SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2015

No: 985-2015

SHEEM KELLY,

Petitioner

v.

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

Respondents.

Team #18

BRIEF FOR RESPONDENTS

TABLE OF CONTENTS

Table of Contents …….....2

Table of Authorities …….3

Questions Presented ……4

Jurisdictional Statement ……....4

Statement of the Case ……5

Summary of the Argument ……10

Argument ……..11

Conclusion ……23

TABLE OF AUTHORITIES

United States Supreme Court Case Law

1. *Bowen v. Roy*, 476 U.S. 693, 693, 707, 712, 718 (1986).
2. *Cutter v. Wilkinson*, 544 U.S. 709, 717, 125 S. Ct. 2113, 2119, 161 L. Ed. 2d 1020 (2005).
3. *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003).
4. *Holt v. Hobbs*, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015).
5. *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 132–133, 97 S.Ct. 2532, 2541 (1977).
6. *Lyng v. Northwest Indian Cemetery Protective Ass'n.*, 485 U.S. 439, 440 (1988).
7. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 657, 109 S. Ct. 1384, 1386, 103 L. Ed. 2d 685 (1989).
8. *Thomas v. Review Bd. Of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981).
9. *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64 (1987).
10. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1673, 191 L. Ed. 2d 570 (2015).
11. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280, n. 6 (1986).

United States Court of Appeals Case Law

1. *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. (2007).
2. *Benning v. Georgia*, 391 F.3d 1299, 1304 (11th Cir. 2004).
3. *Brown-el v. Harris*, 26 F.3d 68, 69 (8th Cir. 1994).
4. *Kelly v. Echols*, 983 F.3d 1125, 1128 (12th Cir. 2015).
5. *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006).

United States District Court Case Law

1. *Kelly v. Echols*, 985 F. Supp. 2d 123, 124 (N.D.T.O. 2015).

Legislative History

1. 146 Cong. Rec. 16698, 16699

QUESTIONS PRESENTED

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

Whether Tourovia Correctional Center's prison policy reserving the right to remove an inmate from a religious diet or fast, due to evidence of backsliding, violates RLUIPA's substantial burden provision?

JURISDICTIONAL STATEMENT

The district court's subject matter jurisdiction comes from the powers enumerated it under the judicial review standard set forth in Article III, Section 2 of the U.S. Constitution and it heard the case on March 7, 2015. Subsequently, on appeal, the corresponding appeals court, in this case the 12th Circuit, under its power of appellate review heard the case on June 1, 2015. This case, in timely fashion, now appears before the Supreme Court on appeal from plaintiffs, whose summary judgement was vacated.

STATEMENT OF THE CASE

In 2000, Siheem Kelly (hereinafter "Kelly") was convicted of multiple drug-trafficking offenses and also one count of aggravated robbery. *Kelly v. Echols*, 985 F. Supp. 2d 123, 124 (N.D.T.O. 2015). Kelly then became an inmate at the maximum security prison Tourovia Correctional Center ("TCC"). *Id*. After two years in prison, Kelly filed the required "Declaration of Religious Preference Form," because he decided to convert to the Nation of Islam after previously not being religiously affiliated. *Id.* Kelly also requested to change his last name to "Mohammed," and asked the prison officials to address him under his new name. *Id.* The "Declaration of Religious Preference Form" must be completed if an inmate wants to participate in religious services or participate in a special religious dietary plan. *Id.* The "Declaration of Religious Preference Form" must be filed by the inmate, and the Warden must provide written approval for the prisoner to become an acknowledged member and be eligible for the necessary services. *Id.*

The Nation of Islam is a lesser practiced religion amongst inmates, as it constitutes less than one percent of the general population of the prison. *Id.* As the trial court issued its decision, it was reported that there were only seven members in the TCC who practiced this specific religion. *Id.* Members of the Nation of Islam follow a vegetarian diet and fast throughout the month of Ramadan. *Id.* They also have to pray five times a day at specified prayer times, referred to as "Obligatory and Traditional Prayers." *Id.* The five "Obligatory and Traditional Prayer" times during the day in which members must pray are dawn, early afternoon, late afternoon, sunset, and late evening. *Id.* at 123-24. During these prayers, members demand that they should not be interrupted, and prefer to pray together. *Id.* at 124.

Initially, the TCC was very open to prisoners who wished to actively participate in religious services. *Id.* However, in August 1998, the prison became aware of prisoners using the prayer services to enhance gang activity. *Id.* During the prayer services, prisoners would provide gang orders to the prison service volunteer, and the volunteer would deliver these orders to gang members outside the prison. *Id.* Additionally, there were Christian and Muslim groups (including followers of the Nation of Islam) who attended the night services that were ignoring the evening headcount and instead staying in their prayer rooms for longer periods then allowed. *Id.*

Since these discoveries, the TCC understandably tightened up its policy, and banned the use of prison volunteers and all nightly services. *Id.* The prison provided that if an official chaplain was unavailable to conduct the services then no services would be held. *Id.* Furthermore, the chaplain's hours of services would only be available during three Designated Prayers Times. *Id.* The only times chaplains could provide services outside the hours of operation would be if the prisoner was near death, or if the prisoner was unable to attend a prayer service because of physical incapability or illness. *Id.* The main justification for these restrictions was to make sure the prisoners were back in their prison cells for the evening headcount. *Id.*

The TCC provided a very clear policy that if any prisoner was not in his cell before the headcount, or if there was any evidence of misconduct regarding his daily means, that prisoner would be punished. *Id.* Finally, if the inmate was not present by the evening headcount, then that inmate would face the possibility of solitary confinement as his punishment. *Id.* It should be noted that the TCC never assigned cellmates based on religion; however, the prison's policy does allow prisoners to request to be transferred if any violence had occurred. *Id.*

Regarding granting prayer services, the TCC looked at four considerations: (1) demand, (2) need, (3) staff availability, and (4) prison resources. *Id.* The TCC recognized the Nation of Islam, and allowed its followers to attend prayer services. *Id.* There were three services every day for Catholic, Protestant, Jewish, and Muslim prisoners. *Id.* The prayer services take place in a chapel and four classrooms. *Id.* Any groups labeled as "counter-majoritarian" are allowed to meet every day, but only once per day. *Id.*

In February 2013, Kelly filed a prayer service request, which asked for an extra prayer service that would be scheduled in the evening, after the last meal. *Id.* at 125-26. The request was denied because it would have violated the prison's policy which prevents all prisoners from being anywhere outside their cell before the final headcount. *Id.* at 126. Kelly was also told that the three services, which were already provided to Kelly and all fellow followers of the Nation of Islam were sufficient, and they could perform their other prayers individually in their cells. *Id.* Kelly tried to negotiate with the prison, saying, "that he would compromise for at least one additional service in which to conduct his last two prayers of the day with his brothers." *Id.* Kelly also requested that the prayer service take place away from other prisoners who did not share his same faith, and with a chaplain who was affiliated with the Nation of Islam. *Id.* This led Kelly to file two grievances. *Id.*

In his first grievance, Kelly claimed that he needed the additional prayer service because he could no longer pray in his cell because he was distracted, and other prisoners were ridiculing him. *Id.* Kelly claimed that this was an act of disrespect to his religion. *Id.* Kelly's grievance was denied based on the fact that Kelly was unable to prove there was any negative conduct that occurred while he was praying. *Id.* Kelly then filed a second grievance and argued that praying near a toilet was a disgrace to his religious beliefs. *Id.* This grievance was also denied. *Id.*

Kelly then filed a formal grievance with the prison. *Id.* The formal grievance was redundant in that it reiterated much of the same arguments Kelly already made. *Id.* Kelly also added verses from The Holy Qu'ran which Kelly argued were evidence as to why it was important for him to be allowed his nightly prayer service. *Id.* The Warden of the prison, Kane Echols, explained in a letter to Kelly that the request had to be denied because it violated prison policy. *Id.* Furthermore, the Warden explained that Kelly was unable to show that there was any negative activity occurring during his prayers. *Id.* at 126-27. The Warden even suggested that if Kelly was being ridiculed, it would behoove Kelly to simply request a transfer to a new cell in hopes of finding a more respectful cellmate. *Id.* at 127.

Two weeks after Kelly was denied his formal grievance, Kelly's new cellmate reported that Kelly was threatening him with violence if the cellmate did not give Kelly his meatloaf dinner. *Id.* When the superintendent was told this, the superintendent told both the Warden and the Director of the Tourovia Correctional Center's Chaplaincy Department, Mr. Saul Abreu. *Id.* at 123, 127. After a search of Kelly's cell, prison officials found meatloaf wrapped in a napkin, which was under Kelly's mattress. *Id.* at 127. Because of this discovery, the prison removed Kelly from the vegetarian diet program. *Id.* Furthermore, because of the violent threats against Kelly's new cellmate, the prison barred Kelly from attending worship services for one month. *Id.* The prison was able to provide this punishment thanks to the Tourovia Directive. *Id.*

Tourovia Directive #99 provides that "if any inmate is found to bully another inmate for their food or is caught breaking their respective religious diets – the prison reserves the right to take him off his diet program." *Id.* It also states that "if any violence or threat of violence is connected to any member of a faith group, the prison may suspend the inmate's freedom to attend religious services for any amount of time as TCC sees fit. *Id.*

In protest to the punishment, Kelly began a hunger strike. *Id.* After refusing to eat for two days, prison officials decided to tube-feed Kelly, even though Kelly wanted to continue his hunger strike. *Id.* Soon after the prison began the tube-feeding, Kelly ended his strike and ate with the other prisoners. *Id.*

Kelly filed a complaint in the Federal District Court of Tourovia for the Twelfth Circuit. *Id.* He challenged the validity of the prison's policies regarding prayers services and diet programs. *Id.* Kelly claimed it was a violation of his First Amendment rights as provided in the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). *Id.* Kelly argued that under the RLUIPA, he was entitled to have evening prayer services outside his cell. *Id.* Kelly also argued that the prison's decision to remove him from the vegetarian diet program was a violation of his religious beliefs. *Id.*

In their answer, the prison, Warden, and Director of the TCC's Chaplaincy Department (all named as defendants in the complaint), explained that TCC allows all prisoners to worship their faith any way they choose while in their cells, as they allow the prisoners to use items like sacred texts, devotional items, and other miscellaneous materials. *Id.* at 123, 127. Additionally, they stated that their policy was receptive to all religious practices, as long as the practice was consistent with prison concerns, such as security, safety, order, and rehabilitation. *Id.* at 127. They explained that the prayer accommodations Kelly was demanding would have created a heightened staff burden on the prison, and under the RLIUPA, they were allowed to deny Kelly's demand. *Id.* The prison explained through a detailed affidavit by the Director of the Chaplaincy Department that the prison's reasons for both the prayer service restrictions and diet program restrictions were valid. *Id.* at 127-28. This affidavit also provided an addendum that covered the prison's documented cost containment stratagems. *Id.* at 128.

With regards to the evening prayer service, it was raised by the prison that "Kelly failed to establish that his religious practices were substantially burdened by the denial of the congregational evening service." *Id.* In their defense, they explained that "their prayer service policies [were] the least restrictive means of furthering the compelling interests of security, personnel, and financial concerns for the prisons, its inmates, and employees." *Id.* Ultimately, the Nation of Islam did not have the necessary support to be granted an additional meeting, and the denial was appropriate. *Id.*

Regarding the vegetarian diet program, the defense explained that their actions were justified under their policy. *Id.* In their answer, it was clear that even though Kelly was practicing the Nation of Islam, he converted to that religion after not practicing any religion for two years. *Id.* This fact "placed him on a watch-list of inmates who might potentially assume religious identities to cloak illicit conduct and assimilate into gang activity." *Id.* The District Court was even provided a written statement from Kelly's former cellmate which stated that Kelly did in fact threaten him. *Id.* The threats to the cellmate, as well as the meatloaf found under Kelly's mattress, led the prison to remove Kelly from the vegetarian diet program. *Id.*

SUMMARY OF THE ARGUMENT

The Protection of Religious Exercise in Land Use and by Institutionalized Persons Act ("RLUIPA") provides that no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, unless the government demonstrates that the 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 government interest. 42 U.S.C. §2000cc-1. In addition, if a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or 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 or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion. 42 U.S.C. §2000-cc2(b). For the following reasons, appellee has not met the burden of persuasion necessary to show that respondents have "substantially burdened" his exercise of religion by either their policy of prohibiting late night services (Directive #98) or their policy of revoking religious diet plans due to evidence of backsliding (Directive #99). In the event that the Court finds that the appellee has met the burden of persuasion necessary to show that the respondents have "substantially burdened" his exercise of religious freedom under either policy, the respondents have still met the burden of persuasion necessary to show that either policy is narrowly tailored to serving a compelling state interest of public and prison safety and cost efficiency, and that those policies are the least restrictive means of serving those lawful interests. Respondents ask that the court uphold the 12th Circuit decision in favor of the respondents.

ARGUMENT

I. THE TOUROVIA CORRECTIONAL CENTER'S PRISON POLICY WHICH PROHIBITS LATE NIGHT PRAYER SERVICES DOES NOT PLACE A SUBSTANTIAL BURDEN ON KELLY'S FREEDOM OF RELIGIOUS EXERCISE, AS THE POLICY IS NOT TRULY PRESSURING HIM TO SIGNIFICANTLY MODIFY HIS RELIGIOUS BEHAVIOR OR BELIEFS.

Respondents first argue that this issue should not be considered a "substantial burden." "A substantial burden occurs when a state or local government, through an act or omission, puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Kelly v. Echols*, 983 F.3d 1125, 1128 (12th Cir. 2015) (citing *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006)). This Court has also provided an explanation on "substantial burden," which is that it "asks whether the government has substantially burdened a prisoner's religious exercise."

Holt v. Hobbs, 135 S. Ct. 853, 190 L. Ed. 2d 747 (2015).

If the court was to find that this does meet the description of a "substantial burden," respondents argue that they can overcome the strict scrutiny test. The Eleventh Circuit explained in *Benning v. Georgia* that "[s]ection 3 of RLUIPA applies strict scrutiny to government actions that substantially burden the religious exercise of institutionalized persons." 391 F.3d 1299, 1304 (11th Cir. 2004). The court elaborated that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... even if the burden results from a rule of general applicability." *Id.* However, the court does provide a crucial two step exception for when a burden can be imposed, and that is when "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." *Id.* Respondents argue that this issue does not meet the criteria of being a "substantial burden," and if the court disagrees, respondents can rely on the two step exception in that there is a compelling interest and the prison used the least restrictive means.

Before getting into the "substantial burden" analysis, it should be noted that "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner v. Safley*, 482 U.S. 78, 90, 107 S. Ct. 2254, 2262, 96 L. Ed. 2d 64 (1987) (citing *Jones v. North Carolina Prisoners' Union,* 433 U.S. 119, 132–133, 97 S.Ct. 2532, 2541 (1977)). There also is some legislative history that this Court has recognized regarding the importance of providing deference to prisons: "Lawmakers anticipated . . . that courts entertaining complaints under § 3 would accord 'due deference to the experience and expertise of

prison and jail administrators.'" *Cutter v. Wilkinson*, 544 U.S. 709, 717, 125 S. Ct. 2113, 2119, 161 L. Ed. 2d 1020 (2005) (quoting 146 Cong. Rec. 16698, 16699) (other citations omitted).

Regarding this specific issue and whether it is a "substantial burden," we ask if the prison has substantially burdened the prisoner, and do not look to see if prisoner can participate in other forms of religious practice. *Holt*, 135 S. Ct. at 853. The fact pattern in *Holt* serves as a perfect example in defining "substantial burden," as there, the prisoner was not allowed to grow his beard over a certain length. *Id.* This Court held that the facial hair restriction was a "substantial burden," but when compared to the fact pattern in this case, it is clear that our case does not involve a "substantial burden." *See Kelly v. Echols*, 985 F. Supp. 2d 123, 126 (N.D.T.O. 2015); *Holt*, 135 S. Ct. at 853. In our case, Kelly wants to take part in his nightly prayer service, but the main distinction between Kelly and the defendant in *Holt* is that Kelly can still pray in his cell, whereas the defendant in *Holt* could not find any substitute for growing his facial hair. *Kelly*, 985 F. Supp. at 126; *Holt*, 135 S. Ct. at 853. Kelly may try and counter this argument by saying this is as an example of looking to see if the prisoner can participate in other forms of religious practice, which is exactly what this Court said should not be the test for substantial burden. *Holt*, 135 S. Ct. at 853. However, the important difference is that Kelly is not being asked "to engage in other forms of religious exercise," but rather is being allowed to engage in the exact same form of religious practice. *Kelly*, 985 F. Supp. At 126; *Holt*, 135 S. Ct. at 853. The only difference that TCC is demanding from Kelly is that he performs the same act in a different location. *Kelly*, 985 F. Supp. At 126-27; *Holt*, 135 S. Ct. at 853.

The Fifth Circuit in *Baranowski v. Hart* provided that "substantial burden" is defined as an action that "*truly pressures* the adherent to *significantly modify* his religious behavior and *significantly modify* his religious beliefs." 486 F.3d 112, 124 (5th Cir. 2007) (emphasis added).

Kelly cannot reasonably argue that his religious behavior or belief is being significantly modified as he is simply being asked to pray in a different location. *Kelly*, 985 F. Supp. At 126-27. Kelly may attempt to argue that this is more than simply prayers, but rather a service, however, Kelly has shown that he can conduct prayers alone. *Id.* at 126. His reason for wanting the prayer service was based more on the fact that he claimed he was distracted. *Id.* Therefore, Kelly cannot successfully argue that his religious practice is being significantly modified.

For the reasons argued above, this Court should hold that prohibiting nightly prayer services is not a substantial burden. The previous case law provided by this Court, combined with the favorable fact pattern for the respondent, should allow this Court to rule in favor of the respondent.

II. EVEN IF THE TOUROVIA CORRECTIONAL CENTER'S PRISON POLICY WHICH PROHIBITS LATE NIGHT PRAYER SERVICES IS A SUBSTANTIAL BURDEN ON KELLY'S FREEDOM OF RELIGIOUS EXERCISE, THE POLICY DID NOT VIOLATE THE RLUIPA BECAUSE THE POLICY IS NARROWLY TAILORED TO SERVING THE COMPELLING GOVERNMENT INTEREST OF PUBLIC AND PRISON SAFETY, AND IS THE LEAST RESTRICTIVE MEANS OF DOING SO.

If the Court was to hold that there is a "substantial burden," Kelly would fail in a strict scrutiny analysis. The respondents can show is that there is a compelling interest. This Court has a lengthy history defining compelling interest, and recently this Court held that "preserving public confidence in their judiciaries" was deemed a compelling interest. *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656, 1673, 191 L. Ed. 2d 570 (2015). In *Williams-Yulee*, the Florida bar filed an action against an attorney who was campaigning for a judgeship claiming that the attorney violated state law in that personal solicitation regarding campaign funds are not allowed. *Id.* At 1663-64. The Court stated that the public's confidence in its judiciaries was a compelling interest. In *Nat'l Treasury Employees Union v. Von Raab*, the Court explained the importance of

ensuring safety. 489 U.S. 656, 657, 109 S. Ct. 1384, 1386, 103 L. Ed. 2d 685 (1989). This case involved a "drug-testing program that analyzed urine specimens of employees who applied for promotion to positions involving interdiction of illegal drugs, requiring them to carry firearms or handle classified materials." *Id.* This Court explained that "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgment." *Id.* Furthermore, "[i]t also has a compelling interest in preventing the risk to the life of the citizenry posed by the potential use of deadly force by persons suffering from impaired perception and judgment." *Id.*

In the present case, the compelling interest involves both the safety of the prison and the safety of the general public. *Kelly v. Echols*, 985 F. Supp. 2d 123, 124 (N.D.T.O. 2015). The prison initially had a very accommodating policy regarding prayer services; however, in 1998, the prison recognized that the prayer services were being used to promote gang activity. *Id.* These activities included delivering gang orders through the prayer service volunteer. *Id.* Furthermore, the evening services led many of the Christian and Muslim prisoners to ignore the headcount that took place during the evening. *Id.* The compelling government interest is quite clear, as gang violence and lack of prison headcounts are certainly a concern for public and prison safety, and just like in *Nat'l Treasury Employees Union*, where this Court explained the importance of protecting the life of citizens, the issue in this case also serves as a concern for the safety of citizens and everyone affiliated at the prison. *Kelly*, 985 F. Supp at 124; *Nat'l Treasury Employees Union*, 489 U.S. at 657. It should also be noted that a drug testing program for employees carrying firearms has much less of a direct effect towards public safety then our current case where gang activity was occurring during these prayer services. *Kelly*, 985 F. Supp at 124; *Nat'l Treasury Employees Union*, 489 U.S. at 657.

This Court recognized the importance of protecting the public in *Williams-Yulee*, where this Court felt that the public's opinion of the judicial system was important; and if protecting their opinion is viewed as a compelling government interest then protecting the public and the prison from gang violence would have to be deemed a compelling government interest. *Kelly*, 985 F. Supp at 124; *Williams-Yulee*, 135 S. Ct. at 1673. If this Court holds public *opinion* as a compelling interest, then this Court should hold public *safety* as a compelling interest. *Kelly*, 985 F. Supp at 124; *Williams-Yulee*, 135 S. Ct. at 1673.

Because there is a clear public safety concern, this Court should follow its own precedent and hold that protecting the public from gang activity, as well as forcing the inmates to partake in a very important headcount, qualifies as a compelling interest.

Finally, we are faced with the issue of whether this plan is narrowly tailored. This Court has provided some assistance in determining the true definition of "narrowly tailored" in that "the term may be used to require consideration of whether lawful alternative and less restrictive means could have been used." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280, n. 6 (1986).

The Twelfth Circuit explained in its decision of this case that the prison acted appropriately in applying the ban to all religions, rather than just Kelly's religion. *Kelly*, 983 F.3d at 1130. "If the Warden were to change the prison policy for just seven members of the Nation, he would have to change the policy for larger, more prevalent groups like Sunni Muslims, Christians, and Jews at TCC." *Id.* The 12th Circuit explained that the universal ban was to keep the peace amongst the prisoners. *Id.* Additionally, the court relied on the argument that "[w]ardens generally defend broad rather than narrow prison policies by stating that 'individualized exemptions are problematic because they cause resentment among the other

inmates, a copy-cat effect, and problems with enforcement of the regulations . . . in determining who is exempted and who is not.'" *Id.* (citing *Hoevanaar v. Lazaroff*, 422 F.3d 366, 371 (6th Cir. 2005)). This fact is important because when analyzing this issue, this Court should recognize that it is not simply if there was a least restrictive way Kelly's religious group could be allowed nightly prayer services, but rather, if there was a least restrictive way *all* religious groups could be allowed nightly prayer services. *See Id.* This reasoning was followed in *Baranowski* in that it was important for the prison to treat all inmates in the same manner. *Baranowski*, 486 F.3d at 118.

The prison has provided Kelly with an alternative manner in handling this dispute, and that is through requesting a new cellmate. *Kelly*, 985 F. Supp at 127. Kelly has repeatedly argued that the reason for why he is requesting an evening prayer service is because he has been distracted and disrespected. *Id.* Respondents argue that their plan is narrowly tailored, and does not cause any of the many problems that would be created if the prison were to allow evening prayer services to exist. *See Id. at 125.* The process of requesting a new cellmate does not demand the prison to hire a volunteer that may or may not be gang affiliated, and also does not affect their evening headcount. *See Id.* This is consistent with this Court's definition of "narrowly tailored" in *Wygant*, in that the prison has created an alternative option that is less restrictive. *See Kelly*, 985 F. Supp at 127; *Wygant*, 476 U.S. at 280, n. 6.

For the reasons mentioned above, this Court should hold that the prison has successfully met its claim in that their policy regarding nightly prayer services are in fact narrowly tailored. Because respondents can show that there is a compelling interest, and their policy is narrowly tailored, this Court should hold that Kelly's claim fails under the strict scrutiny test.

III. THE TOUROVIA CORRECTIONAL CENTER POLICY THAT REVOKES A PRISONER'S SPECIAL DIET PROGRAM DUE TO BACKSLIDING DOES NOT VIOLATE THE RLUIPA SUBSTANTIAL BURDEN PROVISION BECAUSE THE POLICY DOES NOT FORCE ANY PRISONERS TO SIGNIFICANTLY MODIFY THEIR RELIGIOUS BELIEFS OR BEHAVIORS.

The court should hold that the Tourovia Correctional Center policy reserving the right to remove an inmate from a religious diet or fast due to backsliding does not violate the RLUIPA "substantial burden" provision because the Tourovia Correctional Center policy does not force the prisoner to significantly modify their beliefs or religious behavior, but rather punishes those who have voluntarily departed from their asserted religious code. The RLUIPA substantial burden provision provides that no government shall impose a "substantial burden" on the religious exercise of a person residing in or confined to an institution, unless the government demonstrates that the imposition of the burden on that person is in furtherance of a compelling government interest and is the least restrictive means of furthering that compelling governmental interest. 42 USC §2000cc-1. A "substantial burden" is a government action or regulation that truly pressures the adherent to significantly modify his religious behavior and significantly modify his religious beliefs. *Baranowski,* 486 F.3d at 124 (5th Cir. 2007).

A proponent can show that a "substantial burden" on religion exists when the government puts substantial pressure on an adherent to modify his behavior and violate his beliefs. *Thomas v. Review Bd. Of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981). In addition, The Free Exercise Clause of the First Amendment affords an individual protection from these certain forms of government compulsion, but notably does not afford an individual a right to dictate the conduct of the government's internal procedures. *Bowen v. Roy*, 476 U.S. 693, 693 (1986). In *Bowen*, the court held that a government requirement that those who qualified for welfare must submit and use their social security numbers in order to receive that welfare was a valid government

requirement that did not put substantial pressure on the adherent to modify his behavior and violate his beliefs. *Id.* at 712. Additionally, a policy decision by a government that it wishes to treat all applicants alike and that it does not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to such condition or restrictions is entitled to substantial deference. *Id.* at 707. Finally, the incidental effects of government programs, which may interfere with the practice of certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require the government to bring forward a compelling justification for its otherwise lawful actions. *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 440 (1988).

A "substantial burden" on religious activity does not exist if there is no showing that the government put substantial pressure on the proponent to modify their behavior or modify their religious beliefs. *Thomas*, 450 U.S. at 718 (1981). Like in *Bowen*, where the court held that The Free Exercise Clause afforded an individual protection from certain government compulsion, but did not afford an individual a right to dictate the conduct of the government's internal procedures, Kelly is protected from certain government compulsion, but does not have the right to dictate the conduct of TCC's internal procedures, namely Directive #99, which allows TCC to revoke religious alternative diets due to evidence of backsliding. *See Bowen*, 476 U.S. at 693 (1986). Also, like in *Bowen*, where the court held that a government requirement that those who qualified for welfare must submit and use their social security numbers in order to receive that welfare was a valid governmental requirement that did not put substantial pressure on an adherent to modify his behavior and violate his beliefs, TCCs requirement that those who qualify for a special diet program must submit proof of their religion and actively participate in their religion in order to continue to be given the special religious diet is a valid governmental

requirement that does not put substantial pressure on Kelly to modify his behavior and violate his beliefs. *See Id*. at 712. Additionally, like in *Bowen*, where the government, who wished to treat all applicants alike, and did not wish to become involved in case-by-case inquiries into the genuineness of each religious objection to their policies, and were given substantial deference regarding their specific policy that required all people applying to welfare to submit their social security number, the specific policy of Directive #99 that requires all prisoners applying to the religious diet program to submit proof and continue to practice their religion while imprisoned, was created to treat all applicants alike, and avoid case-by-case inquiries into the genuineness of each different religious objection to the policy, and should thus be given substantial deference. *See Id.* at 707. Finally, like in *Lyng*, where the incidental effects of government programs, which may interfere with the practice of certain religions, but which have no tendency to coerce individuals into acting contrary to their religious beliefs, do not require the government to bring forward a compelling justification for its otherwise lawful actions, any incidental effect on a religious practice by Directive #99 does not require that TCC have the burden of showing a compelling justification for its otherwise lawful actions, as nowhere in Directive #99 is there language which has a tendency to coerce individuals into acting contrary to their religious beliefs. *See Lyng*, at 440 (1988).

TCC's religious alternate diet program, Directive #99, does not place a "substantial burden" on the religious beliefs of Kelly. There is no substantial pressure on Kelly to modify his behavior or violate his beliefs, as he could have continued to receive the benefits of the religious dietary program so long as he conformed to the behavior or beliefs that he himself propagated to hold. *See Thomas*, at 718 (1981). The backsliding provision does not place a "substantial burden" on Kelly as it is his choice on whether to act within the confines of his upheld religious

beliefs, and we give substantial deference to a policy decision by government that treats all applicants alike. *See Bowen*, at 707 (1986). Given this framework, TCC does not need a compelling justification for their lawful action of creating the Directive #99 backsliding provision. *See Lyng*, at 440 (1988). TCC's Directive #99 has simply not placed a "substantial burden" on Kelly's right to exercise his religious beliefs.

IV. TO THE EXTENT THAT THE TOUROVIA CORRECTIONAL CENTER POLICY THAT REVOKES A PRISONER'S SPECIAL DIET PROGRAM DUE TO BACKSLIDING DOES VIOLATE THE RLUIPA SUBSTANTIAL BURDEN PROVISION, THE POLICY IS STILL NARROWLY TAILORED TO SERVING THE COMPELLING GOVERNMENT INTERESTS OF COST EFFICIENCY AND PRISON SECURITY AND IT IS THE LEAST RESTRICTIVE MEANS OF DOING SO.

Even if the Tourovia Correctional Center policy that revokes a prisoner's special diet Program due to backsliding does violate the RLUIPA substantial burden provision, Kelly's claim that his religious freedom was infringed upon is still invalid, as the prison policy was still narrowly tailored to serving the compelling government interests of cost efficiency and prison security, and it was the least restrictive method of accomplishing that interest. Under RLUIPA, if the government imposes a "substantial burden" on an inmate, the government must demonstrate that the imposition of the burden on that person is (1) in furtherance of a compelling government interest and (2) is the least restrictive means of furthering that compelling governmental interest. 42 U.S.C. §2000cc-1(a)(1-2). Note that this analysis only comes to fruition once the prisoner can show that the government policy put a "substantial burden" on their freedom of religious exercise. *Id.*

In order to function correctly, correctional facilities must give deference to their compelling interests in particular areas such as public and prison safety, and costs of accommodations. Courts should apply the compelling interest standard with "due deference 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." *Cutter*, 544 U.S. at 723 (2005). In addition, the "context matters when reviewing such an application." *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003). The state can justify this violation of a religious liberty so long as they demonstrate that they used the least restrictive means possible to further their compelling interest. *Thomas*, 450 U.S. at 718 (1981). In the Eighth Circuit, the Court of Appeals held that the policy of removal of a religious diet after a prisoner had voluntarily not adhered to that diet was not restrictive upon the prisoner's freedom of religion as they had made the cognizant choice, under lack of coercion, to place themselves outside the group of worshippers that the policy accommodated. *Brown-el v. Harris*, 26 F.3d 68, 69 (8th Cir. 1994).

Correctional facilities are given deference in regards to their policies involving the compelling interests of security and costs so long as those policies are the least restrictive means possible. The least possible level of restriction is no restriction. Here, like in *Brown-el*, where the prisoner voluntarily decided to eat food that was not part of his accommodated religious diet, Kelly decided to steal and keep meatloaf that was not part of his religious diet. *See Id.* In terms of policy, correctional facilities have a compelling interest to keep costs down and keep security up. If this court finds that Kelly is entitled to relief because Directive #99 is not narrowly tailored to serving the compelling interests of cost efficiency and safety, it will open the floodgates for any prisoner, for nearly any religious rationale (whether real or improvised), to reap the benefits of an already spread thin social system. It is not the role of the courts to implement prison policies through case law, which is why, in the case law cited above, we see such deference to the prison system in creating and promoting these policies to begin with.

The court should hold that even if Directive #99 imposes a "substantial burden" on Kelly's exercise of religious freedom, that Directive #99 is narrowly tailored to serving the compelling governmental interests of cost efficiency and security, and is the least restrictive means of doing so. In holding such, the court should deny Kelly's prayer for relief.

CONCLUSION

For the aforementioned reasons, Kelly has not shown that Directive #98 or Directive #99 violate the substantial burden provision of the RLUIPA. Neither directive forces or coerces Kelly to act in violation of his supposed religious belief. In addition, both directives are narrowly tailored blanket provisions aimed at promoting the compelling governmental interest of cost efficiency and prison security, and are the least restrictive means at accomplishing those goals. Important to note is that these directives treat members of all religions in the prison equally, and punishment is imported not through the prison's actions but through the actions of the person professing to have such a belief. Respondents respectfully ask the Court to rule in their favor by upholding the decision of the 12th Circuit.