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IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 2015

No. 985-2015

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*SIHEEM KELLY,*

Petitioner,

v.

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

Respondents.

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

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BRIEF FOR THE PETITIONER

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## QUESTIONS PRESENTED

- I. Whether Tourovia Correctional Center's prison policy prohibiting night services to members of the Islamic faith violates RLUIPA?
  
- II. 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?

## JURISDICTIONAL STATEMENT

Petitioner seeks review of the judgment of the United States Court of Appeals for the Twelfth Circuit vacating his award of summary judgment granted by the United States District Court for the Eastern District of Tourovia. This Court has jurisdiction to hear this appeal pursuant to 28 U.S.C. § 1254, which provides that the Supreme Court of the United States has jurisdiction to review cases from the courts of appeals by writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree. 28 U.S.C. § 1254.

## STATEMENT OF THE CASE

### **I. Factual Background**

Siheem Kelly has been a devout practicing member of the Nation of Islam (“NOI”) at Tourovia Correctional Center (“TCC”) since the year 2000. R. at 3. The NOI is a denomination of the Islamic faith, which requires its adherents to participate in a strict vegetarian (or Halal) diet and fast during the month of Ramadam. *Id.* The Nation also requires its members to pray five times a day during obligatory and traditional prayer times which occur at dawn, early afternoon, late afternoon, sunset, and late evening. R. at 3-4. Most NOI adherents believe that their faith requires a clean and solemn environment for prayer. R. at 4. As required by TCC, Mr. Kelly filed a “Declaration of Religious Preference Form” in order to become eligible to participate in religious services and religious dietary programs offered by the prison. R. at 3. NOI members at TCC have maintained satisfactory behavioral standing at the prison for the past five years. R. at 3. Moreover, none of the current members have any record or history of violence at TCC. *Id.*

In August of 1998, TCC revised its religious service policy, making it more restrictive by banning the option to petition for prayer services at night with a prison service volunteer. *Id.* This change came about following TCC’s discovery that during prayer services, volunteers were assisting in relaying gang messages from Christian inmates to gang-affiliated individuals outside of the prison. *Id.* Shortly after its implementation, members of the Christian and Sunni Muslim faith groups violated the new policy, which resulted in the prison banning the use of all prison volunteers and all nightly services as punishment. *Id.* TCC policy is clear that any inmate who is not in their cell before final head count at 8:30 p.m. will be placed in solitary confinement as punishment. *Id.* Further, TCC policy also imposes punishment if there is evidence of any misconduct regarding daily meals or religious diets. *Id.*



In February of 2013, Mr. Kelly, acting as a liaison for all acknowledged members of the Nation, submitted a written request for an additional congregational prayer service to take place in the late evening. R. at 5. Mr. Kelly's request was denied by Warden Echols a week later as a result of TCC Directive #98, which prohibits inmates from being outside of their cell at final head count. *Id.* Following the denial of his first request for religious accommodations, Mr. Kelly filed two additional grievances, both of which were denied. *Id.*

Mr. Kelly currently attends all three prayer services offered by the prison, however, he sincerely believes that his faith requires five separate services. *Id.* As a compromise, Mr. Kelly verbally expressed to the warden that he would settle for one additional prayer service in which he would conduct the final two required prayers of the day, however he received no response to this request. *Id.* Mr. Kelly is unable to pray in his cell because his religion requires a clean and solemn environment for prayer, and his cell contains a toilet and a non-NOI cellmate who ridicules and harass him during prayer, both of which exclude his cell as a viable location for prayer. *Id.*

Two weeks following the submission of Mr. Kelly's third grievance, a new inmate at TCC, who was also Mr. Kelly's new cellmate, alleged that Mr. Kelly threatened him with violence if he did not give him his meatloaf dinner. R. at 6. Although there was no evidence to support the allegations of threats, TCC removed Siheem Kelly from its Halal-compliant diet program. *Id.* Additionally, TCC punished Mr. Kelly with a month's ban on attending religious services. *Id.* In response to his removal from the Halal diet, Mr. Kelly refused to eat anything from the standard menu options in an effort to avoid violating his religious beliefs. *Id.* Two days after Mr. Kelly was removed from his religious diet, TCC responded by forcefully tube-feeding him non-Halal foods. *Id.*

## II. Procedural History

Following the denial of his formal grievance and the tube-feeding incident, Siheem Kelly filed a complaint in the Federal District Court of Tourovia asserting violations of the First Amendment and Religious Land Use and Institutionalized Persons Act (“RLUIPA”). *Id.* The Defendants’ moved for summary judgment, which was denied. R. at 15. Ultimately, the District Court found in favor of Mr. Kelly and held that the Defendants failed to provide adequate evidence in support of their contention that allowing Mr. Kelly’s requests would cause additional threats to safety and administration. *Id.* The District Court further held that the Defendants failed to demonstrate that they explored or adopted the least restrictive means in furtherance of their stated interests. *Id.* The Defendants appealed to the United States Court of Appeals for the Twelfth Circuit. R. at 16. The Circuit Court concluded that the District Court erred in finding a violation of RLUIPA, and vacated Mr. Kelly’s award of summary judgment. On July 2, 2014, this Court granted certiorari with respect to the questions presented herein. R. at 23.

### SUMMARY OF THE ARGUMENT

The RLUIPA provides expansive protection to institutionalized persons with regard to their religious liberties. Specifically, the statute prohibits the government from substantially burdening a prisoner’s religious exercise unless it can show that its actions constitute the least restrictive means of furthering a compelling state interest. RLUIPA places the initial burden on a claimant to demonstrate the existence of a substantial burden on a sincerely held religious belief. Once the claimant demonstrates this, the burden then shifts to the government to prove that its actions are justified by a compelling interest achieved through the least restrictive means. A compelling state interest must not be based on mere speculation, exaggerated fears, or post-hoc rationalizations,

rather, the government must provide concrete evidence to meet the rigorous standard demanded by RLUIPA.

TCC violated Siheem Kelly's rights under RLUIPA because it unjustifiably placed a substantial burden on his exercise of religion in two ways. First, TCC's prison policy prohibiting night services to members of the Islamic faith violates Mr. Kelly's sincerely held religious belief in the need for five daily prayers, one of which must occur during the late evening and in a clean and solemn environment. Second, TCC violated RLUIPA when it removed Mr. Kelly from his religious diet program after a single unsubstantiated allegation of deviation from the diet. Substantially burdened Kelly's sincerely held religious beliefs.

The prison's policy regarding evening prayer substantially burdens Mr. Kelly's religious exercise because it coerces him into abandoning his faith. TCC policy requires all inmates to be present in their cell before final head count by 8:30 p.m., which prohibits Mr. Kelly from engaging in late evening prayer as mandated by the NOI. If he were to remain outside of his cell in order to adhere to his religious beliefs, TCC would punish him by placing him in solitary confinement. Thus, the threat of solitary confinement places substantial pressure on Mr. Kelly to abandon his beliefs in order to avoid punishment.

TCC's policy concerning removal from a religious diet program violates RLUIPA because it does not constitute the least restrictive means of furthering a compelling interest. In attempting to validate this policy, TCC asserts a compelling interest in maintaining prison safety and security, however, it fails to provide any evidence to suggest that the policy furthers these goals. Moreover, the policy is overly broad and vague, and as such, it cannot meet the least-restrictive-means standard under RLUIPA.

## ARGUMENT

Congress enacted the Religious Land Use and Institutionalized Persons Act (the “RLUIPA”) in an effort to provide expansive protection for religious liberty. *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015). RLUIPA provides in relevant part as follows:

No 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, unless the government demonstrates that imposition of the burden on that person-- (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1.

Recognizing that prisoners receive inadequate religious protection under the Constitution, Congress specifically designed RLUIPA to extend the same degree of protection to prisoners as that received by members of the general public under the Free Exercise Clause. A free exercise claim brought by a prisoner as a violation of RLUIPA is entitled to strict scrutiny analysis, whereas, outside of the RLUIPA, “when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests.” *Turner v. Safley*, 482 U.S. 78, 89 (1987). “RLUIPA...mandates a stricter standard of review for prison regulations that burden the free exercise of religion than the reasonableness standard under *Turner*.” *Shakur v. Schriro*, 514 F.3d 878, 888 (9th Cir. 2008).

Legislative intent concerning the scope of RLUIPA is clear and unambiguous, and accordingly, the protections it offers must be interpreted as far-reaching. In addition to requiring that claims alleging violations of RLUIPA be subject to strict scrutiny, Congress also mandated, by the language of the statute itself, that RLUIPA “shall be construed in favor of a broad protection of religious exercise.” 42 U.S.C.A. § 2000cc-3. “RLUIPA’s heightened protection stem[s] from Congress’s recognition that the right of inmates (and other institutionalized persons) to practice

their faith is ‘at the mercy of those running the institution.’” *Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006) (quoting 146 Cong. Rec. S7775 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy)). In their joint statement to Congress in support of enacting RLUIPA, Senators Orrin G. Hatch and Edward M. Kennedy, the senatorial co-sponsors of the Act, explained that “prison officials sometimes impose frivolous or arbitrary rules,” and “[w]hether from indifference, ignorance, bigotry, or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways.” 146 Cong. Rec. S7775 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). Ultimately, the RLUIPA received widespread support and was unanimously passed by both houses of Congress. U.S. Dept. of Justice, Report on the Tenth Year Anniversary of the Religious Land Use and Institutionalized Persons Act, (Sept. 22, 2010) at 2.

**I. TOUROVIA CORRECTIONAL CENTER’S PRISON POLICY PROHIBITING NIGHTLY CONGREGATIONAL PRAYER SERVICES TO MEMBERS OF THE ISLAMIC FAITH VIOLATES RLUIPA BECAUSE IT PLACES A SUBSTANTIAL BURDEN ON RELIGIOUS EXERCISE AND LACKS JUSTIFICATION BY A COMPELLING GOVERNMENT INTEREST ACHIEVED THROUGH THE LEAST RESTRICTIVE MEANS.**

A. Nightly congregational prayer services qualify as a “religious exercise” for purposes of RLUIPA.

Nightly congregational prayer services fall within RLUIPA’s broad definition of the term “religious exercise.” In order to establish a claim under the RLUIPA, the plaintiff must demonstrate: “(1) he takes part in a ‘religious exercise,’ and (2) the State’s actions have substantially burdened that exercise.” *Walker v. Beard*, 789 F.3d 1125, 1134 (9th Cir.) *cert. denied*, 136 S. Ct. 570 (2015). Thus, as a threshold matter, before an inmate can assert that the government has substantially burdened his religious exercise, he must establish that the activity in question does in fact constitute a “religious exercise.”

RLUIPA defines “religious exercise” as “any exercise of religion, whether or not compelled by, or central to, a system of religious belief.” 42 U.S.C.A. § 2000cc-5. In *Employment Div., Dep't of Human Res. of Oregon v. Smith*, and again in *Cutter v. Wilkinson*, this Court accepted the notion that “the exercise of religion often involves not only belief and profession but the performance of ... physical acts [such as] assembling with others for a worship service . . .” *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (quoting *Employment Div., Dep't of Human Res. Of Oregon v. Smith*, 494 U.S. 872, 877 (1990)). Further, in affirming the decision of the United States Court of Appeals for the Fifth Circuit in *Karen B. v. Treen*, this Court supported the belief that “[p]rayer is perhaps the quintessential religious practice for many of the world's faiths, and it plays a significant role in the devotional lives of most religious people.” *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. 1981) *aff'd*, 455 U.S. 913 (1982).

The U.S. District Court for the Eastern District of Tourovia and the U.S. Court of Appeals for the Twelfth Circuit correctly found that Mr. Kelly has met his initial burden of establishing that the activity at issue qualifies as a religious exercise. Here, Mr. Kelly requests a nightly congregational prayer service. It is well established that prayer is quite possibly the most important religious exercise associated with many of the world’s faiths, and that the exercise of most religions often involves congregating for worship. Given the broad definition of “religious exercise” under RLUIPA and the general acceptance of prayer and group worship as fundamental to the exercise of most religions, the activity at issue here, i.e., nightly congregational prayer, qualifies as a religious exercise for purposes of RLUIPA.

- B. As a member of the Nation of Islam, Mr. Kelly sincerely holds his religious belief in the need for an additional nightly congregational prayer service outside of his cell.

Mr. Kelly's reliance on the actual text of the Holy Qu'ran and the Salat in proclaiming his religious belief in the need for a nightly congregational prayer service outside of his cell supports a finding that he sincerely holds his belief. "Although RLUIPA bars inquiry into whether a particular belief or practice is "central" to a prisoner's religion . . . the Act does not preclude inquiry into the sincerity of a prisoner's professed religiosity." *Cutter*, 544 U.S. at 725. It is not the task of the Court to determine the truth or validity of a prisoner's professed religious belief, rather, the Court is charged with assessing whether the prisoner truly or sincerely holds his stated religious belief. *Id.* "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 714, (1981). A sincerely held religious belief is one that is rooted in a particular faith and "not a 'purely secular philosophical concern.'" *Cutter*, 544 U.S. at 725 (quoting *Shakur*, 514 F.3d at 885).

Religious texts are an important source of evidence in evaluating whether a religious belief is sincerely held. This point is illustrated in the case of *Lewis v. Ryan*, in which Mr. Lewis, a Muslim prisoner, alleged violations of both the Free Exercise Clause and RLUIPA based on a California prison's failure to provide him with a Halal food program or to allow him to participate in the Kosher food program. *Lewis v. Ryan*, 2008 WL 1944112, at \*2 (S.D. Cal.). Mr. Lewis also claimed that the prison's vegetarian religious diet option did not meet the requirements of the Islamic faith. *Id.* at \*19. "In support of these assertions, [Mr. Lewis] references pertinent portions of the scripture contained in the Holy Qu'ran, which state in pertinent part, '[s]o eat meats on which Allah's name has been pronounced' and '[h]e who does not eat meat is not of my religion.'"

*Id.* Based on this evidence, and in spite of the fact that the government offered an entirely different interpretation of the above-quoted scripture, the Court concluded that Mr. Lewis “present[ed] a plausible reading of the Quran, and demonstrate[d] that his beliefs are sincere.” *Id.*

Mr. Kelly’s belief in the need for nightly prayer is sincerely held because it is based in large part on the text of the Quran itself, and is therefore rooted in Islam and not founded on a purely secular philosophical concern. Similar to the facts of *Lewis*, in the instant case, Mr. Kelly references passages from religious texts in support of his belief that that a nightly congregational prayer service is obligatory for members of the Nation of Islam. Specifically, Mr. Kelly refers to scripture from the Quran and the teachings of the Salat, an Islamic prayer guide.

For example, in Mr. Kelly’s formal grievance filed with the prison, he supported his request for a nightly congregational prayer service by quoting verses from the Quran that explained the mandatory nature of this activity. Mr. Kelly specifically quoted the following passages: “Keep up prayer from the declining of the sun till the darkness of the night, and the recital of the Quran. Surely the recital of the Quran at dawn is witnessed”; and, “...[C]elebrate the praise of the Lord before the rising of the sun and before its setting, and glorify [Him] during the hours of the night and parts of the day, that thou mayest well be pleased.” *The Holy Qu’ran*, 17:78, 20:30. The above-quoted text delineates five distinct prayer times occurring at defined temporal intervals throughout the day, one of which is to take place during the “darkness of the night.”

The sincerity of Mr. Kelly’s religious belief is also supported by the teachings of the Salat, which explain that members of the NOI must pray five times each day in accordance with the obligatory and traditional prayer times, which are: (1) Dawn; (2) Early Afternoon; (3) Late Afternoon; (4) Sunset; and (5) Late Evening. In addition to the support derived from Islamic religious texts and the record in this case, it is generally accepted, and has been acknowledged by



other federal courts, that the performance of ritual prayer five times per day is standard practice by observant followers of the Islamic faith. *Hudson v. Dennehy*, 538 F. Supp. 2d 400, 404 (D. Mass. 2008).

Mr. Kelly also sincerely believes that the Islamic faith requires that all prayer must take place outside of his prison cell. As the record indicates, most members of the Nation of Islam believe that they must pray in a very clean and solemn environment, and that once prayer begins, members should not be interrupted. Other courts have recognized the general belief among followers of Islam that a clean environment is required for prayer, and that a prison cell such as Mr. Kelly's which contains a toilet, is not a viable location for this activity. *See, e.g., Jihad v. Fabian*, 680 F. Supp. 2d 1021, 1027 (D. Minn. 2010) (concluding that a Muslim inmate's sincerely held religious beliefs prohibit him from praying in a room with a toilet). Given the foregoing, Mr. Kelly has adequately demonstrated that his beliefs are rooted in the Islamic faith and not derived from secular concerns. Both case law and the record below support Mr. Kelly's contention that his prison cell is a proscribed place for prayer pursuant to the tenets of Islam, and thus, support the conclusion that his belief is sincerely held.

C. Tourovia Correctional Center's policies substantially burden Mr. Kelly's ability to freely exercise his faith.

The denial of Mr. Kelly's request for a nightly congregational prayer service places a substantial burden on his exercise of the Islamic faith. In asserting a violation of RLUIPA, "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." 42 U.S.C. § 2000cc-2. RLUIPA does not define the term "substantial burden." According to the joint statement of Senators Hatch and Kennedy,

[t]he Act does not include a definition of the term “substantial burden” because it is not the intent of this Act to create a new standard for the definition of “substantial burden” on religious exercise. Instead, that term as used in the Act should be interpreted by reference to Supreme Court jurisprudence.”

146 Cong. Rec. S7775 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy).

This Court’s most comprehensive definition of “substantial burden” was set forth in *Thomas v. Review Board of Indiana Employment Security Division*, and provides as follows:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.

*Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981).

Later, in *Holt v. Hobbs*, this Court added that the RLUIPA substantial burden inquiry asks whether “the government has substantially burdened religious exercise...not whether the RLUIPA claimant is able to engage in other forms of religious exercise.” *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015).

- i. *Tourovia Correctional Center’s policy prohibiting nightly prayer services places substantial pressure on Mr. Kelly to modify his behavior and violate his religious beliefs.*

Pursuant to Tourovia Directive Definitions, all prayer services must take place during designated prayer times, the last of which is defined as the hours before the evening meal at 7:00 p.m. Further, Tourovia Directive #98 states that no prayer services are permitted after the last inmate head count at 8:30 p.m. TCC’s policy also provides that any inmate who is not in their cell before final head count shall be placed in solitary confinement as punishment. Mr. Kelly’s request for a nightly prayer service is essential to the practice of his faith, as the Quran mandates prayer during the late evening hours of the day. If Mr. Kelly were to engage in prayer outside of his cell during the late evening, as his faith requires, he would find himself in violation of TCC’s policies. First, because any prayer outside of the designated prayer times is prohibited, and second, because

late evening prayer would require him to be outside of his cell after last head count at 8:30 p.m. As a result of TCC's strict punishment for such violations, Mr. Kelly has been forced to violate his beliefs by dispensing with late evening prayer in order to avoid being punished by solitary confinement.

In *Warsoldier v. Woodford*, the Ninth Circuit Court of Appeals found that a substantial burden on the exercise of religion existed when faced with facts and circumstances very similar to those in this case. *Warsoldier* involved a Cahuilla Native American prison inmate named Billy Soza Warsoldier, whose faith dictated that he may only cut his hair upon the death of a close relative. *Warsoldier v. Woodford*, 418 F.3d 989, 991 (9th Cir. 2005). Mr. Warsoldier refused to adhere to a hair grooming policy which required that all male inmates maintain their hair no more than three inches in length. *Id.* As a result of his refusal to comply with the policy, Mr. Warsoldier was subjected to punishment which included confinement to his cell, additional duty hours, loss of assignment to particular duties, loss of phone call rights, expulsion from recreational classes, revocation of his executive position on the Inmate Advisory Council, loss of the privilege to go to the main yard for recreation, a decrease on his monthly commissary allowance, and loss of the ability to make special purchases at the prison store. *Id.* at 992. Here, if Mr. Kelly fails to adhere to TCC's prison policy prohibiting nightly prayer, he faces solitary confinement, a punishment which would deprive him of all human contact other than minor interaction with prison staff, and which single-handedly encompasses every aspect of the various forms of punishment imposed upon Mr. Warsoldier.

TCC's policy imposing solitary confinement upon those who fail to be present in their cells by the last head count inflicts substantial pressure on Mr. Kelly and other inmates to sacrifice their religious beliefs in order to evade punishment. In reliance on this Court's definition of the term

“substantial burden” as set forth in *Thomas*, the Ninth Circuit in *Warsoldier* concluded that “[b]ecause the grooming policy intentionally puts significant pressure on inmates such as Warsoldier to abandon their religious beliefs by cutting their hair, [the] grooming policy imposes a substantial burden on Warsoldier’s religious practice.” *Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005). Here, Mr. Kelly encounters an almost identical situation. He has two options: (1) obey his faith in violation of TCC policy and risk being placed in solitary confinement; or (2) abandon his religious beliefs in order to avoid punishment. Therefore, TCC policy imposes a substantial burden on Mr. Kelly’s religious practice because it coerces him into obedience and significantly pressures him to abandon his religious beliefs.

- ii. *Mr. Kelly’s ability to engage in other forms of religious exercise has no relevance in determining whether TCC’s policy prohibiting nightly prayer services violates RLUIPA.*

Allowing Mr. Kelly to engage in prayer in his prison cell during the late evening hours does not negate the fact that TCC’s policy prohibiting nightly prayer services violates RLUIPA. In *Holt v. Hobbs*, this Court established that the existence of alternative means of religious exercise is not a relevant consideration in an RLUIPA analysis. *Holt*, 135 S. Ct. at 862. *Holt* involved a Muslim inmate who requested permission from the Arkansas Department of Corrections to be allowed to grow a one-half inch beard for religious purposes. *Id.* at 861. The grooming policy in place at that time provided that “[n]o inmates will be permitted to wear facial hair other than a neatly trimmed mustache that does not extend beyond the corner of the mouth or over the lip.” *Id.* at 860. The record in that case demonstrated that Mr. Holt sincerely believes that his faith requires him not to trim his beard at all, however, he offered to compromise with the prison and settle for a one-half inch beard instead. *Id.* at 861.

In *Holt*, this Court expressly rejected the District Court’s conclusion that “the [prison’s] grooming policy did not substantially burden [Mr. Holt’s] religious exercise because ‘he had been provided a prayer rug and a list of distributors of Islamic material, he was allowed to correspond with a religious advisor, and was allowed to maintain the required diet and observe religious holidays.’” *Id.* at 862; *See also, Greene v. Solano Cty. Jail*, 513 F.3d 982, 987 (9th Cir. 2008) (concluding that under RLUIPA, the term “religious exercise” does not mean the general practice of one’s religion, but rather, each particular practice within one’s religion, and rejecting the government’s argument that it may impose outright bans on particular aspects of an inmate’s religious exercise without violating the RLUIPA, so long as, in the aggregate, those bans do not amount to a substantial burden). This Court also explained that RLUIPA claims differ from those involving prisoners’ First Amendment rights in that the availability of alternative means of practicing religion is only a relevant consideration in cases involving the latter. *Holt*, 135 S. Ct. at 862.

TCC’s argument that its policy prohibiting nightly prayer services does not substantially burden Mr. Kelly’s religious exercise is flawed because it improperly imports reasoning from cases involving prisoners’ First Amendment rights. Here, TCC claims that Mr. Kelly’s religious exercise is not substantially burdened because it allows all prisoners to worship in their cells using items such as sacred texts, devotional items, and materials. This line of reasoning is in direct contravention of the holding in *Holt*, as the State is attempting to justify a substantial burden on one particular religious exercise by pointing to alternative means of practicing religion. Because Mr. Kelly’s claim was brought as a violation of RLUIPA and not as a violation of his rights under the First Amendment, the State’s argument concerning alternative means of religious practice may

not factor into this Court's decision as to whether the policy prohibiting nightly prayer services constitutes a substantial burden.

- D. Tourovia Correctional Center has failed to demonstrate that its policy prohibiting nightly prayer services is the least restrictive means of furthering a compelling state interest.

In an RLUIPA claim, once a plaintiff has established the existence of a substantial burden on religious exercise, the burden then shifts to the government to demonstrate that its actions constitute the least restrictive means of furthering that interest. *Id.* at 857. In their joint statement to Congress, Senators Hatch and Kennedy explained that “[t]he compelling interest test is a standard that responds to facts and context.” 146 Cong. Rec. S7775 (July 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy). Further, the joint statement explains that Congress, in enacting the RLUIPA, adopted the same philosophy concerning the “compelling interest” standard as that set forth by the Judiciary Committee in its report on the earlier Religious Freedom Restoration Act of 1993 (the “RFRA”). *Id.* The following passage is taken from the Judiciary Committee’s report on the RFRA, and through the joint statement of Senators Hatch and Kennedy, is made applicable to the RLUIPA.

[T]he committee expects that courts will continue the tradition of giving 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. At the same time, however, inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act’s requirements.

*Id.* (citing U.S. Senate, Judiciary Committee, *Report to the Senate on the Religious Freedom Restoration Act*, S. Rpt. 103-111 (1993)).

Tourovia Correctional Center offers insufficient evidence in support of its alleged compelling interests concerning prison safety and security, finances, and staffing. With regard to its alleged concern that nightly prayer services would threaten the safety and security of the prison,

TCC can only point to incidents that occurred nearly two decades ago during Christian prayer services. In fact, within TCC, members of the Nation of Islam have generally maintained satisfactory behavioral standing over the past five years, and none of the current NOI members have any history of violence within the prison. The only evidence offered with regard to prison finances was the cost containment strategy addendum attached to the affidavit attested to by the Director of the Chaplaincy Department. The record is devoid of any information concerning the contents of the addendum or the actual financial status of the prison at the time that Mr. Kelly's request was made. Finally, with regard to its personnel concerns, TCC offers only the affidavit of the Director of the Chaplaincy Department, which simply states that prayer accommodations would impose heightened staffing burdens, without any facts or circumstances to support his assertion. Without supporting facts and circumstances, TCC's proffered compelling interest can only be based on mere speculation and exaggerated fears, and thus, under the RLUIPA, there can be no finding of a compelling interest.

Assuming, *arguendo*, that TCC were able to adequately prove the existence of a compelling interest, it has not met its burden concerning least restrictive means. "The least-restrictive-means standard is exceptionally demanding, and it requires the government to sho[w] that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Holt*, 135 S. Ct. at 864 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014)). Moreover, "[the government] cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier*, 418 F.3d at 999 (citing *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 824 (2000)) (finding, in context of First Amendment challenge to speech restrictions, that "[a] court should not assume

a plausible, less restrictive alternative would be ineffective”). Mere conclusory assertions that a particular government policy is the least restrictive way of achieving a compelling interest are insufficient to meet the government’s burden concerning under the RLUIPA. *Warsoldier*, 418 F.3d at 998.

The District Court for the Eastern District of Tourovia correctly held that TCC failed to consider alternative means of achieving its alleged compelling interest, and as such, it did not meet its burden concerning least restrictive means. As the District Court notes, TCC could have scheduled a later final head count or grouped NOI inmates into the same cells or adjacent cell blocks in order to test whether its policy concerning night services was the least restrictive means of achieving its goal. There is no evidence in the record that TCC tried or even considered these two alternatives, nor does the record contain any evidence that TCC considered any other plausible options. Because TCC failed to consider possible alternative means of achieving its alleged compelling interest, its policy prohibiting nightly prayer services violates RLUIPA and must be declared invalid.

## **II. TOUROVIA CORRECTIONAL CENTER’S REMOVAL OF SIHEEM KELLY FROM THE RELIGIOUS DIET PROGRAM AFTER A SINGLE ALLEGATION OF BACKSLIDING VIOLATES RLUIPA.**

Passage of the Religious Land Use Institutional Persons Act (“RLUIPA”) promised to extend religious freedoms previously limited under *Employment Div., Dept. of Human Resources of Ore. v. Smith*. See *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015) (describing the passage of the RFRA, and its sister statute, the RLUIPA, as a response to the allowance of rules of general applicability under *Smith*). Congress intended for RLUIPA to protect religious practices from rules of general applicability. See 42 U.S.C.A. § 2000cc-1. Therefore, RLUIPA effectively splits from First Amendment case law. In effect, the statute grants broader religious protection to



institutionalized persons than that received under the First Amendment. 42 U.S.C.A. § 2000cc-1(b)(1). In *Cutter v. Wilkinson*, this Court recognized the constitutionality of RLUIPA and its workability with the Establishment Clause, and further acknowledged that RLUIPA serves the legitimate purpose of alleviating government created burdens on the exercise of religion. *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

In order to successfully assert an RLUIPA claim, the petitioner bears the initial burden of showing a “substantial burden” on their religious practice. *See* 42 U.S.C.A. § 2000cc-1. A challenger may disrupt an RLUIPA claim by demonstrating that a substantial burden is justified by a compelling state interest achieved through the least restrictive means. *Id.*

- A. Tourovia Correctional Center substantially burdened Mr. Kelly’s religious exercise by removing him from the religious diet program after a single alleged incident of backsliding.

RLUIPA forbids government imposition of a substantial burden on the religious exercise of an institutionalized person, unless the burden is the least restrictive means of furthering a compelling state interest. *Id.* A substantial burden occurs when government actions either (1) coerce an inmate to violate his beliefs in order to maintain a benefit or avoid punishment, or (2) force an inmate to violate a religious belief because of unilateral action taken by the prison. *See Holt v. Hobbs*, 135 S. Ct. 853 (2015) (finding that punishment for disobeying prison policy prohibiting beards amounts to coercion to violate faith and constitutes a substantial burden).

In order to establish a substantial burden, the court must first answer the preliminary question of whether the asserted activity falls under the umbrella of religious exercise. 42 U.S.C.A. § 2000cc-1, 3. “Religious exercise” under RLUIPA takes a broad meaning in comparison to pre-*Smith* First Amendment case law. *See* 42 U.S.C.A. § 2000cc-3 (g); *See also Holt*, 135 S. Ct. at 860. RLUIPA protects religious exercise “whether or not compelled by, or central to, a system of

religious belief.” 42 U.S.C.A. § 2000cc-5. As discussed earlier, this Court accepts that religious exercise “often involves not only belief and profession but the performance of ... physical acts...” *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005).

- i. *Siheem Kelly sincerely believes that his faith requires him to maintain a Halal diet and fast during the month of Ramadan.*

Although courts are prohibited from considering the centrality or compelling nature of a particular religious exercise in an RLUIPA analysis, they may inquire as a threshold matter, whether a professed religious belief is sincerely held. *Holt v. Hobbs*, 135 S. Ct. at 862. The sincerely held belief standard is a subjective standard, which asks whether the adherent truly believes that a particular religious exercise is required by his faith. *Id.* This Court’s decisions consistently support the position that it is not the role of the courts to question the reasonableness of a particular belief; instead, a court must determine whether the asserted belief is based on an honest conviction. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014). A claimant’s own actions consistent with his asserted belief are a strong indication that a conviction is sincerely held. *Id.* Moreover, the sincerity of a claimant’s belief is not diminished by the fact that the professed belief may appear illogical, unreasonable, or distasteful. *Walker*, 789 F.3d at 1134-35; *Koger v. Bryan*, 523 F.3d 789, 797 (7th Cir. 2008).

In *Walker v. Beard*, the Ninth Circuit was faced with an exceptionally challenging “sincerity” analysis. *Walker*, 789 F.3d at 1134. In that case, the Court of Appeals reviewed RLUIPA and Free Exercise claims of an inmate practicing Odinism, a racially motivated, white supremacist based religion. *Id.* At the heart of the claim was an Odinist practice called “warding,” which required that Mr. Walker be placed in a racially segregated housing unit. *Id.* However distasteful, the Ninth Circuit recognized “warding” as a religious practice and found that Mr. Walker sincerely believes that engaging in this activity was a requirement of his faith. The Court

reasoned that the Odinist practice of “warding” brings adherents closer to their God and provides an opportunity for communication between followers and their God. *Id.*

The *Walker* case is analogous to the present case to the extent that it applies to Mr. Kelly’s subjective and sincere belief in the NOI dietary restrictions. Mr. Kelly has been a member of the Nation at TCC for approximately eleven years, and his actions demonstrate that he is a fiercely loyal adherent to the NOI and its tenets. For example, Mr. Kelly attends all three available prayer services currently available for NOI members and follows a strict vegetarian Halal diet. Acting as a liaison for his NOI brethren, he filed a formal grievance to compel the prison to provide additional prayer services for NOI inmates in accordance with the mandates of his faith. To further his claim, Siheem Kelly cites specific passages from the Holy Qu’ran to describe prayer requirements under the NOI faith. Furthermore, after his removal from the diet, Mr. Kelly resisted TCC’s attempts to feed him non-Halal food. Siheem Kelly fully adhered to his religious dietary beliefs until TCC forcefully fed him non-compliant food after he resisted for two days. These efforts do not denote a man conning prison officials. Adherence to a religious based diet as a means of exercising one’s faith is far more mainstream and, albeit not a factor for consideration, much less offensive, than the “warding” practice accepted by the Ninth Circuit in *Walker*.

- ii. *Mr. Kelly’s removal from the Halal vegetarian diet forced him to violate his sincerely held religious beliefs.*

The “substantial burden” inquiry asks whether government action coerces or exerts substantial pressure on an adherent to modify his or her behavior and violate sincerely held religious beliefs. *Compare Hobbie v. Unemployment Appeals Comm’n of Fla.*, 480 U.S. 136, 141 (1987); *and Thomas v. Review Bd. Of Ind. Emp’t Sec. Div.*, 450 U.S. 707, 718 (1981) (finding that Mr. Thomas sincerely believed a job making armaments would violate the tenets of the Jehovah’s Witness faith); *with Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439, 450 (1988)

(finding no substantial burden where government action simply makes religious exercise more difficult and has no coercive effect). It is inconsequential whether an inmate may still exercise their religion through other practices. *Holt*, 135 S. Ct. at 862.

Once a claimant establishes the existence of a substantial burden, the onus shifts to the State to prove that its actions are the least restrictive means of furthering a compelling government interest. In *Lyng v. Northwest Indian Cemetery Protective Ass'n*, this Court decided whether a portion of planned road that passed through a site holding religious significance for local tribes arose to a substantial burden requiring the government to show a compelling interest. *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 442 (1988). In that case, the Forest Service finalized plans to build a road after conducting a thorough investigation, including various impact studies and community outreach. Unfortunately, a portion of road, which potentially disturbed the religious site, could not be avoided, as all plans required that portion of road. *Id.* at 439. The local tribes disagreed with the plan and argued that their religious practices in that area relied on an undisturbed natural setting, privacy, and silence. *Id.* They argued that the road would cause disruption preventing their religious exercise. *Id.*

In *Lyng*, this Court acknowledged that some indirect burdens might necessitate the showing of a compelling interest. However, in order for a burden to be substantial, whether direct or indirect, it must be accompanied by some coercive element compelling an individual to act contrary to their religious beliefs. *Id.* at 450. This Court recognized that *Lyng's* sincerely held belief was adversely affected by the proposed road, but found no substantial burden, or coercive element, compelling religious non-compliance. *Id.* The rationale behind this Court's decision was that the road presented a mere intrusion or adverse effect and did not rise to the level of a substantial burden. Had the case come out differently, government action would be deemed unconstitutional

any time it encroached on a person's religious beliefs. However, that is not the standard, and as such, this Court found that no substantial burden existed with respect to the local tribes' exercise of religion.

Unlike *Lyng*, TCC's removal of Kelly from the diet program materialized into a direct and substantial burden on his religious exercise. TCC's actions far exceed the unavoidable consequences in *Lyng*, where, only after careful review, did the Forest Service proceed with their road plans which may disturb the natural, private, silent setting of the religious site. Here, TCC removed Mr. Kelly from the diet program after a single allegation of backsliding, and exacted further retribution by prohibiting him from attending prayer services for one month. TCC's removal of Mr. Kelly substantially burdened his faith, as it destroyed any opportunity for him to comply with his religious dietary requirements.

Siheem Kelly's removal from the religious diet program pursuant to Directive #99 substantially burdened his religious exercise by forcing him to choose between eating a non-Halal diet or eating nothing at all. Mr. Kelly's placement within the prison walls already places a burden on his ability to practice his religion, and as a result, he relies on the prison to provide simple accommodations. Mr. Kelly sincerely believes that the NOI requires a Halal diet. By removing him from the religious diet program, Mr. Kelly was faced with two options: (1) consume a non-Halal diet in violation of his faith, or (2) abstain from eating altogether. Because of his sincerely held religious convictions, Mr. Kelly opted for the latter in order to avoid a faith violation. In response to this, TCC yet again substantially burdened Mr. Kelly's religious exercise by violently force feeding him non-Halal food.

B. Tourovia Correctional Center failed to meet its burden of demonstrating a compelling state interest in removing Siheem Kelly from the religious diet program.

i. *Merely asserting an interest in maintaining order, security, and discipline, or controlling costs, without more, is insufficient to meet the compelling interest standard.*

The government may incur administrative expenses in order to avoid burdening inmates' religious exercise. See 42 U.S.C.A. § 2000cc-3 (“... [RLUIPA] may require...incur[ring] expenses in...operations to avoid imposing a substantial burden on religious exercise.”); See also *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 (2014).

Tourovia Correctional Center failed to show a compelling state interest in using Directive #99 against Siheem Kelly after a single allegation of backsliding. In *Lovelace v. Lee*, the Fourth Circuit examined whether the Keen Mountain Correctional Center met its burden of demonstrating a compelling state interest in removing NOI inmate, Leroy Lovelace, from the Ramadan diet program after an officer alleged that Lovelace broke his fast. *Lovelace v. Lee*, 472 F.3d 174, 183 (4th Cir. 2006). Keen Mountain instituted the Ramadan program in 2002, which provided a special pre-dawn breakfast and post-sunset dinner to accommodate Ramadan fasting. *Id.* Keen Mountain approved Mr. Lovelace to participate in the Ramadan program, but the institution removed him six days after his entry into the program following an allegation that he broke his fast. *Id.* at 183. The Fourth Circuit accepted the removal as a substantial burden on Lovelace's religious exercise, and shifted the burden onto Keen Mountain to prove that their actions were in furtherance of a compelling state interest. *Id.* at 190.

The Fourth Circuit rejected Keen Mountain's argument that Lovelace's removal from the diet program furthered its compelling state interests in securing prison order and discipline and controlling budgetary costs. *Id.* Keen Mountain's argument failed because it neglected to provide evidence to substantiate its position that Lovelace's removal from the diet program aided in

securing prison order and discipline and controlling budgetary costs. *Id.* at 191. Furthermore, the Fourth Circuit explained that the Keen Mountain officials did not even attempt to corroborate their claims with sworn statements. *Id.*

Similar to the situation in *Lovelace*, TCC failed to offer adequate proof in support of its alleged compelling state interests. TCC's offer of evidence consisted of only a few sworn statements with no corroborating evidence and a document concerning the prison's cost containment strategy. TCC's evidence lacks specificity and consists of hollow claims based on mere speculation. TCC paints Directive #99 as a bulwark of prison security, but fails to demonstrate the compelling need for such a directive.

The evidence offered by TCC in support of its compelling state interest does no more than express a concern for the general dangers associated with running any prison given the nature of the job. Here, in an effort to establish a compelling interest, TCC relies on decade old events, which caused the policy change. Reference to these events, which had absolutely nothing to do with the NOI or any of its members, provides little to no assistance in validating TCC's compelling interest argument. Moreover, TCC cannot cite to a single incident of an NOI inmate violating or abusing prison policies.

TCC's claim that regulating inmates' diets furthers its compelling interest in preventing inmates from cloaking illicit conduct or gang affiliation through religious identities is unfounded. Similar to *Lovelace*, TCC does not substantiate this interest with any evidence or particular incidents where inmates abused diets to further illicit conduct. TCC also cites no particularized facts indicating how costs would rise if "backsliding" inmates keep their diets. Furthermore, TCC cites no evidence, past or present, of any inmates abusing the dietary policies. Although TCC officials discovered food in Mr. Kelly's bunk, it was uneaten and no physical evidence existed to

substantiate his cellmate's allegation. Further, the cellmate's allegation strongly contradicts Mr. Kelly's prison history at TCC, which demonstrates that he has maintained an incident free record for the previous 11 years as a practicing NOI inmate. Even if the allegation had merit, a single allegation of "backsliding" does not justify removal from a religious diet program. Because TCC relies on exaggerated fears, mere speculation, and unsubstantiated testimony, it fails to meet the stringent requirements necessary to demonstrate a compelling state interest under RLUIPA.

- ii. *TCC's compelling state interest argument fails even when given an appropriate degree of due deference.*

RLUIPA does not require or permit "unquestioning deference" to a prison's stated "compelling interest."<sup>1</sup> Instead, RLUIPA grants broad religious protection, which requires courts to strictly scrutinize stated government interests attempting to justify substantial burdens on religious exercise. *See* 42 U.S.C.A. § 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."); *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015).

In *Holt v. Hobbs*, this Court offered considerable guidance as to the appropriate level of deference that ought to be given to prison administrators in analyzing their compelling interest arguments. In *Holt*, this Court reviewed the dismissal of a Muslim inmate's First Amendment and RLUIPA claims against the Arkansas Department of Corrections ("ADC"). *Holt v. Hobbs*, 135 S. Ct. 853 (2015). The prison denied Holt's request for an exemption to the prison's no facial hair policy, which would allow him to comply with his Muslim faith by keeping a half-inch beard. *Id.*

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<sup>1</sup> RLUIPA's express language never mentions "deference" in any section. In fact, the section on "Rules of Construction" provides no guidance on deferring to a prison's judgment or experience, but does reiterate a grant of broad protections for religious exercise. *See generally* 42 U.S.C.A. § 2000cc-3(g) ("This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution."); *Holt v. Hobbs*, 135 S. Ct. 853, 864 (2015).



ADC based its denial on a claim that it had a compelling security interest in controlling the flow of contraband and preventing inmates from growing beards to aid in prison escapes or illicit conduct. *Id.* at 859. Even though the magistrate judge recognized the absurdity of hiding contraband in Holt's half-inch beard, the judge recommended dismissal because ADC was entitled to deference. *Id.* at 861. As a result, the District Court accepted the magistrate judge's recommendation, which the superior court later affirmed. However, this Court expressly denounced the "unquestioning deference" standard applied by the lower courts, and held that "unquestioning deference" is incompatible with RLUIPA because it would avoid the "rigorous standard" demanded by Congress. *Id.* at 861, 864.

The Twelfth Circuit erroneously and impermissibly applied an unquestioning deference standard in analyzing TCC's claims. TCC relies on ad-hoc rationalization and mere speculation to validate Kelly's removal. They offer decades old evidence to endorse Directive #99, a policy developed pre-RLUIPA. However, the almost twenty-year old evidence fails for numerous reasons. First, the incidents do not involve Kelly or any NOI inmates. Second, these events only call into question religious prayer services, not religious diets. TCC's entire argument rests on its alleged interests in security and order, which they attempt to support with insufficient evidence. Their interests are nothing more than fears and concerns inherent in any prison context. Even under an appropriate deferential analysis, TCC's position fails muster. Because TCC fails to provide particularized proof to support its position, the Twelfth Circuit's holding reflects unquestioning deference for prison administrators in direct contravention of this Court's holding in *Holt*.

C. Tourovia Correctional Center failed to prove that Directive #99 was the least restrictive means of ensuring a safe, secure, and orderly prison environment.

Directive #99 is not the least restrictive means of furthering TCC's stated interests in safety, security, order, rehabilitation and prevention of illicit conduct through religious practice. The failure of a prison to employ the least restrictive means in achieving a compelling interest is described by the Seventh Circuit in *Koger v. Bryan*. In that case, the Court reversed the district court's grant of summary judgment against inmate, George Koger, a member of the Ordo Templi Oritentis ("OTO") faith. *Koger v. Bryan*, 523 F.3d 789 (7th Cir. 2008). At the center of Mr. Koger's claim was the Pontiac Correctional Center's ("PCC") denial of his request for a non-meat diet because a minister could not confirm the dietary restrictions associated with the OTO faith. *Id.* at 793. The Court ultimately determined that the prison's policy requiring dietary confirmation by a minister failed for two reasons. First, because PCC offered insufficient evidence to demonstrate how requiring confirmation by a minister furthered PCC's interests, and second, because the requirement of confirmation by a minister did not appear to be the least restrictive means of achieving PCC's stated interests. *Id.* at 800-01. The Court based its decision on the fact that PCC's policy conflicted with the Illinois Administrative Code, which merely required a prisoner to submit "written verification" of dietary restrictions. *Id.* at 801. In *Koger*, the Court determined that the Administrative Code provided the least restrictive method of furthering PCC's interests, and as such, PCC's policy did not satisfy the least-restrictive means standard. *Id.*

Like the dietary policy in *Koger*, TCC's Directive #99 "backsliding clause" is not the least restrictive means of furthering the prison's alleged compelling state interests. The policy is unnecessarily broad and vague, as it empowers the prison to remove any inmate from a religious diet when the prison has "adequate reason to believe" that inmate is not adhering to the diet. The policy provides no threshold for removal, nor does it offer a standard of proof, or an opportunity

for review. Without mechanisms in place to assess the validity and effect of allegations of backsliding, TCC's policy simply reaches too far and cannot meet the RLUIPA's least-restrictive-means requirement.

### **CONCLUSION**

For the foregoing reasons, the Petitioner respectfully requests that this Court reverse the decision of the United States Court of Appeals for the Twelfth Circuit and reinstate the ruling of the United States District Court for the Eastern District of Tourovia awarding summary judgment in favor of the Petitioner.