No. 472-2015

IN THE

Supreme Court of the United States

SIHEEM KELLY,

Petitioner,

v.

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

Respondent.

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

BRIEF FOR PETITIONER

Team 9

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Court of Appeals Cases

United States District Court Cases

United States Constitutional Provisions

United States Statutes

Miscellaneous Authority

QUESTIONS PRESENTED

1. Under the Religious Land Use and Institutionalized Persons Act of 2000, does Tourovia Correctional Center's prison policy prohibiting night prayer services to members of the Nation of Islam violate an inmate's First Amendment right to religious exercise when such a prohibition forces an inmate to defy his religious beliefs by praying with disrespectful distractions in an unsanitary environment?

2. Under the Religious Land Use and Institutionalized Persons Act of 2000, does Tourovia Correctional Center's prison policy unlawfully burden an inmate's religious exercise when it permits the prison to revoke an inmate's religious dietary privileges, based on a sincerely held religious belief, because of one alleged instance of nonobservance?

JURISDICTIONAL STATEMENT

The Court of Appeals for the Twelfth Circuit entered its judgment for this case on June 1, 2015. J.A. 16. This Court granted the writ of certiorari for this civil suit on July 1, 2015, J.A. 23, and has jurisdiction pursuant to 28 U.S.C. § 1254(1) (2012).

STATEMENT OF THE CASE

I. Factual History

As a federal maximum security prison, Tourovia Correctional Center ("TCC,") has a duty to oblige the rights granted inmates by the Religious Land Use and Institutionalized Persons Act ("RLUIPA,"). J.A. at 6. Siheem Kelly, ("Mr. Kelly,") challenges two TCC policies for violating his religious freedom under the Act. Id.

TCC'S Restrictive Policies Regarding Religious Practices

TCC has two policies restricting the religious practices at issue. First, the prison has a policy which places a number of restrictions on inmate worship services. Currently, the prison bans the use of prison volunteers and night services to ensure that all inmates are back in their cells at 8:30 P.M. for the final headcount. J.A. at 4. TCC used to allow both night services and prison volunteers but revoked these practices nearly two decades ago when the prison learned that service volunteers were passing gang orders from Christian inmates to outside gang members. Id. The privilege was also revoked in response to prisoners staying in prayer rooms past the last in-cell headcount each evening. Id. Prisoners can now be punished with solitary confinement if they are missing for the final 8:30 headcount. Id. TCC also restricts religious services via Directive #98 which prohibits religious services from being held without an official chaplain. Id. Official chaplains only work during three designated Prayer Times: before the morning, afternoon, and evening meals at 8:00 A.M., 1:00 P.M., and 7:00 P.M., respectively. Id., at 24. Prayer service requests are granted based on demand need, staff availability, and prison resources. Id., at 4.

Second, TCC's Directive #99 describes the rules and restrictions it has regarding religious alternative diets. Id., at 26. The prison grants written requests for religious diets "to

the extent practicable within the constraints of [TCC's]: a) security considerations; b) budgetary or administrative considerations, and; c) the orderly operation of the prison. Id. Pursuant to this policy, TCC reserves to right to revoke dietary privileges from an inmate when the prison believes the diet is not being followed. Id.

The Nation of Islam at TCC

The Nation of Islam (NOI) is a sect within traditional Sunni Muslim Islam. Id., at 3. While it is a minority religious group at TCC, it is still a recognized religious group whose members have the right to receive prayer services and special religious diets. Id., at 3, 4. Currently, there are seven NOI member inmates eligible to receive these services. Id., at 3. NOI members are required to pray five "Obligatory and Tradition Prayers" every day at dawn, early afternoon, later afternoon, sunset and late evening. Id., at 3, 4. Before praying, members must wash themselves and their clothes as best as possible. Id., at 4. Their prayers should be uninterrupted and should take place in a very clean and solemn environment. Id. Members are not required to pray in a group, but group prayer is preferred. Id. However, TCC only permits group prayer three times per day outside of the inmates' cells; members must perform the other two prayers alone in their cells. Id. NOI members also follow a strict Halal vegetarian diet. Id., at 3.

For the last five years, NOI members have maintained satisfactory behavioral standing. Id. Current members have no record or history of violence in the prison. Id. They move together through the prison when travelling to their daily activities and are not harassed by other prison groups. Id. TCC also monitors NOI members to make sure they are not engaging in illicit or gang activity. Id.

Mr. Kelly's Many Attempts and Failures to Receive Prayer Services

Mr. Kelly arrived at TCC in 2000 after being convicted for drug-trafficking and aggravated robbery. Id., at 3. He converted to NOI two years later and, pursuant to prison policy, filed the "Declaration of Religious Preference Form" to acknowledge that change and qualify for related religious services and dietary restrictions. Id. Mr. Kelly currently attends all three prayer services offered at TCC, but wanted two additional group services so that NOI members could perform all five obligatory prayers together. Id., at 5. In February 2013, Mr. Kelly filed a request, on behalf of himself and other NOI members, for an additional congregational prayer service at 8:00 P.M. Id., at 4, 5. This service would occur after the last meal at 7:00 P.M., but before final headcount at 8:30 P.M. Id., at 5. The Director of TCC's Champlaincy Department, Mr. Saul Abreu, denied the request because prison policy prohibited all inmates from going anywhere but their cells before the final headcount, the existing three prayer services were enough to fill NOI's prayer requirement, and members could pray in their cells. Id.

Mr. Kelly was willing to compromise and forego two additional prayer accommodations for just one that would be conducted with an NOI chaplain and away from non-NOI inmates. Id. Kelly received no response. Id.

Following these denials, Kelly filed two grievances explaining why he desired these prayer accommodations. Id. Specifically, Kelly could no longer pray in his cell because his cellmate distracted and disrespected him by intentionally ridiculing him or engaging in lewd behavior while he prayed. Id. Several more NOI inmates were also ridiculed and distracted by non-NOI cellmates during prayer. Id. Again, Kelly's request was denied because he did not prove that his cellmate engaged in this distracting behavior. Id.

The Consequences of a New Cellmate: Tube-Feeding

Mr. Kelly tried again to convey why praying in his cell was inappropriate to Abreu explaining that praying so close to a toilet was a disgrace to Allah's preference. Id. His request was denied again.

Finally, Kelly filed a formal grievance with the prison that included the same claims from his prior grievances. Id. This time, TCC's Warden, Kane Echols, denied the request. Id. He explained that Kelly's request violated TCC policy, and recommended that Kelly request a cell transfer, since they could not verify his cellmate's alleged conduct. Id., at 6.

A new cellmate did not fare well for Mr. Kelly. Id. The new cellmate reported that Kelly allegedly threatened him with violence if he did not give Kelly his meatloaf dinner. Id. Echols and Abreu immediately documented and investigated this allegation. Id. TCC officials searched Kelly's cell and found meatloaf under his mattress. Id. Kelly vehemently denied the meatloaf was his, but the officials did not belief him. Id. While there was absolutely no evidence that Kelly ate meat nor that he harmed his cellmate in any way, the prison punished Kelly by revoking his religious vegetarian diet and barred him from attending worship services for one month. Id.

After his religious diet was revoked, Kelly began a hunger strike to avoid eating food which violated his religious beliefs. Id. Prison officials did not tolerate this behavior and after two days began forcibly tube-feeding him. Id. Tube-feeding proved to be an invasive and painful procedure that left Kelly no choice but to end his strike and eat food which violated his religiously mandated diet. Id.

II. Procedural History

What Finally Drove Mr. Kelly into Court

After all these denials of Mr. Kelly's prayer service requests and his punishment to eat food not part of his religious diet, Mr. Kelly was filed a complaint in the Federal District Court of Tourovia for the Twelfth Circuit. Id. Mr. Kelly challenged the validity of the prison's prayer services and diet program polices as violating his First Amendment rights under the RLUIPA. Id. This action was brought against Mr. Echols and Mr. Abreu. Id. at 2.

Defendants' Justification of their Actions Against Mr. Kelly

Defendants moved for summary judgment and argue that Mr. Kelly did not establish his religious practices were substantially burdened by the multiple denials of an evening congregational service. Id. at 7. Defendants claim prisoners are allowed to worship according to their faith preferences as long as those practices are consistent with the prison's policies, agency security, safety, order, and rehabilitation. Id. at 6. They allow prisoners to worship in their cells using sacred texts, devotional items, and materials. Id. Since religious services are approved based on demand, need, and prison resources, Defendants argue that nighttime prayer services would impose heightened staffing burdens on the prison, therefore denying it was proper under the RLUIPA. Id. Abreu validated prayer and diet restriction policies in an affidavit. Id. at 7. The prison also included documents cost containment stratagems. Id. They argue the Nation lacked the demand necessary to support an additional group meeting. Id. Therefore, Defendants argue that TCC's policies are the least restrictive means of furthering compelling interests of security and personnel and financial concerns for the prison, its inmates and employees. Id.

Defendants also stand by their decision to remove Mr. Kelly from his religious diet. Id. Defendants placed Mr. Kelly on a watch-list after he converted to the Nation of Islam. Id. The

watch list consists of inmates who might potentially assume religious identities to hide illicit conduct and assimilate into gang activity. Id. Their proof was a written statement by the inmate that accused Mr. Kelly of threatening him for a meatloaf dinner. Id. Even though no actual violence was ever proven, Mr. Kelly's religious sincerity was questioned. Id. Thus, Defendants do not take responsibility for compelling him to violate his religious beliefs and practices. Id.

Journey to the Supreme Court

The District Court for the Eastern District of Tourovia held in favor of Mr. Kelly and denied Defendants' motion for summary judgment on the basis that Mr. Kelly's religious practices were substantially burdened by TCC's policies regarding prayers services and religious diets. Even if they were for compelling government interests, TCC did not use the least restrictive means. The Circuit Court of Appeals for the Twelfth Circuit reversed the District Court's decision and found that it erred in finding the RLUIPA was violated. This case arrives in front of the United States Supreme Court with a writ of certiorari.

SUMMARY OF THE ARGUMENT

The free exercise of religion is one of the most important rights in American society. Congress create the RLUIPA, to ensure that even prisoners' religious exercise is protected. Specifically, RLUIPA provides that the government shall not substantially burden a prisoner's religious exercise unless that burden is the least restrictive means of furthering a compelling government interest. 42 U.S.C. § 2000cc-1 (2012). Mr. Kelly, an inmate at TCC, sued TCC for violating RLUIPA when it denied his request for nightly group worship services, and when it revoked his religious diet privileges. The Twelfth Circuit Court of Appeals dismissed his claims; that decision was improper and should be reversed.

First, the Twelfth Circuit erred when it upheld the prison's policy denying nightly group worship services for prisoners who are members of the Nation of Islam (NOI). RLUIPA broadly defines religious exercise in a way that certainly encompasses group worship. Furthermore, TCC's decision to deny Kelly's request under its Religious Corporate Services policy substantially burdens his religious exercise by prohibiting him from engaging in a specific desired religious practice. While there are other possible modes of worship, they are unsatisfactory alternatives and do not eliminate the substantial burden TCC's policy places on Kelly's preferred religious exercise – i.e. group worship. By effectuating this policy, TCC forced Kelly to practice his religion in an unacceptable manner or risk punishment for congregating in violation of prison policy. Finally, TCC's policy is not the least restrictive means to further its compelling security interest. There is no evidence in the record that Kelly or other current NOI members are pose a security risk by participating in nightly group worship services and there are other policies which would further the same goal while restricting religious exercise less.

Second, the Twelfth Circuit erred when it upheld TCC's policy to revoke Kelly's religious diet after one alleged incident of nonobservance. There is no doubt that Kelly's diet is a religious exercise under RLUIPA. Congress broadly defined religious exercise under the Act, and courts have widely held that religious diets qualify. Additionally, TCC's policy substantially burdened Kelly's religious exercise when it revoked his religious diet based on a single unsubstantiated allegation that Kelly violated his dietary restrictions. Kelly is a committed NOI member with sincere religious beliefs. TCC substantially burdened his religious exercise when it forced him to consume a diet which violated his religious beliefs. Furthermore, TCC's policy is not the least restrictive means of furthering a compelling government interest. TCC's professed

security interest in revoking Kelly's diet is unsupported by the record. Even if there is such an interest, TCC failed to demonstrate that it considered and rejected less restrictive alternative policies.

ARGUMENT

I. This Court should reverse the Twelfth Circuit's decision to deny Mr. Kelly nightly group prayer services pursuant to TCC's prison policy because it violates the RLUIPA.

The United States of America prides itself on being the pinnacle of democracy, liberty, and justice. It was built on tenets of equality, promising rights to free its constituents, even if some of those constituents are not physically free. One of these rights is that to religious liberty. U.S. CONST. amend. I. Religious freedom is so important that while the Constitution does not allow promoting one religion over another, it also prohibits impinging on the free exercise of religion. Id. This is a prohibition Congress has made sure applies to all people, even those incarcerated within the penal system. Id. The Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA,") is one of "the latest of long-running congressional efforts to accord religious exercise heightened protection from government-imposed burdens." Cutter v. Wilkinson, 544 U.S. 709, 714 (2005). No matter the status of a person, the government does not have a right to dictate how that person will practice or adhere to his or her religion nor will the government encroach upon that practice or adherence. The RLUIPA ensures this right for prisoners by providing that:

> (a) General rule
> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--
>
> **(1)** is in furtherance of a compelling governmental interest; and

> **(2)** is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1 (2012). The RLUIPA analysis involves four steps. First, the petitioner must identify the religious exercise. Cutter, 544 U.S. at 720. Second, the court asks whether the religious exercise is substantially burdened by the prison regulation. Id. at 732. Finally, applying the strict scrutiny standard, a defendant may show that the religious exercise was burdened, for a compelling government interest and done so by the least restrictive means possible. Id.

It is not for the government to decide how a person shall fulfill his or her religious obligation. It is for the government to ensure that there is no substantial burden being placed upon that religious obligation. Although substantial burden has not yet been strictly defined by this Court, it should be understood as conduct that puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." Thomas v. Review Bd. of Ind. Emp't Sec. Div., 450 U.S. 707, 717-18 (1981). A majority of the circuit courts have applied some variation of the Thomas standard to RLUIPA cases. See Haight v. Thompson, 763 F.3d 554, 565 (6th Cir. 2014) (finding a "substantial burden" when there is "substantial pressure on an adherent to modify his behavior and to violate his beliefs"); Abdulhaseeb v. Calbone, 600 F.3d 1301, 1315 (10th Cir. 2010) (holding that "a religious exercise is substantially burdened…when a government (1) requires participation in an activity prohibited by a sincerely held religious belief, or (2) prevents participation in conduct motivated by a sincerely held religious belief, or (3) places substantial pressure on an adherent either not to engage in conduct motivated by a sincerely held religious belief or to engage in conduct contrary to a sincerely held religious belief"); Washington v. Klem, 497 F.3d 272, 280 (3d Cir. 2007) (finding "a substantial burden exists where: 1) a follower is forced to choose between following the precepts of his religion in order to receive a benefit; OR 2) the government puts substantial pressure on an adherent to substantially modify

his behavior and to violate his beliefs"); Spratt v. R.I. Dep't of Corr., 482 F.3d 33, 38 (1st Cir. 2007) (assuming arguendo that Thomas applies); Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006) (defining a "substantial burden" as "one that puts substantial pressure on an adherent to modify his behavior and to violate his beliefs" (quotations omitted)); Warsoldier v. Woodford, 418 F.3d 989, 995 (9th Cir. 2005) (citing Thomas for definitional support); Adkins v. Kaspar, 393 F.3d 559, 570 (5th Cir. 2004) (finding a "substantial burden on a religious exercise if it truly pressures the adherent to significantly modify his religious behavior and significantly violate his beliefs"). Such interpretations consistent with Thomas encompass the Constitutional desire to protect religious liberty and prevent government impingement on religious freedom.

An analysis of Mr. Kelly's case shows that his rights under RLUIPA have been violated by TCC's policies. J.A. 5. First, a request for nighttime group worship constitutes as a religious exercise. Second, as a result of the denial, Mr. Kelly did face a substantial burden because he was forced to pray in an unclean and unsanitary environment at the mercy of his roommates lewd and disrespectful distractions. Id. Finally, although prison security is a compelling government interest, TCC did not use the least restrictive means to further it. Therefore, Mr. Kelly asks this Court to reverse the Twelfth Circuit's decision.

A. Based on a broad interpretation of the RLUIPA, nightly group prayer services constitute as a valid form of religious exercise.

Mr. Kelly's request for a nighttime congregational worship service is a valid religious exercise under the RLUIPA. The statute defines religious exercise to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A) (2012). The statute dictates it is to be "construed in favor of a broad protection of religious exercise to the maximum extent permitted by the terms of this chapter and the

Constitution." 42 U.S.C. § 2000cc–3(g) (2012). This expansion of the term means it protects religious activities that go beyond just the required activities of a faith.

Under this broad understanding of religious exercise, group worship qualifies as religious exercise, even if it not mandated compulsory by the religion. This Court has held before that religious exercise "often involves not only belief and profession but the performance of…physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine…" Cutter, 544 U.S. at 720 (citing Emp't Div, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872, 877 (1990)). Courts have considered various forms of worship, mandatory or otherwise, to be valid forms of religious exercise, such as preaching to other inmates, keeping kosher and observing Jewish Sabbath, and observing Ramadan. Spratt, 482 at 38, Baranowski v. Hart, 486 F.3d 112, 124 (5th Cir.2007), Lovelace, 472 F.3d at 187, Greene v. Solano Cty. Jail, 513 F.3d 982, 988 (9th Cir. 2008). Courts have also held group worship to be a religious exercise viable to bring a RLUIPA claim. Adkins, 393 F.3d at 567-68 (holding Sabbath and holy day group gatherings to be religious exercise); Van Wyhe v. Reisch 581 F.3d 639 (8th Cir. 2009) (ruling additional group worship time as religious exercise). While Nation members are not required to pray in a group setting, they prefer to worship in the company of fellow believers. J.A. 4. Under the RLUIPA's expanded definition of religious exercise, Mr. Kelly's request for a nightly group prayer service qualifies as a religious exercise.

B. Mr. Kelly's ability to practice his faith has been substantially burdened by TCC's policies denying nightly group prayer services.

Mr. Kelly's ability to freely practice his faith was substantially burdened by TCC's policies to prohibit nighttime congregational prayer services. Congress did not define "substantial burden" within the RLUIPA, however this court has interpreted the substantial

burden test within the realm of the Free Exercise clause to be a "substantial pressure on an adherent to modify his behavior and to violate his beliefs…While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." Thomas, 450 U.S. at 717-18. Based on Congress' trend to expand religious protection and prevent the government from dictating how people practice their faith, the Thomas test for substantial burden is the most fair understanding of substantial burden under the RLUIPA.

1. Religious practice is substantially burdened by the denial of group worship opportunities.

Courts have held in various instances that restrictions or prohibitions on group worship is a substantial burden to adhering to one's faith. In Greene, the plaintiff was a prisoner whose requests for group religious services for himself and forty-two other prisoners were denied. Greene, 513 F.3d at 983. The court had "little difficulty in concluding that an outright ban on a particular religious exercise is a substantial burden on that religious exercise." Id. at 988. In Murphy, The Missouri Department of Corrections did not grant the plaintiff's request for group worship on the basis of preserving security and preventing racial violence. Murphy v. Miss. Dept. Corrs., 372 F.3d. 979, 982 (8th Cir. 2004). The Eighth Circuit concluded that the district court improperly ruled for summary judgment against Murphy. Id. at 988. The plaintiff in Meyer practiced Native American spiritual beliefs. Meyer v. Teslik, 411 F. Supp. 2d 983, 985 (W.D. Wis. 2006). The plaintiff was denied authorization to attend Native American religious services during some months, causing him to miss three services. Id. at 988. The court held that the plaintiff showed his religious beliefs were substantially burdened. Id. at 989.

Similarly, Mr. Kelly requested for a nighttime prayer worship multiple times for himself and the other members of the Nation. J.A. 5. He was denied the request on every account

because it was a violation of TCC policy. Id. Since there are few burdens "more substantial than banning an individual from engaging in a specific religious practice," denial of Mr. Kelly's request is a substantial burden on his religion. Meyer, 411 F. Supp. 2d at 989.

2. The existence of alternative modes of worship do not justify restricting a preferred method of prayer.

The fact that alternative modes of worship exist or the religious practice is not a primary or compulsory element of the religion, does not undermine the substantial burden placed on a prisoner denied his right to group worship. The RLUIPA was enacted to be more narrow and comprehensive than the basic First Amendment rights. Id. at 989. It goes beyond merely protecting the right to practice one's faith, "it protects the right to engage in specific, meaningful acts of religious expression in the absence of a compelling reason to limit the expression." Id. The defendant in Meyer contended that the plaintiff had alternative means to practice his faith such as "meditate silently, fast or correspond with other believers" and that missing three group services was a "*de minimis* deprivation." Id. However, the RLUIPA does not ask how significant the religious practice is or whether the prisoner has other means of worship. 42 U.S.C. § 2000cc-5(7) (2012). In fact, the RLUIPA emphasizes the importance of accepting all forms of worship, "whether or not compelled by, or central to, a system of religious belief." Id.

It is not for the prison or the government to determine what is important or what is enough for Mr. Kelly to do as part of his religious practice. Mr. Kelly may have had the option to pray in his cell at night, but members of the Nation of Islam prefer to pray in congregational settings, as they do for three out of five prayers of the day. J.A. 5. There is no greater burden than "banning an individual from a engaging in a specific religious practice," therefore, Mr.

Kelly's ability to pray in his cell is not a justification for denying him the option of a nighttime group prayer service. Id.

3. TCC's policy prohibiting night prayer services forces an inmate to abandon his religious beliefs because it offers punishment as an ultimatum, and thus, is a substantial burden to religious practice.

Furthermore, by denying Mr. Kelly his request for a nightly group prayer service, he was forced to stray from proper adherence to his his religion. Id. Putting a prisoner in a position where he or she has no choice but to abandon or violate his or her religious beliefs is coercion and is an infringement on religious exercise. Warsoldier, 418 F.3d at 996. In Warsoldier, the plaintiff participated in Cahuilla Native American religious practices, one of which requires him to keep his hair long. Id. at 992. The California Department of Corrections did not allow the prisoners to keep their hair longer than three inches. Id. The plaintiff was found guilty for violating the grooming policy and was given various punishments. Id. The defendant argued that he was never directly coerced into cutting his hair; he was just punished for violating prison policy. Id. at 997. However, the court ruled that giving the "option" to freely practice his religion at the expense of being punished every time he does constitutes as a form of coercion and places a substantial burden on the practice of religion. Id.

Mr. Kelly filed his grievance for a nightly group worship service because praying in his cell was no longer a viable option. J.A. 4. When praying in his cell, he was subject to an unclean and disrespectful environment. Id. Nation of Islam members believe it is Allah's preference that they pray in "clean and solemn environment[s] with other members of [their faith] and once their prayer begins they are not to be disrupted. Id. His cellmate "intentionally ridiculed him or engaged in lewd behavior" as Mr. Kelly tried to perform his prayer. Id. at 5. Moreover, Mr. Kelly's cell had a toilet in it, thus he was not praying in a clean space. Id. at 5. Prison policy also

dictates that an inmate will be punished if he is not present in his cell by the final headcount. Id. at 4. Therefore, without the prison providing a set time and place for members to gather for group worship, inmates can either violate prison policy by praying in another place or they can pray in unclean cells with distractions. Id. The prison may not be directly coercing Mr. Kelly to violate his religious beliefs by explicitly telling him not to pray, but its policies essentially deny Mr. Kelly and other Nation inmates a clean and quiet environment for prayer. Id. This does force them to violate their religious beliefs and is a substantial burden on their religious beliefs.

4. TCC's policy creates a limiting restriction as to with whom a prayer service must be conducted which substantially burden's an inmate's ability to practice.

TCC's policy requiring a chaplain to be present at every prayer service substantially burdens Mr. Kelly's ability to practice faith. The circuit court's reliance on the holding from Adkins in relation to TCC's chaplain requirement is not applicable to Mr. Kelly's situation. J.A. 19. Adkins did not lay down a per se rule in regards to outside volunteer requirements, but rather presents a "fact-specific, case-by-case review." Mayfield v. Texas Dept. Criminal Justice, 549 F.3d 599, 614 (5th Cir. 2008). In Adkins, the plaintiff was a member of the Yahweh Evangelical Assembly ("YEA,") and complained that his ability to practice his faith was burdened because he was not allowed to assemble on every Sabbath and every YEA holy day while incarcerated. Adkins, 393 F.3d at 566. The prison required that an outside volunteer must be present for all religious assemblies. Id. at 571. The court ruled that YEA members were "prevented from congregating…on many Sabbath and YEA holy days," because of a lack of qualified outside volunteers, "not from some rule or regulation that directly prohibits such gatherings." Id.

This case is distinguishable from Mr. Kelly's case in that TCC does not have an outside volunteer policy. J.A. 4. Once again, the prison is interfering with and dictating how inmates

must adhere to their religion. Prisoners are restricted to holding prayer services only when a chaplain is present. Id. Granted the outside volunteer policy was terminated as a result of illicit activity, however that activity happened almost twenty years ago. Id. Also the activity was not conducted by any of the current members of the Nation of Islam, or even the past members of the Nation. Id. at 3. Therefore, TCC's policy to only allow prayer services if a chaplain is present, not an outside volunteer, poses a burden to Mr. Kelly's ability to practice his faith.

C. While TCC's policy did maintain a compelling government interest, it did not use the least restrictive means in furthering that interest, and thus does not pass strict scrutiny.

The RLUIPA does grant prisons a right to pursue a compelling government interest at the expense of a prisoner's religious belief, but only if they use the least restrictive means to do so, which the TCC did not do in Mr. Kelly's case. 42 U.S.C. § 2000cc-1 (2012). When drafting the RLUIPA, Congress intended for it to increase the protection to religious worship in prison, but Congress maintained the deference given to the "experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." Murphy, 372 F.3d at 988 (citing S. Rep. No. 103-111, at 10 (1993)). Congress limited this deference though to ensure prison regulations and policies were not enacted based on "mere speculation, exaggerated fears, or post-hoc rationalizations." Id.

This Court and Congress have emphasized the importance of context when determining what is a compelling government interest. Cutter, 544 U.S. at 710. This has made clear that security interest within the confines of a prison are a compelling government interest. Cutter, 544 U.S. at 710. In Murphy, the Missouri Department of Corrections (MDOC) claimed to deny the plaintiff's request for group worship to "preserve security and to reduce the likelihood of racial

violence." Murphy, 372 F.3d at 982. While the court acknowledged institutional security was a compelling interest, it noted that prison officials "must do more than offer conclusory statements and post hoc rationalizations for their conduct." Id. at 989. The TCC's policy towards religious practices is based on security, safety, order, and rehabilitations concerns. J.A. 6. Requests for religious accommodations are granted or denied based on demand, need, and prison resources. Id. TCC claimed to deny Mr. Kelly's request because it would require heightened staffing burdens and it raised security concerns. Id. at 7. As security concerns are legitimate concerns for a prison to have, TCC did maintain a compelling government interest.

Having a legitimate compelling government interest is not enough though to surpass a restriction on religious freedom. The RLUIPA requires that the compelling government interest be pursued using the least restrictive means possible, a burden that is not met by TCC. 42 U.S.C. § 2000cc-1 (2012). The defendant in Greene argued denying the request for group services was the least restrictive means because the jail "does not have an available classroom… inmates housed in maximum security could not meet in a group setting… [j]ail security would be severely threatened if potentially violent offenders…were not very closely supervised and … were allowed to congregate outside their modules." Greene, 513 F.3d at 989. It was not enough that the prison officials simply stated security concerns for not allowing the plaintiff to attend group religious worship services. Greene, 513 F.3d at 989. In Murphy, MDOC asserted its compelling government interest to be threat of racial violence to prison security. Murphy, 372 F.3d at 989. The court held that MDOC did not have to show actual racial violence occurring, but there was a "question of fact as to whether there are means available to MDOC less restrictive than the total preclusion of group worship." Id. The prison must show that they "actually considered and rejected the efficacy of less restrictive measures before adopting the

challenged practice." Warsoldier, 418 F.3d at 999.

It is important that the TCC maintain security and order within its prison, but in Mr. Kelly's case it has not done so using the least restrictive means. The TCC had changed its open religious accommodation policy to a more restrictive one by banning the option for prayer services at night with a prison service volunteer after events that occurred almost twenty years ago. J.A. 4. Those events did not involve Mr. Kelly or any current Nation members, nor did those events involve any Nation members at all. Id. In fact, constituents of the Nation have maintained satisfactory behavioral standing with the prison for the past five years. Id. at 3. While they do tend to stay together, they have not been accused of being racist or exclusive in their religious participation to warrant a fear of racial violence as in Murphy. Id.; Murphy, F.3d at 989. The current members do not have a record of history of violence at the prison. J.A. 3. The prison also monitors them to make sure they are not engaging in illicit or gang activity. Id. Like Greene, Mr. Kelly is also housed in a maximum security prison and similarly so that factor should not warrant a ruling of least restrictive means. Id.; Greene, 513 F.3d at 989. Unlike Greene, the members do have five location options to hold their prayers, so that cannot be raised as a defense for the least restrictive means argument. J.A. 4; Greene, 513 F.3d at 989. Furthermore, the prison already holds three prayer services a day and monitors the members for illegal activity. Id. at 3. Adding an evening group prayer service would not increase security interests in a manner that is not already considered by the prison.

Mr. Kelly is not asking the prison for a prayer service for late into the night. Id. at 5. Tourovia Directive 98 does not allow prayer services after the last inmate head count at 8:30 P.M. Id. at 24. However, the request was for an additional prayer service after the evening meal at 7:00 P.M. but *before* the final headcount at 8:30 P.M. Id. A chaplain is already present for

prayer services before 7:00 P.M. and having one stay for a little longer for the sake of protecting religious freedom would not be unreasonable. The other option would be to allow outside volunteers to come in and lead the nighttime prayer service. Given that TCC did not consider either of these options, they are most certainly not practicing the least restrictive means of burdening religious practice. Defendants have failed to consider other viable alternatives and thus their policy is the not the least restrictive means to furthering security interests.

II. The Twelfth Circuit Erred when it ruled that TCC's Directive 99, which permits the prison to revoke an inmate's dietary privileges for a sincerely held religious belief after a single instance of nonobservance, does not violate RLUIPA.

The Twelfth Circuit incorrectly held that TCC Directive 99 does not violate RLUIPA. RLUIPA forbids the government from imposing a "substantial burden" on an inmate's religious exercise unless the burden "is the least restrictive means of furthering [a] compelling government interest." 42 U.S.C. § 2000cc-1(a) (2012). Congress passed RLUIPA to give imprisoned inmates greater religious protection than the Constitution provides. Lovelace, 472 F.3d at 186. Congress "intended to provide as much protection as possible to prisoners' religious rights" while keeping prison operations in mind. Murphy, 372 F.3d at 987. The plaintiff must first produce prima facie evidence demonstrating that the prison's policy violates RLUIPA. 42 U.S.C. § 2000cc-2(b) (2012). Thereafter, the government bears the burden of proving that the policy is the least restrictive means of furthering a compelling state interest. 42 U.S.C. § 2000cc-1(a).

Directive 99 is the prison's "Religious Alternative Diets" policy. J.A. at 26. The policy allows TCC to revoke an inmate's religious dietary privileges "for any designated period of time or revoke the privilege permanently" if TCC has reason to believe the diet is not followed. Id. Directive 99 violates RLUIPA because: A) Kelly's religious diet is a religious exercise under

RLUIPA; B) the policy to remove Kelly's religious dietary privileges after a single alleged instance of nonobservance substantially burdens his sincere religious belief, and; C) the government cannot pass strict scrutiny in order to uphold the policy.

A. Kelly's religious diet is a religious exercise under RLUIPA.

Kelly's religious diet counts as a religious exercise under RLUIPA. Congress broadly defined religious exercise 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)(A) (2012). RLUIPA "shall be construed in favor of a broad protection of religious exercise." The circuit courts have commonly determined that consuming a religious diet qualifies as a religious exercise under the Act. E.g., Abdulhaseeb, 600 F.3d at 1314-15. There is no serious contention that Kelly's requested diet is not religious in nature. The Twelfth Circuit's finding that Kelly's diet is a religious exercise, J.A. at 16-17 should be upheld.

B. TCC placed a substantial burden on Kelly's sincerely held religious belief when it removed his religious diet privileges based on a single instance of nonobservance.

TCC placed a substantial burden on Kelly's religious exercise when it revoked his dietary privileges after one alleged instance of nonobservance. The government places a substantial burden on religious exercise when it puts "substantial pressure on an adherent to modify his behavior and to violate his beliefs." Thomas, 549 U.S. at 718. The substantial burden analysis is a "case-by-case, fact-specific" inquiry. Adkins, 393 F.3d at 571. Directive 99 placed a substantial burden on Kelly's religious exercise because; 1) Kelly is a sincere adherent to the Nation of Islam, and; 2) TCC forced Kelly to violate his beliefs when it revoked his religious diet.

1. Kelly is a sincere religious believer and adherent to the Nation of Islam.

The Twelfth Circuit erred when it found no evidence in the record to support a finding of Kelly's religious sincerity. J.A. at 20. RLUIPA forbids the Court from examining whether the inmate's practice is central to his religion. 42 U.S.C. § 2000cc-5(7)(A); Cutter, 544 U.S. at 725, n.13. The Court may choose whether to examine an inmate's religious sincerity. See Cutter, 544 U.S. at 724, n. 13 (stating that RLUIPA "does not preclude inquiry into the sincerity of a prisoner's professed religiosity). "Sincerity is generally presumed or easily established." Moussazadeh v. Tex. Dep't of Criminal Justice, 703 F.3d 781, 791 (5th Cir. 2012). The Court should look towards the inmate's words and actions to determine whether his religious beliefs are sincere. Id. Additionally, the court should examine the issue of religious sincerity with "judicial shyness." Id. at 792. Courts should "limit [themselves] to almost exclusively a credibility assessment when determining sincerity." Id. (quotation marks omitted).

When courts analyze religious sincerity, they are split on whether an inmate who violates his religious diet, or "backslides," constitutes a per se finding of religious insincerity. Compare Moussazadeh, 703 F.3d at 792 (stating that perfect adherence is not required to support a finding of sincerity); Lovelace, 472 F.3d at 188 (rejecting a policy which "automatically assumes that lack of sincerity …with respect to one practice means lack of sincerity with respect to others); and Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988) (stating that "a person who does not adhere steadfastly to every tenet of his faith does not mark him as insincere); with Gardner v. Riska, 444 Fed. Appx. 353, 355 (11th Cir. 2011) (refusing to find the inmate had a sincere belief to follow a kosher diet when he violated it several times).

In Moussazadeh, the Fifth Circuit held that the plaintiff "offered sufficient evidence to establish sincerity as a matter of law." 703 F.3d at 792. There, the Jewish inmate violated his

religious diet by purchasing non-kosher food multiple times. Id., at 791. However, the court determined there was sufficient additional evidence to consider his beliefs sincere; he was raised Jewish, kept a kosher household, and requested kosher meals. Id., at 792.

Similarly, the Lovelace court refused to consider dietary backsliding as conclusive evidence of religious insincerity. 472 F.3d at 181, 188. There, the plaintiff was a practicing Nation of Islam (NOI) member who acted as an NOI liaison at the prison. Id., at 182. He made suggestions for the NOI Ramadan menu and filed religious dietary grievances on behalf of NOI inmates. Id., at 182-83. His dietary privileges were taken away when he allegedly violated his religious diet by breaking his fast during Ramadan; the inmate expressly denied these allegations. Id., at 181, 183. The court refused to accept the alleged backsliding as per se evidence of insincerity. Id., at 188.

In Reed, the court refused to rule on whether the plaintiff's beliefs were sincere when he violated his religious vegetarian diet by eating meat, and allegedly groomed his head and facial hair contrary to his religious beliefs. 842 F.2d at 962. However, the court specifically stated that backsliding is not conclusive evidence of religious insincerity. Id., at 963. To hold otherwise would allow prisons to play the role of religious police and require strict religious orthodoxy. Id.

In Gardner, the court held that the inmate's expressed religious belief to consume a kosher diet was insincere. 444 Fed. Appx. at 355. The court reached this conclusion based on evidence which showed the plaintiff had purchased and eaten non-kosher food on numerous occasions. Id. The inmate did not contest those allegations. Id.

Here, Kelly has been imprisoned at TCC since 2000. J.A. at 3. He converted to NOI in 2002. Id. NOI adherents follow a strict vegetarian diet (or Halal) and fast during Ramadan. Id. Additionally, NOI requires its members to pray five times per day. Id., at 3-4. Since converting

in 2002, Kelly has been an active NOI member who attends all prayer services. Id., at 5. In February 2013, Kelly filed a written request for additional nightly prayer services. Id. He filed two grievances with the Director of TCC's Chaplaincy Department on behalf of other NOI inmates and himself when this request was denied. Id. These grievances were also denied and Kelly ultimately filed a formal grievance with the prison. Id. Two weeks later, Kelly's cellmate reported that Kelly threatened him and asked for his meatloaf. Id., at 6. Prison officials searched Kelly's cell and found meatloaf under his mattress. Id. However, there was no evidence that Kelly ever ate meatloaf or harmed his roommate, and Kelly denied that the meatloaf was his. Id. The District Court considered all this information and found "substantial evidence to demonstrate that his beliefs were sincere." Id., at 10. The Twelfth Circuit reversed and deferred to TCC's finding that Kelly's actions "called his religious sincerity into question." Id., at 20.

The totality of Kelly's words and actions must be considered to determine whether his beliefs are sincere. See Moussazadeh, 703 F.3d at 791. Viewed in the light most favorable to the nonmoving party, the evidence supports a finding that Kelly's religious beliefs are sincere. Just like the inmate in Lovelace, Kelly is a practicing NOI member, regularly attends prayer services, acts as an NOI liaison, and has filed grievances on behalf of his faith group. Kelly exhibits far greater adherence to his religious values than the plaintiffs in Gardner, Reed or Moussazadeh. Those plaintiffs were all seen violating their beliefs (some multiple times) while there is no evidence that Kelly actually violated his. Moreover, the courts in Reed and Moussazadeh were unwilling to consider those inmates' beliefs as insincere despite substantially more evidence of backsliding. Kelly's actions over the eleven year period between his conversion to NOI and the alleged backsliding incident demonstrate that his religious beliefs are sincere. Neither TCC nor the courts should not be allowed to police religion and conclusively

decide someone's beliefs are insincere because of one alleged backsliding incident. The Twelfth Circuit's finding that Kelly's beliefs are insincere should be reversed.

2. TCC placed a substantial burden on Kelly's religious exercise when it revoked his religious diet privileges and forced him to violate his beliefs.

TCC substantially burdened Kelly's religious exercise when it revoked his religious diet after one alleged backsliding incident. RLUIPA does not define "substantial burden" and the Supreme Court has never defined it under the Act. However, this Court has defined "substantial burden" it in the context of First Amendment free exercise claims. E.g. Thomas, 450 U.S. at 717-18. There, the court held that the government imposes a substantial burden on religious exercise when it places "substantial pressure on an adherent to modify his behavior and to violate his beliefs." Id., at 718. The Court has also said that a substantial burden tends to "coerce individuals into acting contrary to their religious beliefs." Lyng v. Nw. Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988).

Some courts have found that a prison policy places a substantial burden on a religious exercise when an inmate has no real option to follow his religious beliefs. In Abdulhaseeb, the court found a genuine issue of fact on whether the prison's policy substantially burdened the plaintiff's religious exercise. 600 F.3d at 1316. There, the prison only offered vegetarian or non-pork religious diets and thus denied the plaintiff's request for a religious diet with halal meat. Id., at 1306-07. This policy placed "substantial pressure on Mr. Abdulhaseeb not to engage in his religious exercise by presenting him with a Hobson's choice – either he eats a non-halal diet in violation of his sincerely held beliefs, or he does not eat." Id., at 1316, 1317. See also Shakur v. Schriro, 514 F.3d 878, 882, 889 (9th Cir. 2008) (finding a substantial burden where the prison offered a vegetarian diet that caused gastrointestinal discomfort which disrupted other religious activities, or a diet that directly violated the inmate's religious beliefs).

Courts have also found that a prison substantially burdens a prisoner's religious exercise when it revokes religious dietary privileges after alleged backsliding incidents. In Lovelace, the Fourth Circuit held that a prison substantially burdened an inmate's religious exercise when it "prohibited [him] from exercising his religious beliefs." 472 F.3d at 187, 189. After a single alleged backsliding incident, the prison substantially burdened the inmate by prohibiting him from fasting during Ramadan and participating in NOI services. Id., at 181, 187. Similarly, the Sixth Circuit stated in Colvin v. Caruso that a prison "policy of removing a prisoner from the kosher-meal program for mere possession of a nonkosher food item may be overly restrictive of inmates' religious rights. 605 F.3d 282, 296 (6th Cir. 2010).

Two circuits have declined to find a substantial burden when a prison removes a backsliding prisoner's religious diet privileges. In Daly v. Davis, the court held that a prison did not substantially burden a prisoner's religious exercise when it revoked his dietary privileges on three separate occasions for backsliding. No. 08-2046, 2009 WL 773880, at *2 (7th Cir. Mar. 25, 2009). The Eighth Circuit upheld a similar policy in Brown-El v. Harris, 26 F.3d 68, 69-70 (8th Cir. 1994). Both courts held that the removal did not create a substantial burden because prisoners backslid voluntarily. Daly, 2009 WL 773880, at *2; Brown-El, 26 F.3d at 69-70. However, the Brown-El court reached this conclusion in the context of a First Amendment free exercise claim which offers less protection than that afforded by RLUIPA. 26 F.3d at 69.

Here, prison officials searched Kelly's cell, after his roommate reported being threatened, and found meatloaf wrapped in a napkin under his mattress. J.A. at 6. After finding the meatloaf, TCC "removed Kelly from the religious diet program" pursuant to Directive 99. Id. Rather than violate his religious beliefs, Kelly chose to stop eating once he was removed from the program. Id. After two days of not eating, "prison employees forcibly began to tube-feed

Kelly." Id. He ultimately decided to eat the nonreligious food rather than continue to subject himself to the painful tube-feeding. Id. Additionally, TCC forbid Kelly from attending NOI worship services for one month based on the alleged threats. Id. Notably, there is absolutely no evidence that Kelly ever ate meat in violation of his religious diet. Id.

Based on these facts, it is evident that TCC substantially burdened Kelly's religious exercise. The prison forbid him from eating his religious diet because of an unsubstantiated claim that he ate meat. At a minimum, the prison imposed a Hobson's choice similar to those in Abdulhaseeb and Shakur. TCC left Kelly with two unacceptable options; it allowed him to eat the general prison diet which violates his beliefs or not eat at all. Furthermore, after 2 days, the prison began force-feeding Kelly, thus obviating any prior ability Kelly maintained to follow his religious beliefs. The facts are almost identical to those in Lovelace and Caruso. TCC prevented Kelly from practicing his religion when it revoked his religious diet and stopped him from attending prayer services. This does not just place substantial pressure on Kelly to modify his behavior and violate his beliefs; this forces him to do so. While the courts in Daly and Brown-El concluded that a substantial burden could not occur when the original backsliding incident was voluntary, they ignored the obvious effect of these policies – they completely bar inmates from practicing their religious beliefs. The Twelfth Circuit's finding that Directive 99 does not place a substantial burden on Kelly's religious exercise was improper and should be reversed.

C. The government cannot prove that Directive 99 passes strict scrutiny.

The Twelfth Circuit erred when it held that Directive 99 passes strict scrutiny. To uphold a policy that places a substantial burden on an inmate's religious exercise, the government must prove that the policy is the least restrictive means of furthering a compelling state interest. 42 U.S.C. § 2000cc-2(b). The government has not met that burden. The Twelfth Circuit's holding

was improper and should be reversed because: 1) Directive 99 does not further a compelling state interest, and 2) even if there is a compelling state interest, revoking religious dietary privileges after a single instance of nonobservance is not the least restrictive means of doing so.

1. There is no compelling government interest to remove Kelly's religious diet privileges after a single alleged backsliding incident.

The twelfth circuit erred when it ruled that TCC had a compelling government interest to revoke Kelly's religious dietary privileges. Congress did not define what a compelling government interest is under RLUIPA. This court has noted, however, that "context matters" when applying this standard. Cutter, 544 U.S. at 723 (citing Grutter v. Bollinger, 539 U.S. 306, 327 (2003)). The courts should "accord due deference to the experience and expertise of prison and jail administrators." Cutter, 544 U.S. at 717. Nonetheless, "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." 146 Cong. Rec. 16698, 16699 (July 27, 2000). Moreover, simply stating a compelling interest is insufficient for the government to meet its burden. Spratt, 482 F.3d at 39. The Government must provide evidence supporting its concern. Murphy, 372 F.3d at 989.

Maintaining prison security is a compelling state interest under RLUIPA. Cutter, 544 U.S. at 725, n.13. Other interests such as order, discipline, costs, and limited resources might also qualify. 146 Cong. Rec. 16698, 16699 (July 27, 2000). Once again, however, any claimed interest must be supported by evidence. In Spratt, the court rejected the defendant's asserted security interest because the only given proof was an affidavit which did not cite any studies or discuss any research supporting it. 482 F.3d at 39. In Shakur, the court entertained the argument that prison costs might qualify as a compelling state interest. 514 F.3d at 889. Ultimately, however, the court rejected this argument because the only evidence supporting this claim was

an affidavit signed by a Pastoral Administrator whose job functions had nothing to do with prison costs or providing religious meals. Id.

Here, TCC argues that "prison safety, personnel and financial concerns for the prison, its inmates and employees constitute compelling interests." J.A. at 13. However, the prison has provided absolutely no evidence to support a compelling interest based on any financial personnel considerations. Thus, the only interest this Court can consider is whether TCC has a security interest in revoking Kelly's diet.

In support of its asserted security interest, TCC offers a written statement from Kelly's cellmate which documents the alleged threats Kelly made. Id., at 14. Importantly, however, there was zero evidence that Kelly ever physically harmed his cellmate. Id., at 6. Moreover, the alleged security interest must be viewed in proper context. Kelly has no history of threatening or harming any inmates since he was incarcerated in 2000, notwithstanding this alleged incident. Just like the affidavits in Spratt and Shakur, this written statement is insufficient to prove that TCC has a compelling security interest sufficient to support revoking Kelly's religious diet. The Twelfth Circuit's finding that TCC has a compelling government interest was improper because the asserted security interest is both speculative and based on exaggerated fears.

2. Revoking dietary privileges for a single alleged backsliding incident is not the least restrictive means for achieving TCC's proposed compelling government interest.

The Twelfth Circuit erred when it ruled that Directive 99 is the least restrictive means of furthering TCC's security interest. A prison "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." Warsoldier, 418 F.3d at 999. Furthermore, "their rejection should generally be accompanied by some measure of

explanation." Spratt, 482 F.3d at 41, n.11. The government cannot meet its burden by simply stating that all other alternatives were considered and rejected. Id.

Courts routinely reject a prison's argument that a policy is the least restrictive means when the argument is only a conclusory statement unaccompanied by proof that other alternatives were considered and rejected. See Shakur, 514 F.3d at 890; Spratt, 482 F.3d at 41; Murphy, 372 F.3d at 988-989. Here, TCC has not offered any proof that it considered other alternative restrictions. Thus, Directive 99 cannot be the least restrictive means of furthering TCC's asserted interest. Even if there were proof, however, there is sufficient evidence to dispute the prison's claim that this policy meets the least restrictive means requirement.

The government faces a high burden when it seeks to prove that revoking religious dietary privileges is the least restrictive means of furthering a compelling interest. In Lovelace, the prison asserted an interest in removing prisoners from religious dietary programs when they break the rules created for those programs. 472 F.3d at 190. While the court was skeptical of that interest, it stated that revoking the inmate's dietary and worship privileges still was not the least restrictive means of furthering that interest. Id., at 191. Specifically, the court noted that "the removal provision is far reaching in that it excludes inmates not only form the special Ramadan meals but also from the Ramadan prayer services." Id. Furthermore, "suspending an inmate's religious diet is a rather restrictive measure and could be viewed as overbroad, potentially affecting sincere and insincere inmates alike." Kuperman v. Warden, N.H. State Prison, No. 06-cv-420-JL, 2009 WL 4042760, at *6 (D.N.H. Nov. 20, 2009).

Here, the Twelfth Circuit found that revoking Kelly's religious diet was the least restrictive means for furthering TCC's security interest "because it sets consequences in motion only for inmates who break the rules of their own accord." J.A. at 21. It reached this conclusion

by "adopting" the reasoning and holding form Brown-El. Id. This was an incorrect reading of the law. The Brown-El court never even discussed least restrictive means because it was decided before RLUIPA was enacted. Moreover, even if performed a RLUIPA analysis, it would not have reached the least restrictive means analysis because it specifically held that the policy did not burden the inmate's religious exercise. 26 F.3d at 69. Thus, the Twelfth Circuit's conclusion that Directive 99 is the least restrictive means of furthering a compelling interest because Kelly's' alleged backsliding occurred voluntarily is wrong. Not only is it an incorrect reading of the law, but it has nothing to do with the security interest asserted by TCC.

The coercive effects of this policy have already been described. Directive 99 substantially burdens Kelly's sincere religious beliefs by forcing him to violate them. There are other means that would be far less restrictive. For example, the prison could change Kelly's cellmate or require more than one violation before placing such a substantial burden on his religious exercise. Both of these would be less restrictive. It is clear that TCC did not adequately consider other valid alternatives. The Twelfth Circuit's holding was improper and should therefore be reversed.

CONCLUSION

The Twelfth Circuit's judgment was improper and should be reversed because TCC's policies prohibiting night services to NOI members and removing inmates from a religious diet or fast after alleged backsliding both violate RLUIPA.

UNITED STATES STATUTES

42 U.S.C. § 2000cc-1 (2012) – Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person--

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which--

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc-2 (2012) – Judicial Relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. § 2000cc–3(g) (2012) – Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding

for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall--

> **(1)** authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or
>
> **(2)** restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter shall be construed to preempt State law, or repeal Federal law, that is equally as protective of religious exercise as, or more protective of religious exercise than, this chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this

chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

42 U.S.C. § 2000cc-5 (2012) – Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause " means that portion of the First Amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"--

(A) means--
(i) a State, county, municipality, or other governmental entity created under the authority of a State;
(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and
(iii) any other person acting under color of State law; and
(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term “program or activity” means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term “religious exercise” includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.