

In the

Supreme Court of the United States

SIHEEM KELLY,

Petitioner,

- against -

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

Respondents.

*ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE
UNITED STATES*

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Whether Tourovia Correctional Center's policy prohibiting late night prayer services violates the substantial burden provision of RLUIPA, even if the additional services would be detrimental to Prison safety and resources.
2. Whether Tourovia Correctional Center's policy of removing inmates from a religious diet program violates RLUIPA's substantial burden provision, despite evidence that the prisoner voluntarily violated the religious diet program.

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Twelfth Circuit is reported at 983 F.3d 1125 (12th Cir. 2015) (indicated in the record at R. 16–22). The opinion of the United States District Court for the Eastern District of Tourovia is reported at 985 F. Supp. 2d 123 (N.D.T.O. 2015) (indicated in the record at R. 2–15).

JURISDICTION

The District Court had jurisdiction under 42 U.S.C. § 2000cc-2(a), and issued its judgment on March 7, 2015 and notice of appeal was timely filed. The Court of Appeals had jurisdiction under 42 U.S.C. § 2000cc-2(a) and 28 U.S.C. § 1291 and issued its judgement on June 1, 2015. This Court has jurisdiction under 42 U.S.C. § 2000cc-2(a) and 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sections 1–5 of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc *et seq.* is reprinted in the Appendix.

STATEMENT OF THE CASE

Statement of Facts

The Tourovia Correctional Center (“TCC” or “the Prison”) is a maximum security prison that provides religious services to all of its devout inmates. Record (“R.”) at 3, 25–6. Siheem Kelly (“Petitioner”) was convicted of aggravated robbery and multiple counts of drug trafficking in 2000, and is currently serving his sentence at TCC. *Id.* at 3. After two years at TCC with no religious affiliation, Petitioner joined the Nation of Islam (“NOI” or “the Nation”) and changed his last name to Mohammed. *Id.*

The NOI is a subgroup of the Sunni Muslim religion. *Id.* It is also the Prison’s smallest religious group, consisting of only seven members, and only one percent of the Prison population. *Id.* Members of the Nation participate in a Halal diet which requires special vegetarian meals. *Id.* NOI followers pray at five designated times throughout the day, and are required to sit, kneel, and stand during prayer. *Id.* at 3–4.

Currently, TCC only holds prayer services before breakfast at 8:00 a.m., before lunch at 1:00 p.m. and before dinner at 7:30 p.m. *Id.* at 24. Before August of 1998, the Prison held a late prayer service after dinner, but before the final headcount. *Id.* at 4. The Prison discontinued the late service and banned the use of prison volunteers to lead prayer services because the inmates were abusing the privilege. *Id.* The inmates were using the service volunteers to relay gang orders outside the Prison, while other inmates went to the prayer service merely to avoid the last daily headcount at 8:30 p.m. *Id.* Now, only official chaplains may lead services during the official prayer times, unless there are extenuating circumstances. *Id.* In determining whether to grant additional prayer services, the Prison considers demand, need, staff availability, and prison resources. *Id.*

In February 2013, Petitioner filed a written request for late night prayer services at 8:00 p.m. for NOI members. *Id.* at 4–5. Saul Abreu (“Abreu”), the Director of the Chaplaincy Department, denied Petitioner’s request, citing TCC’s policy prohibiting inmates from engaging in activities outside their cells before the final head count. *Id.* at 5. Petitioner, however, could still pray in his cell. *Id.* Thereafter, Petitioner made another request for late night prayer services with a NOI Chaplain away from non-NOI inmates. *Id.* Then, Petitioner filed two grievances. The first grievance claimed that he could no longer pray in his cell because his non-NOI cellmate was “disrespectful” to his religion. *Id.* This grievance was denied due to a lack of corroborating evidence. *Id.* The second grievance claimed that praying near a toilet was “a disgrace” to his faith. *Id.* The second grievance was also denied. *Id.* Petitioner filed yet another grievance incorporating the two previous grievances, and requesting an additional prayer service outside of his cell. *Id.* This time, Prison Warden Kane Echols (“Echols”) denied Petitioner’s request, stating that it would violate TCC policy, and suggested that Petitioner request a transfer to a new cell, since he could not prove any of the claims against his cellmate. *Id.* 5–6.

Two weeks later, Petitioner had a new cellmate who filed a formal grievance against him, claiming Petitioner was violently threatening him for his meatloaf. *Id.* at 6. The Prison Superintendent informed Echols and Abreu (collectively “Respondents”) of the threats. *Id.* Respondents documented and investigated the claim. *Id.* The investigation uncovered meatloaf, wrapped in a napkin, under Petitioner’s mattress. *Id.* Consequently, Petitioner was removed from TCC’s vegetarian diet program, and barred from attending worship services for one month. *Id.*

Under Tourovia Directive #99, TCC reserves the right to remove an inmate from a religious diet program, for any period of time, if that inmate bullies another inmate for food, or is caught violating their own religious diet. *Id.* at 26. TCC may also suspend an inmate’s ability to

attend religious services for any amount of time, for any incident of violence, or threat of violence by a member of a faith group. *Id.* at 26.

Despite the statement written by Petitioner's cellmate, and the meatloaf found under his mattress, Petitioner insists that he never made the threats and that the meatloaf is not his. *Id.* at 6. In defiance of the Prison officials, Petitioner started a hunger strike. *Id.* After two days, officials intervened and tube-fed Petitioner, out of concern for his safety. *Id.* Petitioner then ended the hunger strike, and voluntarily ate the non-vegetarian food provided to the general population. *Id.*

Procedural History

Petitioner filed a complaint in Tourovia District Court seeking declaratory and injunctive relief, alleging, *inter alia*, that TCC's religious meal and services policies violated his First Amendment rights. *Id.* at 2. Specifically, Petitioner argued that he, and the other NOI members, were entitled to late night prayer services, outside their cells, away from non-NOI inmates, away from any type of bathroom apparatus, with a NOI chaplain. *Id.* at 2, 5. Petitioner further alleged that the decision to remove him from the vegetarian diet program, after discovering meat under his mattress, compelled him to violate his religious beliefs. *Id.* at 2.

Respondents moved for summary judgement, pursuant to Rule 56(f) of the Federal Rules of Civil Procedure, arguing that TCC provides all religions with sufficient prayer times consistent with prison safety, security, order, and administrative concerns. *Id.* Respondents also argued that Petitioner violated his own religious beliefs when he extorted non-vegetarian food from his cellmate. *Id.*

The District Court denied Respondents' summary judgement motion, instead finding that TCC's policies did substantially burden Petitioner's religious freedom. *Id.* at 15. The District

Court further found that Respondents did not consider the least restrictive means to enforce their compelling safety concerns with respect to the denial of nightly prayer services. *Id.*

The Respondents appealed the District Court's decision to the Twelfth Circuit. The Circuit Court found that the District Court erred in finding that RLUIPA had been violated, and vacated summary judgment for Petitioner. *Id.* at 22. The three judge panel found that denying Petitioner's request for late night prayer services was the least restrictive means of serving a compelling government interest and that removal from the vegetarian diet program did not force him to violate his religious beliefs. *Id.* at 20, 22. Petitioner appealed to the Supreme Court of the United States and a Writ of Certiorari was granted.

SUMMARY OF THE ARGUMENT

I. This Court should uphold the judgment of the Twelfth Circuit Court of Appeals and find that the denial of the Petitioner's request for additional late night prayer services was not a substantial burden under RLUIPA. The factors this Court should consider are whether: (1) the request for religious accommodation is excessive; (2) the request imposes unjustified burdens on other institutionalized persons; and (3) the request jeopardizes the effective function of the institution. Additionally, this Court should consider the factors that the Prison considers when making a determination of whether to grant a request. Those factors are: (1) demand; (2) need; (3) staff availability; and (4) prison resources.

The Petitioner's requests is unduly burdensome on the Prison's resources and safety measures because he asked for not only additional late night prayer services but also a specific NOI chaplain at those services. This was not a requirement of his religion. This, along with the compelling governmental interest of safety and security in a maximum security facility, shows that this Court should deny Petitioner's appeal.

II. The Supreme Court should uphold the Twelfth Circuit’s decision that Respondents’ removal of Petitioner from the special vegetarian diet program did not violate the substantial burden provision of RLUIPA. Respondents removed Petitioner from the special vegetarian diet program after Petitioner threatened another prisoner for non-vegetarian food. Furthermore, Petitioner voluntarily ate non-vegetarian food that was prepared for the general population. Therefore, Petitioner’s voluntary behavior led to Respondents’ decision to remove him from the special vegetarian diet program.

Respondents’ decision was in furtherance of the compelling state interest of maintaining security by deterring disobedience within the confines of a maximum-security prison. Furthermore, Respondents’ decision was the least restrictive means to achieve this interest because it was directly related to Petitioner’s behavior, without preventing Petitioner from exercising his religion in other manners, such as praying five times a day.

ARGUMENT

I. RESPONDENTS’ DENIAL OF LATE NIGHT PRAYER SERVICES DID NOT VIOLATE RLUIPA’S SUBSTANTIAL BURDEN PROVISION BECAUSE LATE NIGHT PRAYER SERVICES WOULD COMPROMISE THE PRISON’S SAFETY AND RESOURCES

The Religious Land Use and Institutionalized Persons Act (“RLUIPA”) was created to combat institutionalized persons from having their constitutional right to the free exercise of religion substantially violated by the government. 42 U.S.C. § 2000cc-2.

The term “substantial burden” is not specifically defined in RLUIPA; however, this Court should follow the definition provided by the Fifth Circuit. *Baranowski v. Hart* defined “substantial burden” as a government action or regulation that “truly pressures the adherent to significantly modify his religious behavior and significantly modify his religious beliefs.” 486

F.3d 112 (5th Cir. 2007). Expanding the Fifth Circuit’s definition of “substantial burden” would contradict the ultimate deference given to institutions to ensure safety and security. *Id.*

With the creation of RLUIPA, a balancing test emerged. This was to ensure that the inmate’s Constitutional right to exercise religion was not being infringed, while also giving institutions the ability to meet the extreme challenges that arise while running an institution such as TCC, a maximum security facility.

Petitioner requested additional late night prayer services, in addition to the three he and the other members of the Nation already received. Ultimately, in considering a request like Petitioner’s, the Respondents must take into account several factors when making their determination. The most pertinent factors are: (1) demand; (2) need; (3) staff availability; and (4) prison resources. This Court, too, should take those factors into consideration when determining that the denial of late night prayer services was reasonable. Additionally, there are pressing public policy concerns that this Court should consider. Being able to keep the prisoners and employees of a maximum-security facility safe is, and should be, the Respondents’ number one concern.

A. Petitioner’s Requests Were Excessive under RLUIPA and Unnecessary to Comply with NOI Religious Requirements.

“Any prison’s decision to accommodate religious requests must be measured so that it does not override other significant interests.” *Cutter v. Wilkinson*, 544 U.S. 709 (2005). The leading Supreme Court case that discusses RLUIPA, *Cutter*, describes the balancing test that courts should use in order to determine if the religious request overrides other significant interests. Not only should the Court take into consideration the factors the Prison considers, the Court must also take into consideration the factors laid out in *Cutter*. The factors laid out in *Cutter* were whether: (1) the request for religious accommodation is excessive; (2) the request

imposes unjustified burdens on other institutionalized persons; and (3) the request jeopardizes the effective function of the institution. *Id.* at 725.

First, Petitioner's requests were excessive. Petitioner made two requests that would ultimately put a large burden on the Prison. The first request was that late night prayer services be added, at night, after dinner, for members of the Nation. R. at 5. This is an excessive request because of the added burden this places on the Prison staff. The non-exhaustive list of burdens includes: having to find a chaplain who is both a member of the Nation and is willing to work at night in a maximum security prison; having to employ and pay for this chaplain; and having to hire extra correctional officers to guard the inmates during the prayer services.

Having an additional prayer service after dinner means that members of the Nation may not be in their cells for the final headcount, which would create confusion within the Prison. Headcounts are very important to facilities such as TCC because an inaccurate headcount in a maximum security prison could easily lead to a dangerous situation or escape. In the past, TCC had problems with inmates avoiding the nightly headcount by pretending to be part of the late night prayer services. This could cause massive security breaches if the guards are not aware of where everyone is at all times.

Petitioner's second request was that the Prison provide an official NOI chaplain to lead the prayer service. *Id.* This puts an undue burden on the Prison for two reasons. First, the Prison already staffs a chaplain, and now the members of the Nation are requesting that the Prison find another chaplain who is an exclusive member of their religious group. This could be very difficult because the Nation is a very small group, where only seven inmates out of the entire Prison population follow the religion, so finding a chaplain with those same religious views, who will also follow the protocol of a maximum security facility, could prove troublesome. If the

Prison were to provide a NOI chaplain for late night prayer services, they would have to allocate more of its budget to pay the chaplain's salary. Not working during the daytime and instead being required to come in for an evening prayer service may cost the prison more and make it even harder to find a chaplain.

According to the NOI, members must pray five times per day. Additional late night prayer services will increase the amount of prayer services from three to four, still short of the required five. If granted, this would allow Petitioner standing to ask for another prayer service in addition to the one at issue. This would double the burden on the Prison, since every prison, not only TCC, would be required to comply with that ruling. This would also prompt the other inmates to request additional services. Moreover, Petitioner requesting one additional service instead of two is evidence that Petitioner cares more about having a different nightly routine than praying outside his cell five times per day.

Additionally, this request is unduly burdensome to the Prison because of the resources the Prison will have to invest in the additional late night prayer services. Not only will TCC have to pay for a special chaplain, but additional prayer services require more security officers to make sure there is no illegal activity occurring, and to cover the Prison floor to conduct headcounts.

Since TCC is a state funded institution, accommodating this request would require either the state to provide more money to the facility, and consequently to all other institutions that must adhere to such requests, or, the more likely option, the institution would have to find it in its budget to pay the chaplain. This would be an excessive burden placed on the facility since prisons, especially a maximum-security facility, like TCC, are funded by the state and cannot raise money on their own to pay for unforeseen costs. Prisons, like TCC, which are funded by the state and thereby, the people from that state, through tax money, have a burden placed upon

them. Not only does the Prison need to make sure that everyone inside and outside the Prison stays safe and secure, but the prison also has a duty to the people to make use of the money it is given in the most efficient way possible. Taking the funds of the Prison away from a program that may benefit everyone and using it to only aid seven individuals is not an efficient use of Prison resources.

Second, this Court should determine that the religious accommodation would impose an unjustified burden on other prisoners. If additional prayer services were given only to the seven members of the Nation, then it would cause increased tension between prisoners of other religions who are not afforded the special prayer services. In a maximum security facility keeping the peace among inmates is a main goal. Most of the inmates are serving very long sentences and forced confinement for a long time is bound to start trouble. The environment can get very tense. Where it looks like one group is favored and getting special treatment, other prisoners or groups may resent that and retaliate against the group perceived to be getting special benefits. *See Kahey v. Jones*, 836 F.2d 948, 951 (5th Cir. 1988) (explaining that when inmates are treated differently from one another there is an increased threat to morale and safety). The prisoners are kept on the same schedule for that reason. Adding additional prayer services for only seven inmates would increase tension between the religious groups that could turn violent and affect the overall safety of the Prison.

Moreover, it is very likely that the larger religious groups would then request the same accommodation, since all religious groups used to have late night prayer services. R. at 4. This would lead to more safety and budgetary concerns since more chaplains and security guards would be needed. It would also increase the variety of inmate schedules, which would make it harder for Prison officials to track the inmates and would cause animosity against the perceived

favoured group. This would lead to increased fights between cellmates and gang violence. Ultimately, this would lead to more prisoners claiming that they follow a religion, just to stay out of their cells longer. This is a concern of the Prison since it had occurred in the past, prompting the creation of Tourovia Directive #98. *Id.* at 25. Ultimately, this puts the Prison officials in an all of nothing position where if they grant one additional religious accommodation they will, out of fairness, need to grant them all.

Third, the late night prayer services request would jeopardize the effective function of the institution. Any prison, especially a maximum security facility, utilizes or adheres to a very strict daily routine. This routine is put into place for the overall safety and security of the inmates, correction officers, and prison personnel. Although late night prayer services may seem like a small accommodation, in an institution like TCC, the problems will be magnified.

If the other Islamic sects decided to petition for the same benefits, granting their requests would also run counter to Tourovia Directive #98. *Id.* This Directive was issued after TCC had to change its policy regarding nightly religious services because a prison volunteer was using the prayer time to relay gang orders from inmates to gang members outside of the Prison. *Id.* at 4. In addition to banning prayer services with prison volunteers, the Directive was also put into place because members of religious groups would stay in their prayer room longer than authorized to skip the final headcount. *Id.* Despite TCC's best efforts to conduct late night prayer services, it was impractical. It is clear now that to re-implement the nightly service with the addition of an official NOI chaplain would jeopardize the safety and effective function of the Prison as it had it the past.

The Twelfth Circuit Court of Appeals determined that Petitioner's request for late night prayer services was excessive, imposed unjustified burdens on the other inmates and jeopardized

the effective function of the institution, and according to *Cutter*, the Prison does not have to comply with such a request. 544 U.S. 709, 725.

The denial of Petitioner's request for an additional nightly prayer service did not significantly burden his religious beliefs. Under *Baranowski v. Hart*, a government action or regulation that "truly pressures the adherent to significantly modify his religious behavior and significantly modify his religious beliefs" constitutes a significant burden, and that did not occur here. 486 F. 3d 112. Petitioner can still pray five times a day, which is what his religion requires. An example of a substantial burden would have been if the prison did not allow the members of the Nation to pray at all after dinner, but this is not the case.

Additionally, in *Lovelace v. Lee*, a substantial burden may arise if, in this case the Prison facility put substantial pressure on the inmate to modify his behavior and violate his beliefs. 472 F.3d 174, 187 (4th Cir. 2006). This also did not occur in the present case. Here, Petitioner and other NOI members were still allowed to pray five times per day complying with the religious requirements of the Nation; they were just denied the non-compulsory ability for congressional prayer. The only thing Respondents did was deny a prison-hosted and funded late night prayer services. Praying in a specific room, around specific people, with a specific chaplain is not a requirement of the Muslim religion. Petitioner still has the ability to pray in his cell and is afforded three times throughout the day where he can pray around his fellow Nation members in a designated room with a religious leader. The prayer requires the individual to stand, bend and kneel all of which can be done in a cell.

B. Petitioner's Request for Late Night Prayer Services is Unduly Burdensome on the Prison Because of the Lack of Demand, Need, Staff Availability, and Prison Resources.

When the Prison is making a determination regarding whether to grant the request of an inmate, they consider four factors: (1) demand; (2) need; (3) staff availability; and (4) prison

resources. R. at 4. In addition to the Prison's considerations, the Prison is given deference by RLUIPA and case law, to deny religious accommodations, as long as the inmate was not substantially burdened. If the Prison is required or forced to grant the request, it becomes a slippery slope of safety issues and ultimate policy concerns for all prisons.

When looking at the demand, the Prison takes into consideration the amount of people the request would affect. In this instance, the Nation only has seven members. Therefore, the benefit of providing a space for the NOI to pray, at the risk of substantial cost and safety concerns to the Prison, are weighed against the Prison's general policy of allowing prayer only in cells after dinner. The general policy is more beneficial, as it provides the Prison with surety that it can control its staff, budget, and inmates, while not denying religious groups the opportunity to exercise their beliefs. The opportunity to pray outside the cell with members of the same religion are still available to all religion affiliated inmates three times per day.

When looking at the need of the inmates, adding late night prayer services would aid only a few. Under *Adkins v. Kaspar*, a substantial burden is not put on an inmate's religious freedom if a governmental action only prohibits that inmate from enjoying an additional benefit that is not available to everyone. 393 F.3d 559 (5th Cir. 2004). In this case, Petitioner and the other Nation members would have an additional prayer service and a different routine from the rest of the inmates, providing a large benefit to them, which could infringe on the overall safety of the Prison. Ultimately, granting an accommodation that affects the security of the Prison would go against the needs of the Prison.

Analyzing the staff availability consideration, the request would put a large strain on the staff because the current chaplains only work during the day, and according to the request, the chaplain would have to be a member of the Nation and now work at night. This is very

unreasonable because finding a chaplain that meets all of these criteria would be a difficult task. Even if Petitioner were to forego having a chaplain of his specific faith, the issue still remains that the chaplains the Prison employs do not work at night, and more guards would need to be staffed in order to escort and observe the prisoners.

Finally, the Prison considers its resources when determining whether to grant a request. In this case, the Prison would have to hire new chaplains and guards which costs additional money. If the Prison decided to allocate parts of the budget to those requests, it would have to take the money away from somewhere else. When other religious groups learn about the special accommodation made for members of the Nation to pray together, each religious sect may want its own additional prayer service which will send the Prison into endless chaos and litigation.

Under *Turner v. Safely*, prison officials have been given significant leeway when it comes to enforcing regulations, in order to ensure the safety and security of their institutions. 482 U.S. 78 (1987). Safety and security is always the number one concern of a maximum security facility and the courts recognize that. Although RLUIPA was enacted to combat “egregious and unnecessary” restrictions that prisons place on religious liberties, the harsh language of the statute shows that this does not apply in many situations. 146 Cong. Rec. S7775 (Jul. 27, 2000). Egregious is defined as “very bad and easily noticed,” thus, the plain text of the statute shows that congress’s intent was to combat very bad and noticeable restrictions on religious liberties, which is not present in this case. *Egregious*, MERRIAM WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/egregious>. The Prison has provided Petitioner with everything that is necessary to pray five times per day as required by his religion. Additionally, the Prison has provided three separate prayer services so members of NOI could pray together, something that is not required by the Muslim religion. Therefore, the issue before this Court is

not a very bad and easily noticed restriction on Petitioner's religious liberty, but whether the Prison must accommodate an unreasonably burdensome request.

In addition to the textually inferred intent of the Congress to focus on *egregious* violations of prisoner rights, the Senate Judiciary Committee explicitly instructed the courts to give due deference to the jail administrators when it comes to procedures to keep prisons safe and secure, while also considering cost. *Cutter*, 544 U.S. at 723. This is exactly what the Prison has done in this case. The Prison weighed out the factors and ultimately made a judgment or determination that the safety and security of the Prison coupled with the cost of additional late night prayer services is not feasible.

This Court must determine that Respondents' denial of Petitioner's request for late night prayer services was reasonable according to the Prison policies and the factors laid out in *Cutter v. Wilkinson*.

C. If this Court Determines that Petitioner was Substantially Burdened under RLUIPA, then this Court should still rule in favor of the Respondent since the Prison Policy is the Least Restrictive Means of Furthering the Prison's Compelling Safety Interest.

Even if this Court determines that Petitioner was substantially burdened by the Prison not allowing additional late night prayer services, the Prison policy is still the "least restrictive means of furthering a compelling government interest" and therefore this court should rule in favor of the Respondents. R. at 7 (*citing Garner v. Kennedy*, 713 F.3d 237, 241 (5th Cir. 2013)).

The Prison, by denying the request for additional late night prayer services, is implementing the least restrictive means possible. Although on its face the denial may seem to single out only NOI members, this is not the case. One way the government can prove that it employed the least restrictive means is by showing that it considered less restrictive means but rejected them as inadequate to serve the compelling interest at issue. *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 280 (1986). Unlike in *Murphy v. Missouri Dept. of Corrections*, where the

Prison did not show how there were security concerns, 372 F.3d 979, 988 (8th Cir. 2004), here, the Prison has shown the problems that arise with late night prayer services, including inmates missing headcount and gang activity concerns. R. at 4. If granted, the additional late night prayer services would need to be available to all religious groups, which would be a huge burden on the Prison. Denying the additional late night prayer services request is the least restrictive way the Prison can keep order and fairness.

When determining if the Prison has a compelling government interest in denying the request, this Court should refer to *Cutter v. Wilkinson*. In *Cutter*, this Court explained that due deference needs to be given to prison officials when creating regulations that may impact the security, costs, order, and discipline of prisons. 544 U.S. at 723. The safety and security of a prison is absolutely a compelling government interest, especially in a maximum security facility, like TCC. *See also Lovelace v. Lee*, 472 F.3d at 190 (finding that RLUIPA was not created to place religious accommodation of inmates over the inherent needs of the institution).

Ultimately, even if this Court determined that the Prison substantially burdened Petitioner's request, this Court should still rule in favor of the Respondents, since the denial was the least restrictive means of furthering the governmental interests of cost and safety.

II. RESPONDENTS' REMOVAL OF PETITIONER FROM THE SPECIAL VEGETARIAN DIET PROGRAM DID NOT VIOLATE RLUIPA'S SUBSTANTIAL BURDEN PROVISION BECAUSE PETITIONER VOLUNTARILY CHOSE TO VIOLATE THE SPECIAL DIET AND THE PUNISHMENT WAS DIRECTLY RELATED TO HIS DISRUPTIVE BEHAVIOR, WITHOUT PREVENTING HIM FROM EXERCISING HIS RELIGION IN OTHER MANNERS

Respondents' decision to remove Petitioner from the special vegetarian diet program did not violate the substantial burden provision of RLUIPA. A substantial burden is created when the government exerts significant pressure on the individual to modify his behavior, forcing him to

violate his sincerely held religious beliefs, or by compelling conduct that is contrary to the individual's religious beliefs.

Respondents removed Petitioner from the special vegetarian diet program because Petitioner's conduct gave the Prison officials adequate reason to believe Petitioner was not adhering to the special vegetarian diet. Prison officials discovered meatloaf, which is not part of the special vegetarian diet program, hidden under Petitioner's mattress. Petitioner's cellmate provided a written statement that Petitioner had threatened him for non-vegetarian food. Finally, Petitioner voluntarily ate non-vegetarian food that had been prepared for the general population. Therefore, Petitioner's voluntary behavior led to Respondent's decision to remove him from the special vegetarian diet program.

Additionally, Respondents' decision served to deter future disobedience and fraud by other inmates. Preventing disobedience and waste are compelling government interests when the institution is a maximum-security prison. Furthermore, Petitioner was still able to exercise his religion in other ways, proving that Respondents' actions were the least restrictive means to achieve their safety and budgetary interests.

A. Respondents Did Not Substantially Burden Petitioner's Religious Freedom by Removing Him from the Special Vegetarian Diet Program Because Petitioner Voluntarily Chose to Eat Food that was Contrary to the Program.

Tourovia Correctional Center did not substantially burden Petitioner's right to exercise his religion because Petitioner was removed from the special vegetarian diet only after prison officials found meatloaf in Petitioner's cell, and observed Petitioner voluntarily eat food that was contrary to the special vegetarian diet.

The threshold inquiry under RLUIPA is whether the challenged governmental action substantially burdens the exercise of religion. *Baranowski*, 486 F.3d at 124. The government

creates a substantial burden to a person's free exercise of religion when it puts significant pressure on the individual to modify his behavior, forcing him to violate his sincerely held religious beliefs. *Adkins*, 393 F.3d at 566. Furthermore, a substantial burden requires that the government's actions prevent or limit religiously motivated conduct, or compel conduct that is contrary to an individual's religious beliefs. *Daly v. Davis*, No. 08-2046, 2009 U.S. App. LEXIS 6222, at *6 (7th Cir. Mar. 25, 2009).

A temporary limitation on a prisoner's religious observance is not so "atypical or significant as to constitute deprivation of a liberty interest. *Daly*, at *5. Moreover, a substantial burden does not exist when a prison restricts only one activity, such as daytime eating, when the prisoner still is allowed to exercise his religion through other activities, such as prayer. *Brown-El v. Harris*, 26 F.3d 68 (8th Cir. 1994). Removing accommodations after a prisoner fails to take advantage of them puts no pressure on the prisoner because the prisoner has chosen to reject the accommodation through his own conduct. *Id.*

In the present case, Respondents did not substantially burden Petitioner's right to exercise his religion; Petitioner was only removed from the special vegetarian diet because his own voluntary conduct was contrary to that diet. R. at 20. Petitioner's cellmate reported that Petitioner had threatened and intimidated him into giving Petitioner meatloaf, which would not be part of the vegetarian diet. *Id.* at 6. When the prison officials searched Petitioner's cell, they found meatloaf hidden under Petitioner's mattress. *Id.* Furthermore, Petitioner eventually began voluntarily eating the non-vegetarian meals prepared for the general prison population. *Id.*

Petitioner's claim is similar to the claim rejected by the Eighth Circuit in *Brown-El v. Harris*. In that case, the prisoner was removed from the Ramadan fast list because he voluntarily broke the fast while in the infirmary. The Eighth Circuit ruled in favor of the prison because the

prisoner, having broken the fast, “simply placed himself outside the group of [accommodated] worshippers.” *Brown-El*, 26 F.3d at 70. In the present case, Petitioner also voluntarily behaved in a way inconsistent with his religious beliefs by not only eating a non-vegetarian meal, but also threatening his cellmate for non-vegetarian food.

It was Petitioner’s own voluntary disregard for adhering to the special vegetarian diet that forced the Prison to remove the accommodation. Respondents had dutifully accommodated Petitioner’s request for a vegetarian diet until the two incidents at issue. Respondents did not create a policy that forced Petitioner to act against his faith; nor did Respondents threaten Petitioner to behave in the manner that led to his removal from the accommodation. Therefore, Respondents did not substantially burden Petitioner’s right to exercise his religion.

B. Respondents Have a Compelling Interest in Maintaining Security and Deterring Prisoners from Abusing the Limited Resources Available to the Prison by Removing Backsliding Prisoners from Special Diet Programs.

The decision to remove Petitioner from his special vegetarian diet serves two compelling state interests. First, the punishment serves to deter other prisoners from attempting to abuse the program. Second, it increases security and the orderly operation of the Prison.

When assessing a compelling government interest, the context of the regulations and procedures being administered inside the volatile environment of a prison matters. *Cutter*, 544 U.S. at 721. Courts should give the experience and expertise of prison administrators “due deference” when evaluating regulations and procedures “meant to maintain good order, security, and discipline, consistent with consideration of costs and limited resources.” *Id.* at 723. Therefore, RLUIPA does not “elevate accommodation of religious observances over the institutional need to maintain good order, security, and discipline, or to control costs.” *Baranowski*, 486 F.3d at 125.

A prison may assert any number of compelling interests that justify its policies. *Lovelace*, 472 F.3d at 192. Security, safety, discipline, and budget considerations are recognized as potential compelling government interests. *Id.* at 191; but security deserves "particular sensitivity" when considering the government's compelling interest. *Cutter*, 544 U.S. at 722.

Despite being given deference in its decisions, prisons cannot abuse their authority. For example, a prison must show a more compelling interest than merely punishing a prisoner who "flouts prison rules" when it removes the prisoner from a special diet program. *Id.* Also, an outright refusal to accommodate a special diet because of cost concerns may not survive judicial review if other prisons in the state provide the same diet at only a minimally higher cost than a standard diet. *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008).

Respondents have a compelling interest to deter prisoners from using religion as a pretext to request special diets. Removing Petitioner from the special vegetarian diet after his threatening and disorderly behavior reminds other prisoners that their behavior determines their access to special accommodations. This is especially important considering the limited resources Respondents have available to accommodate special requests. Providing and preparing special meals for a group like the Nation, with only seven members in the entire prison, displaces resources the Prison could use elsewhere.

More importantly, Respondents must be able to maintain security and good order among the Prison's inmates. Petitioner's threats of violence against his cellmate raise the interest of security. If Respondents do not respond effectively to one prisoner's threats against another, they risks creating an unstable prison environment. By addressing Petitioner's aggressive behavior against another prisoner, Respondents showed other inmates that threatening or aggressive behavior will have consequences.

C. Removing Petitioner from the Special Vegetarian Diet was the Least Restrictive Means Available Because the Restriction was Directly Related to His Conduct and Did Not Prevent Him from Fully Practicing His Religion in Other Ways.

Respondents employed the least restrictive means available by removing Petitioner from the special vegetarian diet program. Because Petitioner voluntarily disregarded the special diet that he requested and Respondents provided, Respondents chose a punishment that directly addressed Petitioner's behavior without restricting his ability to exercise his faith in other ways.

Given the underlying considerations of the penal system, it is necessary for prisons to withdraw or limit many privileges and rights of prisoners. *Shakur*, 514 F.3d at 884. Therefore, whether the burden imposed on an individual right is the least restrictive means available is a question of both fact and law, "highly dependent on a number of underlying factual issues." *Garner*, 713 F.3d at 242.

A policy or regulation that broadly limits or outright prohibits a prisoner from practicing his religious beliefs will likely not be the least restrictive means. *Cutter*, 544 U.S. at 713. For example, the prison officials in *Cutter* denied the prisoners access to religious literature and opportunities for group worship, forbid the prisoners from adhering to religious dress mandates, and withheld religious ceremonial items. *Id.* Additionally, the prison in *Shakur*, denied a prisoner's request for a kosher meal because it would have imposed a financial burden on the prison. *Shakur*, 514 F.3d at 884. However, the Ninth Circuit court held that the prison did not prove it had used the least restrictive means to achieve its interest. *Id.* Specifically, the court pointed to another prison within the state that had provided certain inmates with kosher meals with only a minimal increase in cost. *Id.*

Also, a prison must show in the record that its policy is justified. For example, in *Garner*, the Fifth Circuit found a prison policy prohibiting male inmates from wearing beards was not the

least restrictive means available. 713 F.3d at 246. The prison in *Garner* argued that its policy served the compelling interest of prisoner identification; however, the policy only addressed beards and no other grooming habits, such as shaving one's head. *Id.*

In the present case, Respondents employed the least-restrictive means by removing Petitioner from his special vegetarian diet because the decision did not prevent Petitioner from practicing his religion in other ways. Petitioner was still allowed to worship five times a day and was not restricted in any additional way from practicing his religion.

Moreover, Respondent's decision to remove Petitioner from his special vegetarian diet did not coerce Petitioner into violating his religious beliefs. In fact, Petitioner forced Respondents to remove the accommodation after he voluntarily disregarded the special menu. Therefore, Respondents' decision was directly related to Petitioner's disorderly conduct. Despite requesting a special diet, Petitioner hid non-vegetarian food and voluntarily ate food from the general menu. R. at 20. In light of Petitioner's behavior, Respondents chose a punishment that was appropriate and the least restrictive means available.

CONCLUSION

This Court should uphold the decision of the Twelfth Circuit Court of Appeals vacating summary judgement for Petitioner and finding that Respondents' denial of additional late night prayer services did not substantially burden Petitioner nor did it violate RLUIPA because Petitioner's request was excessive and overly burdensome on the Prison. Additionally, this Court should also find that removing Petitioner from the special vegetarian diet program was the least restrictive means of ensuring prisoner obedience and prison security, and that the removal did not pressure Petitioner to violate his religious beliefs.

APPENDIX

42 U.S.C. § 2000cc-1. 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 2 of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997), 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. Judicial Relief.

(a) Cause of action. A person may assert a violation of this Act 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 2 [42 USCS § 2000cc], 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 2 [42 USCS § 2000cc] 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 Act 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 Act. The United States may bring an action for injunctive or declaratory relief to enforce compliance with this Act. 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 Act 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. Rules of Construction.

(a) Religious belief unaffected. Nothing in this Act shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated. Nothing in this Act 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 Act 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 Act 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 Act 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 Act.

(e) Governmental discretion in alleviating burdens on religious exercise. A government may avoid the preemptive force of any provision of this Act 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 Act, 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 Act.

(g) Broad construction. This Act shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this Act and the Constitution.

(h) No preemption or repeal. Nothing in this Act 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 Act.

(i) Severability. If any provision of this Act or of an amendment made by this Act, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provision to any other person or circumstance shall not be affected.

§ 2000cc-4. Establishment Clause Unaffected.

Nothing in this Act shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this Act. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

§ 2000cc-5. Definitions.

In this Act:

- (1) Claimant. The term "claimant" means a person raising a claim or defense under this Act.

(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 4(b) and 5 [42 USCS §§ 2000cc-2(b) and 2000cc-3], 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 606 of the Civil Rights Act of 1964 (42 U.S.C. 2000d-4a).

(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.