Mich. 2012) (holding that a zero-tolerance policy amounted to a substantial burden when it deprived an inmate "of his diet for a [one-time] possession of protein powder"). Kelly was removed from his religiously required diet for one incident, despite his otherwise perfect behavior. Furthermore, prison officials could not confirm that Kelly had broken his religious diet or threatened his cellmate. A policy removing an otherwise sincere religious inmate for one instance of unconfirmed

backsliding places religious exercise on unstable ground, instead of protecting it as required by RLUIPA. The end result of a zero-tolerance policy is to effectively remove all inmates at TCC from the religious diet program—it is conceivable that every NOI inmate will stray from perfection at some point. The drafters of RLUIPA could not have intended to endorse zero-tolerance policies when enacting a statute that would protect religious freedom "to the maximum extent permitted." § 2000cc-3.

In the very least, Kelly has raised a factual question concerning the burden placed on religious practice by the prison's zero-tolerance policy. By selecting a rule that requires perfect behavior, TCC put a standard in place that many inmates will not be able to meet. Because the court cannot rule out the possibility that inmates will be unable to live up to the zero-tolerance policy, Kelly has raised a genuine issue of material fact as to whether the policy places a substantial burden on religious exercise.

C. The Prison's Denial of Congregational Services Imposes a Substantial Burden On Religious Exercise.

As noted above, a prison policy imposes a substantial burden if "1) a follower is forced to choose between following the precepts of his religion and forfeiting benefits otherwise generally available to other inmates . . . OR 2) the government puts substantial pressure on an adherent to substantially modify his behavior and to violate his beliefs." *Klem*, 497 F.3d at 280. In the context of religious ceremonies, prison policies amount to a substantial burden when they prevent inmates from (1) taking part in a required ceremony or (2) practicing the ceremony in the correct way. *See Walker v. Beard*, 789 F.3d 1125, 1135 (9th Cir. 2015) (holding that forcing a prisoner to pray in his cell with a non-white cellmate amounted to a substantial burden when his religion forbid him from doing so); *Sossamon v. Lone Star State of Texas*, 560 F.3d 316, 332 (5th Cir. 2009) (finding a genuine issue of material fact as to whether a lack of access to chapels with

"Christian symbols or furnishings" amounted to a substantial burden); *Lovelace*, 472 F.3d at 188 (holding that the inability to observe the Ramadan feast was a substantial burden). Creating a situation in which a Muslim inmate "could not fulfill one of the five pillars or obligations of Islam" also amounts to a substantial burden. *Lovelace*, 472 F.3d at 188. Moreover, "assembling with others for a worship service" is a protected form of religious exercise. *Cutter v. Wilkinson*, 544 U.S. 709, 710 (2005). At the summary judgment stage, denying "communal worship" when it is an "important part" of an inmate's religion also precludes a grant of summary judgment. *Murphy*, 372 F.3d at 988; *see also Greene v. Solano Cty. Jail*, 513 F.3d 982, 988 (9th Cir. 2008) ("We have little difficulty in concluding that an outright ban on [group worship] is a substantial burden on that religious exercise.").

1. Denying Kelly's Request for an Extra Congregational Service Outside of His Cell Substantially Burdened His Religious Exercise.

By failing to accommodate Kelly's sincere religious beliefs, the prison policy placed significant pressure on Kelly to alter his behavior. Adherents of Islam require a "very clean, solemn environment" in which to observe their five daily prayers. (R. at 4.) However, the prison policy forces Kelly to violate his sincere religious beliefs by requiring him to worship in an unclean environment. While the District Court held that these policies "placed pressure on Kelly to violate his religious beliefs," in actuality, these policies do more than place pressure on Kelly to violate his religious beliefs—they affirmatively *cause* Kelly to violate his religious beliefs.

Forcing Kelly to pray near a commode results in Kelly having to choose between worshiping in a disrespectful manner, which violates the requirement that he worship in a "very clean and solemn environment," (R. at 4) and not praying at all, which violates the requirement that he pray five times daily. (R. at 3.) In either situation, Kelly is forced to violate his religious beliefs. As other courts have held, creating a situation in which a Muslim inmate "could not

fulfill one of the five pillars or obligations of Islam" amounts to a substantial burden. *Lovelace*, 472 F.3d at 188. Furthermore, forcing an inmate to worship in an inappropriate environment can amount to a substantial burden. *See Sossamon*, 560 F.3d at 332 (holding that a lack of access to chapels with "Christian symbols or furnishings" could amount to a substantial burden). At the very least, failing to provide an appropriate place of worship and forcing Kelly to worship in an unclean environment raises a factual question concerning whether the policy amounts to a substantial burden. *See, e.g.*, *Murphy*, 372 F.3d at 988.

Furthermore, the prison policy places pressure on Kelly to abandon his religious practice by subjecting him to a cellmate who could make his religious exercise unacceptably arduous. Kelly already had one experience with a disrespectful cellmate who made his worship exceedingly difficult. (R. at 5.) Other courts have noted that being forced to worship in the presence of individuals who do not share the same faith or who should not be present during a prayer ceremony amounts to a substantial burden. *See, e.g.*, *Walker*, 789 F.3d at 1135 (holding that forcing a prisoner to pray in his cell with a non-white cellmate amounted to a substantial burden when his religion forbade him from doing so); *Weir v. Nix*, 114 F.3d 817, 821 (8th Cir. 1997) (holding that a policy might substantially burden an inmate's beliefs if the only opportunity for "group worship arises under the guidance of someone whose beliefs are significantly different from his own."). Furthermore, the burden placed on Kelly's religious exercise by a disrespectful cellmate is exacerbated by the prison transfer policy requiring Kelly to suffer "incidents of violence" before he can request a transfer into a different cell. (R. at 4.)

2. Denying Kelly's Request for Group Worship Amounts to a Substantial Burden by Prohibiting a Required Religious Practice.

TCC's policy also causes Kelly to violate his religious beliefs by preventing him from nightly group worship. Group worship is a protected form of religious exercise. *Cutter*, 544 U.S.

at 710 (2005). Moreover, Islam adherents "prefer to pray in the company of each other" during their five daily prayers. (R. at 4.)

For Kelly, praying in the company of his fellow NOI inmates is particularly important. Group worship is religious practice that he and other NOI inmates believe is required by their religion. By depriving Kelly of the ability to worship with his fellow NOI inmates, the prison substantially burdens Kelly's sincere religious beliefs. *See Weir*, 114 F.3d at 821 (holding that a policy might substantially burden an inmate's beliefs if the only opportunity for "group worship arises under the guidance of someone whose beliefs are significantly different from his own."); *Greene*, 513 F.3d at 988 (holding that a ban on group worship amounted to a substantial burden). As one court noted when analyzing a group worship ban, "[i]t is difficult to imagine a burden more substantial than banning an individual from engaging in a specific religious practice." *Meyer v. Teslik*, 411 F. Supp. 2d 983, 989 (W.D. Wis. 2006).

II. NEITHER TCC'S CONGREGATION OR DIETARY POLICES FURTHER COMPELLING INTERESTS IN THE LEAST RESTRICTIVE MANNER.

Under RLUIPA, the government is prohibited from imposing a substantial burden on a prisoner's religious exercise unless imposing the burden (1) "is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest." § 2000cc-1(a). The prison, TCC, has the burden of proving both of these elements. § 2000cc-2(b) (explaining that the government bears the burden of persuasion for both the compelling governmental interest and least restrictive means prongs). As discussed above, summary judgment should not be granted if there is a "genuine issue as to any material fact . . . ." FED R. CIV. P. 56. "The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact." *Ben-Levi v. Brown*, No. 5:12-CT-3193-F, 2014 WL 7239858, at *2 (E.D.N.C. Dec. 18, 2014), *aff'd*, 600 F. App'x 899 (4th Cir.

2015). If the moving party meets its burden, the non-moving party is required to put forth specific facts that show a genuine issue relating to a material fact. *See id.*

A. Neither the Congregation Restriction Nor the Meal Prohibition Further Compelling Government Interests.

To overcome a RLUIPA claim, the Act requires the government to show it is furthering a compelling government interest. *See* § 2000cc-1(a). Although the Act does not define the meaning of a "compelling interest" (R. at 13.), the Supreme Court has explained that "context matters in the application of that standard." *Cutter*, 544 U.S. at 723 (citation and internal quotation marks omitted). In other words, this court must view the case in light of its context in the record to determine whether the purported government interest is justified. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006) ("RFRA requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' — the particular claimant whose sincere exercise of religion is being substantially burdened.") (citation omitted). Although a past religious accommodation does not require the prison to grant that accommodation in the future, a reviewing court must analyze the evidence in each case to determine if the accommodation is truly problematic. *See Yellowbear v. Lampert*, 741 F.3d 48, 58 (10th Cir. 2014). Only when an accommodation is truly problematic and supported by evidence does a compelling governmental interest in eliminating the accommodation exist. *See id.*

A prison's mere conclusory assertions regarding a compelling interest will not suffice. *See id.* (explaining that although the prison is afforded due deference, the government must provide evidence to support its interest); *see also Spratt v. R.I. Dep't of Corr.*, 482 F.3d 33, 39 (1st Cir. 2007) (explaining that to succeed on summary judgment the prison cannot simply claim a security concern). The First and Eleventh Circuits have explained that statements based on

speculation are inadequate to show a compelling government interest. *See Rich v. Fla. Dep't of Corr.*, 716 F.3d 525, 533 (11th Cir. 2013); *Spratt*, 482 F.3d at 39. As the Second Circuit elaborated, "'inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the [RLUIPA's] requirements.'" *Jova v. Smith*, 582 F.3d 410, 415-16 (2d Cir. 2009) (quoting 146 CONG. REC. S7775) (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA) (citation and internal quotation marks omitted). Thus, in order to prevail on the compelling interest prong, the prison must show—based on evidence from the record and not mere speculation—that it is furthering a compelling government interest.

1. TCC's Prison Security Interest Is Not Furthered by Restricting Congregation Because the Policy Is Not Grounded in Relevant Evidence.

Though security concerns are due "'particular sensitivity,'" *see Koger*, 523 F.3d at 800 (citing *Cutter*, 544 U.S. at 722), TCC's compelling security interest is not supported by relevant evidence and, as a result, fails the compelling interest prong. It should be noted that since the prohibition of nightly services was enacted, in part, as punishment (R. at 4.), the purported compelling security interest may be more illusory than actual. *See Spratt*, 482 F.3d at 40 n.8 (noting that if the prisoner was correct that the ban on preaching was "enacted in retribution . . . it would undercut the state's argument that the blanket ban on preaching is essential to prison security."). Assuming prison security can qualify as a compelling interest, TCC still fails the compelling interest prong due to a lack of evidentiary support.

The prison's security concern is rooted in two non-violent incidents that occurred nearly 20 years ago—and approximately two years before Kelly was an inmate at TCC. (R. at 3-4.) Notably, neither incident involved NOI members. (R. at 4.) Moreover, the government can point to no substantiated case in which either Kelly or any NOI member acted violently. The District

Court was correct in concluding that the "decision to reject Kelly's prayer request was insufficient" and was based on an "'exaggerated fear'" aimed at preventing non-religious gang activity. (R. at 14.); *cf.* 146 CONG. REC. S7775 (2000) (explaining that prison policies based on "exaggerated fears" will violate RLUIPA).

The Twelfth Circuit noted that providing nightly services to only NOI members would cause resentment. (R. at 22.) However, a similar argument was rejected by the Eleventh Circuit in *Rich*, 716 F.3d at 533 (rejecting the argument that non-kosher inmates may retaliate against kosher inmates if the former believe accommodating the latter impacts the quality of non-kosher food). Moreover, the prison formerly granted nightly prayer services only to select groups, and there were no documented resentment problems. (R. at 4.)

Regarding the costs and staffing interest, the government provided an affidavit explaining the costs associated with security and presumably staffing requirements as well. (R. at 7.) However, it is unclear from the record if the prison *specifically* quantified the claimed administrative burden of providing one additional prayer service. (R. at 7.) Because *the record* is not supported by evidence that explains the impact these costs will have on prison administration or budgets, the government's argument must fail. *See Yellowbear*, 741 F.3d at 59 (explaining that statements must be supported by the record). To reiterate, TCC has the burden of proving that its imposed substantial burden furthers a compelling governmental interest. § 2000cc–2(b).

2. TCC Has Not Eliminated All Factual Questions and Must Fail at the Summary Judgment Stage.

At the summary judgment phase, TCC was required to enter its non-superficial policy justifications in the record. *See Lovelace*, 472 F.3d at 190-91 (contrasting the Supreme Court's plurality in *Beard v. Banks* where prison officials entered into the record an undisputed affidavit

and deposition to explain why their interests were served). In this current case, TCC failed to provide evidence beyond a superficial explanation.

3. *Denying Religiously Required Meals Serves No Compelling Government Interest.*

Not only does TCC's meal policy fail to *further* a compelling government interest, but the prison does not even assert a compelling government interest. TCC claims the meal policy exists to support security, budgetary, and administrative concerns, as well as to properly operate the prison. (App. to Pet.'s Br. 3.) In regards to the security concern, the prison does not assert a single argument to explain how providing one meal would threaten security. Regarding the budgetary and administrative concerns, TCC is already providing a religious diet to the other six NOI members. (R. at 3, 20.) The government does not show how providing one additional meal to accommodate Kelly would be prohibitively expensive or administratively infeasible. Moreover, even if the prison could save some amount of money, "[s]aving a few dollars is not a compelling interest, nor is a bureaucratic desire to follow the prison system's rules." *Schlemm v. Wall*, 784 F.3d 362, 365 (7th Cir. 2015); *see also U.S. v. Sec'y, Florida Dep't of Corr.*, No. 12-22958-CIV, 2015 U.S. Dist. WL 1977795, at *8 (S.D. Fla. Apr. 30, 2015) ("[I]t is hard to understand how Defendants can have a compelling state interest in not spending money that they are already voluntarily spending on the exact thing they claim to have an interest in not providing.").

4. *TCC Must Fail on Summary Judgment for Failing to Show How Denying Religiously Required Meals Amounts to a Compelling Interest.*

Even if costs, administration, and prison management are compelling government interests, the government's argument would still fail. A motion for summary judgment should be denied on the compelling interest prong when the record "'contains no competent evidence as to

the additional cost of providing Halal or kosher meat to . . . Muslim prisoners.'" *Yellowbear*, 741 F.3d at 60 (citation omitted). As just discussed, there is no competent evidence that would bolster the compelling governmental interest argument in Kelly's case.

Similar to the congregation policy, the prison does not explain the added burden presumably caused by providing one additional meal. As a result, the prison's statements are conclusory and cannot be used to support the compelling interest prong. *See id.* at 59-60; *see also Baranowski*, 486 F.3d at 125 (holding that "controlling costs" by not providing inmates with kosher meals and "maintaining good order" by not breeding resentment were compelling government interests based on "*uncontroverted* summary judgment *evidence*") (emphasis added). Because uncontroverted evidence is not present in Kelly's case, the meal policy must fail the compelling interest prong.

B. Neither the Congregation Nor the Meal Policy Is Carried Out in the Least Restrictive Manner.

Prison officials are provided with deference in regards to security, good order, discipline, resources, and costs. *See Cutter*, 544 U.S. at 723; *see also Knight v. Thompson*, 723 F.3d 1275, 1282-83 (11th Cir. 2013) (explaining that courts do not have "carte blanche to second-guess the reasoned judgments of prison officials"). However, that deference is not absolute. *See Spratt*, 482 F.3d at 40 ("[W]e will [not] rubber stamp or mechanically accept the judgments of prison administrators") (citation and internal quotation marks omitted); *see also Holt*, 135 S. Ct. at 864 (explaining how RLUIPA "does not permit such unquestioning deference").

The narrow tailoring prong is "'exceptionally demanding.'" *Holt*, 135 S. Ct. at 864 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014)). To satisfy this prong, the prison must "sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion . . . ." *Id.* In other words, the prison

must use a less restrictive means to further its interests if those means are available. *See id.*; *Native Am. Council of Tribes v. Weber*, 750 F.3d 742, 751 (8th Cir. 2014) (explaining that the *prison* must present the court with evidence that its means are the least restrictive available).

Moreover, in order to prevail on the narrow tailoring RLUIPA prong, the prison must show that it considered alternatives and determined they were not feasible. *See Benning v. Georgia*, 864 F. Supp. 2d 1358, 1366 (M.D. Ga. 2012) (interpreting the findings of the First, Third, Fourth, Seventh, and Ninth Circuits to mean that prisons must have given consideration to and rejected alternatives to satisfy the second RLUIPA prong). To meet its burden, the prison must itself explain how its means of limiting religious exercise are the least restrictive. *See Holt*, 135 S. Ct. at 866 (explaining that courts "must not assume a plausible, less restrictive alternative would be ineffective") (citation and internal quotation marks omitted). In addition, courts can only consider the *actual* (and not hypothetical) reasons the prison asserts for making its decisions. *See Ciempa v. Jones*, 745 F. Supp. 2d 1171, 1194 (N.D. Okla. 2010) (explaining that the RLUIPA strict scrutiny standard does not permit hypotheticals).

1. Forbidding NOI Members from Congregating, as Part of a General Policy, Is Not the Least Restrictive Means to Further the Government's Security Interest.

A complete ban on nightly service is not the least restrictive means to further the prison's security interest. Given that non-violent inmates do not present a security risk, prohibiting them from congregating does not pass the least restrictive means prong. *See Ciempa*, 745 F. Supp. 2d at 1196-97. In addition, if the government already provides an exception to a general rule, that exception is evidence that the government could more closely tailor its policy so that it is less restrictive. *See Burwell*, 134 S. Ct. at 2782; *Holt*, 135 S. Ct. at 860 (prison policy making a beard

length exception for inmates with medical but not religious needs was not least restrictive). As a result, this court should find that TCC's nightly prayer ban is not the least restrictive means.

Although the record does not explicitly state any alternatives offered by Kelly, the burden is on the prison to satisfy the second prong of RLUIPA by considering and rejecting alternatives. *See Abdulhaseeb*, 600 F.3d at 1319 (relying on the Fourth and Eighth Circuits to explain that the burden rests with prison officials). There are several alternatives offered and rejected in the record. However, notably, the Twelfth Circuit and not the prison, offered these alternatives. (R at 22.) The Twelfth Circuit noted that the "only less restrictive alternative available" would be to permit a congregation exemption for the seven NOI members. (R. at 22.) The court feared this exemption because it could cause resentment and enforcement difficulties. (R. at 22.) However, the court's trepidation does not absolve TCC of its requirement to provide evidence to support its position. *See Panayoty v. Annucci*, 898 F. Supp. 2d 469, 485-86 (N.D.N.Y. 2012) (holding that a prison must provide evidence that the imposition of its policies are the least restrictive means to further its compelling interest); *cf. Burwell*, 134 S. Ct. at 2780 (holding that the government must "'demonstrat[e] that application of [a substantial] burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest'") (emphasis removed) (quoting §§ 2000bb-1(a)(b)). As the District Court noted, the prison did not provide the court with enough "competent evidence" to support the contentions that Kelly's requests would pose safety and administrative difficulties. (R. at 15.)

Relying on the Supreme Court decision in *Cutter*, the Fifth Circuit clarified that when an inmate requests excessive accommodations (or accommodations that will unduly burden other inmates or impact effective prison operations) a prison can reject the request. *See Chance v. Tex. Dep't of Crim. Justice*, 730 F.3d 404, 416 (5th Cir. 2013). Kelly's request does not fall into any

of these impermissible categories. TCC argues that a night service is impracticable because any required chaplain is only authorized to work during specifically designated hours. (R. at 4.); (App. to Pet.'s Br. 1-2.) However, TCC already provides an exemption for those who are ill, dying, or physically unable to attend services. (R. at 4.) As a result, the prison has shown that it can provide necessary chaplains when it desires. *See Burwell*, 134 S. Ct. at 2782 (explaining that an accommodation indicates that the policy is not being furthered in the least restrictive manner). If providing chaplains is not feasible, TCC has proven it was able to provide volunteers to serve in place of chaplains in the past. (R. at 4.) TCC gives no explanation as to why it could not conduct more thorough background checks and reinstate the volunteer policy. In addition, TCC argues that NOI members do not have adequate numbers to justify an additional prayer service. (R. at 7.) However, TCC does not explain why NOI membership is adequate for daytime services but inadequate for an evening service.

The Twelfth Circuit presents and rejects the alternative of allowing NOI members to finance their own services. (R. at 22.) The Twelfth Circuit, however, failed to address any of the alternatives posited by the District Court: conducting a headcount after NOI members returned to their cells or grouping NOI members in close proximity. (R. at 14.) Regardless, nowhere in the record does the prison *itself* offer evidence that it considered these less restrictive means.

The Twelfth Circuit also asserted that if the Warden offers an exemption to NOI members, he would have to alter the policy for other, larger groups. (R. at 21.) This blind assertion was rejected by the *Holt* court. *See Holt*, 135 S. Ct. at 866 ("At bottom, this argument is but another formulation of the 'classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.' We have rejected a similar argument in analogous contexts, and we reject it again today.") (citation omitted); *see*

also Chance, 730 F.3d at 416 (5th Cir. 2013) ("Although prisons cannot blindly assert that an exception for one person would require exceptions for everyone, we have recognized the validity of such concerns where experience or evidence warrants that conclusion.").

In this present case, neither the prison nor the Twelfth Circuit explains how the assertion goes beyond speculation. TCC does not show that (1) it would be unable to address security concerns with the available personnel, (2) a security problem is posed by the habitually non-violent NOI members, or (3) additional security would impose unjustified increased costs. Without evidence ruling out each of these points, the prison has relied on the Twelfth Circuit's conclusory and speculative assertions (R. at 21-22.); and speculation cannot survive the least restrictive prong. *See Garner v. Kennedy*, 713 F.3d 237, 245-46 (5th Cir. 2013) (explaining that speculation about cost increase will not survive the second prong of the RLUIPA test).

In addition, the U.S. Department of Justice Federal Bureau of Prisons Change Notice explained that when a warden limits a religious activity, that restriction should only apply to those who created the need for the restriction. *See* Charles E. Samuels, Jr., *Religious Beliefs and Practices*, U.S. DEPARTMENT OF JUSTICE FEDERAL BUREAU OF PRISONS 3 (June 12, 2015), https://www.bop.gov/policy/progstat/5360_009_CN-1.pdf [hereinafter "BOP PRACTICES"]. According to the Bureau of Prisons own reasoning, banning all inmates from congregating is clearly over-inclusive.

2. Banning Kelly from Partaking in Religiously Required Meals Is Not the Least Restrictive Means to Further Any Compelling Interest.

Assuming, arguendo, that the meal policy furthers a compelling government interest, the prison's policy does not follow the least restrictive means to further that interest. TCC has failed to identify alternatives to banning Kelly from his religiously required meal. Some common sense alternatives include reducing other privileges such as recreation time, visiting time, and

telephone use. In fact, 28 C.F.R. § 541.3 (2016) lists a number of possible sanctions; none of which TCC considered. The Supreme Court has found that a prison can withdraw an accommodation if the claimant "abuses the exemption." *Holt*, 135 S. Ct. at 867; *see also Cutter,* 544 U.S. at 726 (explaining that a prison is not required to accommodate excessive religious requests or requests that unjustly burden other inmates or endanger prison operations). Allegedly backsliding one time can hardly be characterized as an "abuse." Similarly, giving an inmate a religiously mandated meal that is already provided to other inmates cannot plausibly be described as excessive, causing a burden, or endangering prison operations.

In its analysis, the Twelfth Circuit erroneously relied on *Brown-El* to hold that TCC's meal policy was the least restrictive means of furthering the prison's interest. (R. at 21.) In *Brown-El*, a Muslim prisoner was removed from his diet program after he voluntarily consumed a meal during his religious fasting period. (R. at 21.) However, the *Brown-El* court erred in analyzing the claim under the First Amendment's less stringent reasonableness test instead of the more protective RFRA.[2] *Brown-El*, 26 F.3d at 69 ("[W]e need not consider the new standard because Brown-El failed to raise or otherwise bring his claim under [RFRA]."). The *Brown-El* meal policy would have likely failed under the higher least restrictive means standard.

Zero-tolerance policies are clearly not least restrictive. One obvious and less restrictive option is to restrict a prisoner's privileges only after a pattern of eating non-religious food. In Sec'y, Florida Dep't of Corr., 2015 U.S. Dist. WL 1977795, at * 12, the court held that the prison's policy of immediately suspending inmates from the meal program before investigation violated RLUIPA, because the policy was not the least restrictive. This violation was held for both the prison's zero-tolerance policy and ten-percent rule, where inmates were suspended after

[2] RFRA "provide[s] greater protection for religious exercise than is available under the First Amendment." *Holt*, 135 S. Ct. at 859-60. Under RLUIPA, prisoners request religious accommodations using the RFRA standard. *Id.*

missing ten percent of their monthly meals or more (*12-13). There were other cost reduction measures (such as tracking meals and reusing certain meal components) that the prison already used and could continue to use. *See id.* In the present case, there is no evidence in the record that TCC considered any alternative cost reduction measures. *See Colvin*, 852 F. Supp. 2d at 868 (explaining that while there is a governmental interest in providing religious meals to those who are sincere, there was no question that the "draconian [zero-tolerance] regulation" was not the least restrictive means to controlling costs).

In an analogous case, the *Holt* court ruled that the prison's policy that made a beard length exception for inmates with medical needs, but not religious needs, was not the least restrictive. *See Holt*, 135 S. Ct. at 860, 864. Furthering the prison's interest in the least restrictive manner may require TCC to allocate additional financial resources to accommodate religious needs. *See Burwell*, 134 S. Ct. at 2781; *see also* § 2000cc-3(c) (RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). In Kelly's case, TCC does not adequately explain why a complete ban is the least restrictive means to further its interests.

Finally, the Federal Bureau of Prisons explains that religious meal removal is used to reevaluate whether the program is appropriate for the inmate. *See* 19 BOP PRACTICES. The Bureau explains the process for re-applying and implies that the maximum waiting period for an alleged first time offender is thirty days. *See id.* In contrast, the TCC policy provides no opportunity to reapply. Furthermore, TCC removed Kelly from his religiously mandated meal program indefinitely. (R. at 6.) The TCC policy does not follow the direction of the Bureau. Removing Kelly from his religiously required diet indefinitely and without an opportunity to reapply is not the least restrictive means to further any government interest.

3. *TCC Must Fail on Summary Judgment for the Least Restrictive Means Prong.*

To prevail on summary judgment, TCC is required to give a detailed explanation of how its policies banning congregation and religiously required meals are the least restrictive means of furthering its compelling interest. *See Spratt*, 482 F.3d at 42-43 ("[B]efore we can evaluate whether deference is due, we require that prison administrators explain in some detail what their judgment is."). That detail is lacking in the current case. TCC "must 'demonstrate, and not just assert, that the rule at issue is the least restrictive means of achieving a compelling governmental interest.'" *Id.* at 42 (citing *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003)). TCC has demonstrated nothing and must fail on summary judgment.

CONCLUSION

For the aforementioned reasons, the Petitioner respectfully requests that the Supreme Court of the United States reverse the judgment of the Twelfth Circuit, declare that TCC's prison polices violate the substantial burden provision of RLUIPA, and deny respondents' motion for summary judgment.

Respectfully Submitted,
Competitor Number 8
Counsel for the Petitioner
Dated: March 7, 2016

APPENDICES

Appendix 1

Tourovia Directive Definitions in relevant part

Definitions

"Faith Group" means 10 or more acknowledged members of any faith, whether it is majoritarian or counter-majoritarian.

"Chaplain" means a Facility staff member designated to with the responsibility to coordinate and oversee religious programs for the offender population and to advise the superintendent regarding religious programming.

"**Designated Prayer Times**" means the hours before each meal in which prayer services for the authorized religious members may conduct their congregational services in the room the prison administration so delineates.

a. Before the morning meal at 8:00 A.M.

b. Before the afternoon meal at 1:00 P.M.

c. Before the evening meal at 7:30 P.M.

Appendix 2

Tourovia Directive #98 in relevant part

98. Religious Corporate Services

Purpose: to establish policy for the practice of faith groups and ensure that inmates have the opportunity to participate in practices of their faith group, individually or corporately as authorized, that are deemed essential by the governing body of that religion, limited only by a showing of threat to the safety of staff, inmates, or other person involved in such activity, or that the activity itself disrupts the security or good order in the facility. Religious based programs/observances shall be accommodated, within available space and time, unless an overriding compelling governmental interest exists.

1. Inmates who wish to participate in prayer services shall conduct any congregational service at the Designated Prayer Times.

    a. Requirement for a Chaplain. To protect the integrity and authenticity of the beliefs and practices of religious services and programs, a Chaplain must be available for the coordination, facilitation, and supervision of inmate services or programs and there must be sufficient offender interest (10 or more designated faith group members)

    b. Restrictions on Services. Due to security and administrative efficiency, no inmate is to leave their cells for any reason after the last inmate head count. Prayer services shall not be allowed after the last inmate head count at 8:30 P.M., daily.

After consultation, the facility chaplain may

a) limit the participation in a particular religious activity or practice (e.g. religious, work proscription, ceremonial meals, etc.) of offenders who are part of that religious group or

b) curtail the congregate interaction of groups involved in a given faith group as a group if

    - no specific faith group leader is involved to lead the ceremony; or

    - deemed a potential security risk to the safety and security of the facility.

Appendix 3

Tourovia Directive #99 in relevant part

99. Religious Alternative Diets

Requirement of a Written Request. Inmates who wish to observe religious dietary laws shall provide a written request for a special diet to the Director of Chaplaincy Services along with their Declaration of Religious Preference Form. The requests shall be accommodated to the extent practicable within the constraints of the Tourovia Correctional Center's

a) security considerations

b) budgetary or administrative considerations, and

c) the orderly operation of the institution.

Backsliding from a Religious Diet. In the event that an inmate gives prison administration adequate reason to believe that the religious alternative diet is not being adhered to, Tourovia Correctional Center reserves the right to revoke religious alternative diet privileges for any designated period of time or revoke the privilege permanently.