No. 472-2015

In the Supreme Court of the United States

SIHEEM KELLY,

PETITIONER,

-against-

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

RESPONDENTS.

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

BRIEF FOR PETITIONERS

TEAM 4

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QUESTIONS PRESENTED

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

2. 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

The Judgment of the Court of Appeals in Kelly v. Echols, 983 F.3d 1125 (12th Cir. 2015), Docket No. 985-2015, was entered June 1, 2015. The petition for a writ of certiorari was filed, and then granted on July 1, 2014. This court has jurisdiction pursuant to 28 U.S.C.A. § 1254(1).

STATEMENT OF THE CASE

Statement of the Facts

In 2000, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") amended the Religious Freedom Restoration Act ("RFRA") to give state prisoners a cause of action to recover if prison authorities impose a substantial burden on his exercise of religion. Kevin L. Brady, Comment *Religious Sincerity and Imperfection: Can Lapsing Prisoners Recover Under RFRA and RLUIPA*, 78 U. Chi. L. Rev. 1431, 1465 (2011).

In 2000, Petitioner, Siheem Kelly, became an inmate at Tourovia Correctional Center ("TCC"), a state maximum security prison, after being convicted of drug trafficking and aggravated robbery. R. at 3. In 2002, Kelly converted to the Nation of Islam ("NOI" or "the Nation"). *Id*. Kelly filed the requisite "Declaration of Religious Preference Form" to change his religious affiliation and to participate in religious services and the vegetarian diet program. *Id*. NOI is a minority religious group with seven active members, no member of which has any record or history of violence within TCC. R. at 3. TCC's current policy limits the Nation's prayer-times to three times a day outside of the cell, and twice a day inside the cell. *Id.* at 4. In 1998, TCC banned the option to petition for prayer services at night after it was discovered that prison volunteers were relaying gang orders from members of the Christian community to gang-affiliated individuals outside of the prison's walls. *Id*.

In 2013, Kelly, as acting liaison, filed a prayer request on behalf of all Nation members for an additional congregational nightly prayer service to be held at 8:00 P.M., after the last meal at 7:00 P.M. but before final headcount at 8:30 P.M. R. at 5. Saul Abreu, the Director of the Chaplaincy Department at TCC, refused Kelly's request on the ground that the three services already provided were sufficient to fulfill the Nation's prayer requirements. *Id*. However, the *Salat*, meaning prayer guide in Arabic, requires adherents to pray five times a day during designated prayer times, which include Dawn, Early Afternoon, Late Afternoon, Sunset, and Late Evening. *Id*. at 3-4. While prayer, most adherents require a very clean and solemn environment. Adherents must wash themselves and their clothes and secure a clean surface on which to kneel and face Mecca. *Id*. at 4.

Kelly has filed a total of three grievances in response to the prayer service denials. R. at 5. Kelly's first grievance stated that the reason he and the other Nation members needed an additional nightly congregational prayer was because they were unable to pray in their cells any longer, due to incidents in which their non-NOI cellmates intentionally ridiculed them or engaged in lewd behavior while they prayed. *Id*. The grievance was denied on the ground that Kelly had not proven that his cellmate was actually engaging in such conduct. *Id*. Kelly's second grievance asserted that praying in a cell where a toilet sits only a few feet away was disgraceful to Allah's preference that he pray in a "clean and solemn environment". R. at 5. After Abreu again denied Kelly's grievance, Kelly decided to file a formal grievance with the prison that included the claims from the previous two grievances, another request for a nightly congregational prayer service for NOI members, and verses from the Holy Qu'ran explaining why a congregational prayer service each night was obligatory. *Id*. Warden Kane Echols denied

the grievance on the ground that Kelly's request violated TCC policy, but suggested that Kelly seek a cellmate transfer. R. at 6.

Two weeks after the formal grievance was denied, Kelly's new cellmate reported to a superintendent that Kelly was threatening him with violence if he did not provide Kelly with his meatloaf dinner. *Id*. A subsequent search of Kelly's cell unveiled meatloaf wrapped in a napkin under his mattress. *Id*. Even though Kelly adamantly insisted that the meatloaf was not his, he was still removed from the vegetarian diet plan and barred from attending any worship services for an entire month. R. at 6. Kelly's response was to refrain from eating anything. *Id.* However, after two days of Kelly's hunger strike, TCC officials began to forcibly tube-feed him and, as a result of the pain and invasiveness of the tube feeding, Kelly ended his strike. *Id*.

Procedural History

Petitioner, Siheem Kelly, filed a complaint in the United States District Court for the Eastern District of Tourovia against Respondents, Echols as the Warden of TCC, and Abreu as the Director of the TCC Chaplaincy Department. R. at 2. Respondents moved for summary judgment, arguing that Kelly failed to establish that his religious rights were substantially burdened for either claim. *Id*. The District Court denied the Respondents motion for summary judgment, and found for Kelly as a matter of law. *Id*.

The United States Court of Appeals for the Twelfth Circuit reversed the decision of the District Court. R. at 16. First, the Twelfth Circuit held first that there was no substantial burden in denying the fourth prayer request, finding it "excessive". R. at 17. Second, the Twelfth Circuit held that it was not a substantial burden to remove Kelly from the diet program, finding that Kelly's conduct was a "voluntary departure from his alleged religious beliefs and practices." R. at 20. Lastly, the Twelfth Circuit found that the challenged policy was the least restrictive

means of furthering a compelling interest, "because it set consequences in motion only for inmates who break the rules of their own accord". R. at 21. Petitioner now appeals the decision of the Twelfth Circuit to the Supreme Court of the United States of America.

SUMMARY OF THE ARGUMENT

I. This Court should reverse the decision of the United States Court of Appeals for the Twelfth Circuit and hold that TCC's policy prohibiting all evening congregational prayer services constitutes a substantial burden on Kelly's religious exercise in violation of RLUIPA. Substantial pressure existed for Kelly to modify his behavior and violate his beliefs. Kelly's request for a nightly congregational prayer service is essential to his beliefs, as the prayer service constitutes the *late evening* time of the day in which the Qu'ran mandates prayer. The prison's ban on evening prayer services substantially pressures Kelly to violate his own beliefs in bypassing the *late evening* prayer service. TCC's policy also pressures Kelly to violate his beliefs in conducting his final prayers in the presence of a cellmate's ridicule and the usage of a toilet. Furthermore, the threat of prison punishment for refusing to violate one's religious beliefs constitutes substantial pressure to conform. Kelly faced a real threat of being locked in solitary confinement if he chose to disobey the policy and conduct his prayers outside of his cell.

Respondents did not satisfy their burden of proving that the blanket ban on nightly prayer services was the least restrictive means of furthering its compelling interests in prison security and administrative convenience. Respondents did not carried their burden of showing that the policy was the least restrictive means of furthering the prison's compelling interest in security, because TCC's policy change prohibiting all night prayer services was predicated upon some "exaggerated fear" of inmates

conducting illicit misconduct during prayer services at night, and because there was the same potential for inmate misconduct during the daytime prayer services.

Respondents have failed to carry their burden of proving that the policy was the least restrictive means of furthering the prison's compelling interest in controlling costs because the affidavit provided by prison officials indicated only that costs would increase, without attempting to approximate those costs. Thus, TCC's policy violates RLUIPA, because it substantially burdens Kelly's religious exercise of prayer and Respondents have failed to satisfy their burden of proving that it was the least restrictive means of furthering their interests.

II. This Court should reverse the decision of the United State Court of Appeals for the Twelfth Circuit and hold that TCC's policy removing an individual from the religious diet plan after one indiscretion violates RLUIPA, because the policy substantially burdens Kelly's religious exercise and it is not the least restrictive means of furthering a compelling government interest. Removing Kelly from his religious diet because of one unsubstantiated incident of backsliding substantially burdens his religious exercise by pressuring him to violate his religiously mandated dietary restrictions. Because of his alleged deviation from the halal diet, Kelly is also being pressured to miss out on prayer services.

TCC's policy is causing Kelly to violate the pillar of his mandated Friday congregational prayer and has effectively pressured him to abandon his religious diet. In addition, TCC's policy forces prison officials to engage in "religious policing" tactics which violate a prisoner's right to free exercise under RLUIPA. A policy which imposes harsh punishments for a small indiscretion like a one-time or occasional break from a

religious diet, places substantial burdens on a prisoner's free exercise rights by obstructing their courses of action once they are caught eating the food given to the general prison population.

Furthermore, Respondents have not carried their burden of showing that the policy was the least restrictive means of furthering any compelling interest, because they did not adequately demonstrate that they actually explored and rejected the efficacy of less restrictive measures before adopting the current policy. Thus, TCC's policy violates RLUIPA, because it substantially burdens Kelly's religious exercise and Respondents have failed to satisfy their burden of proving that it was the least restrictive means of furthering their interests.

ARGUMENT

I. THE TOUROVIA CORRECTIONAL CENTER'S PRISON POLICY PROHIBITING NIGHTLY CONGREGATIONAL PRAYER SERVICES TO MEMBERS OF THE ISLAMIC FAITH VIOLATES RLUIPA BECAUSE THE POLICY PUTS SUBSTANTIAL PRESSURE ON KELLY TO MODIFY HIS BEHAVIOR AND VIOLATE HIS RELIGIOUS BELIEFS

The RLUIPA "substantial burden" inquiry asks whether the government has substantially burdened religious exercise. *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). The relevant inquiry in this case is whether TCC's policy denying Kelly and other NOI members a nightly congregational prayer service substantially burdens the practice of Islam. *Walker v. Beard*, 789 F.3d 1125, 1135 (9th Cir. 2015). To substantially burden a religious practice, the limitation "must impose a significantly great restriction or onus upon such exercise." *Id*. (quoting *San Jose Christian Coll. v. City of Morgan Hill*, 360 F.3d 1024, 1034 (9th Cir. 2004)). However, a substantial burden need not actually force an individual to change his practices; "a violation may occur '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…'" *Id*. (quoting *Thomas v. Review Bd. of the Ind. Empt. Sec. Div.*, 450 U.S. 707, 717-18 (1981)).

In order for a person's religious beliefs to be substantially burdened, the belief must be central or important to the individual's religious practice. *Ford v. McGinnis*, 352 F.3d 582, 593-94 (2d Cir. 2003). This centrality inquiry of the substantial burden test is designed to distinguish and exclude from its scope beliefs or practices which are so peripheral to a religion that any burden can be properly characterized as "constitutionally de minimis." *Id.* at 593. In this case, substantial pressure existed for Kelly to modify his behavior and violate the fundamental tenets of his religious beliefs.

Once the plaintiff demonstrates that the challenged policy substantially burdens his religious exercise, the government must prove that the burden in question is the least restrictive means of furthering a compelling government interest. *Garner v. Kennedy*, 713 F.3d 237, 241 (5th Cir. 2013). This means that the policy must be narrowly tailored in achieving the government's stated interests and the government must demonstrate that alternative means of achieving those interests were *actually* considered and deemed insufficient. *See generally*, *Warsoldier v. Woodford*, 418 F.3d 989, 995 (9th Cir. 2005). "Although prison officials are given 'wide latitude within which to make appropriate limitations,' they must do more than offer conclusory statements and post hoc rationalizations for their conduct. *Murphy v. Missouri Dept. of Corrections*, 372 F.3d 979, 982 (8th Cir. 2004). The RLUIPA inquiry "requires the Government to demonstrate that the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being

substantially burdened." *Holt*, 135 S. Ct. at 863 (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014)).

A. TCC'S Policy Prohibiting Night Prayer Services To Members Of The Islamic Faith Violates RLUIPA, Because It Substantially Pressures Kelly To Modify His Behavior And Violate His Beliefs In Bypassing The Late Evening Prayer Service And In Praying Under Hostile And Unsanitary Conditions.

Tourovia Directive #98, denying Muslim adherents a nightly congregational prayer service, substantially pressures Kelly to modify his behavior and violate his own beliefs, because it forces him, and the other NOI members, to bypass the late evening prayer time and conduct their prayers in hostile and unsanitary conditions. R. at 5. Denying NOI members a nightly congregational prayer service compromises the validity of their status as Muslims. The absence of a meaningful evening prayer hinders their communication and connectedness with Allah, and compromises the sacred relationship between Allah and His worshippers. This, in turn, may render void all otherwise valid prayers and practices, and compels Muslim prisoners to teeter the line between a recognized believer and a discredited non-believer. Effectively, TCC is forcing NOI members out of their Muslim faith.

Although the denial of a nightly congregational prayer service may seem innocuous on its face, its potential effect is the total destruction of the Muslim belief system. Any burden on a practice so substantial and significant to a religious faith as this is, by definition, a substantial burden. *Holt*, 135 S. Ct. at 862. The prison's policy requires Kelly to bypass the late evening prayer time and thus to "engage in conduct that seriously violates [his] religious beliefs." *Id.* (quoting *Hobby Lobby Stores, Inc.*, 134 S. Ct. at 2751). If Kelly disobeys the policy and conducts his prayer services outside of his cell, he will face solitary confinement. R. at 4.

The threat of prison punishment is also a crucial factor in the "substantial burden" discussion. *See Holt*, 135 S. Ct. at 862 (holding that any threat of "serious disciplinary action" in

response to following one's religious beliefs constituted a pressure to conform). TCC's policy states that if any inmate fails to be present in their cells by the last head count at 8:30 P.M., the inmate risks being placed in solitary confinement as punishment. R. at 4, 25. Thus, Kelly faces a real threat of punishment if he chooses to disobey the policy by conducting his prayer services outside of his cell, instead of being present within his cell for the final head count. R. at 4. TCC's blanket ban on congregational night services gives Kelly two choices: either miss the last head count and be thrown in solitary confinement, or pray in your cell in an environment that effectively derogates your religious beliefs. *Id*. Because the policy puts Kelly to this choice, his religious exercise is substantially burdened. *Holt*, 135 S. Ct. at 862. Thus, in addition to the substantial burden that inherently exists whenever a practice that is critical to the observance as a Muslim is burdened, the policy substantially burdens Kelly's religious exercise, because it carries a real threat of punishment for refusing to violate one's own beliefs. R. at 4.

TCC's policy, which confines Kelly to his cell where conditions are hostile and unsanitary, substantially burdens Kelly's religious exercise, because praying over a disrespectful cellmate's ridicule undercuts the sanctity of prayer and makes it almost impossible to conduct it in a manner that the Islamic religion mandates. R. at 5. The blanket prohibition on nightly congregational prayer services has substantially pressured Kelly to modify his behavior, as he is confined to a chaotic, rather than solemn environment, and to violate his beliefs in praying under circumstances in which he knows are not ideal to foster communication with Allah. R. at 4. It is the inabilities or difficulties involved in conducting prayers in the presence of non-NOI inmates that acts to put substantial pressure on Kelly to violate his own beliefs. *Walker*, 789 F.3d at 1135 (bunking with Non-Aryan individual violates prisoner's rights under RLUIPA if it would make it impossible to perform Warding ritual in his cell).

Additionally, TCC's policy substantially burdens Kelly's religious exercise of prayer by forcing him to pray where a toilet sits only a few feet away. R. at 5. The rules of *Salat* express that it is a detestable and offensive act to offer prayers in a place that faces a well or a pit where people often urinate. Ahlul Bayt Digital Islamic Library Project (DILP), *Rules of Salat (Part II of III)*, Al-Islam.org, http://www.al-islam.org/printpdf/book/export/html/18665 (last visited Mar. 7, 2016). While the presence of a toilet alone will not act to render the prayers invalid, it does severely undercut the sanctity of prayer. *Id*. Thus, refusing NOI members a nightly congregational prayer service away from the usage of bathroom facilities substantially pressures Kelly to modify his behavior and violate the fundamental strictures of cleanliness and purity that the Muslim religion espouses.

In denying the existence of a substantial burden, the Twelfth Circuit misunderstood the analysis that RLUIPA demands and instead, imported a strand of reasoning from cases involving prisoners' First Amendment rights. *Holt*, 135 S. Ct. at 862. First, the Court of Appeals erred in concluding that TCC's policy did not substantially burden Kelly's prayer time because Kelly was still physically able to perform the prayer ritual in his cell and in the presence of another inmate. R. at 19. However, unlike First Amendment cases, the availability of other means of practicing religion is not a relevant consideration in a RLUIPA analysis. *Holt*, 135 S. Ct. at 862 ("RLUIPA's '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."); *see*, *e.g., O'Lone v. Estate of Shabazz*, 482 U.S. 342, 351-52 (1987); see also, *Turner v. Safley*, 482 U.S. 78, 90 (1987). Second, the Court of Appeals similarly erred in concluding that Kelly did not demonstrate that his religious exercise was substantially burdened because congregational prayer is not a compulsory act of prayer within the Nation. R. at 19. As

indicated by the statute's text, RLUIPA bars inquiry into whether a particular belief or practice is compelled by, or central to, a prisoner's religion. Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc-5(7)(A).

Finally, the Twelfth Circuit erred in finding that the policy's prohibition does not constitute a substantial burden on the ground that an additional prayer service would be "some benefit" that is not "generally available" to the general prison population. *Adkins v. Kaspar*, 393 F.3d 559, 559 (5th Cir. 2004) (no substantial burden if regulation merely prevents adherent from receiving some benefit that is not generally available). Again, the court relied on a consideration common to First Amendment cases, that is, the impact the accommodation would have on guards and other inmates. *Turner*, 482 U.S. at 89-90. Accordingly, the court held that if the prison were to allow the Nation to receive nightly services, then the prison would have to allow them for all religions. R. at 18. This argument has been rejected by this Court, as a mere "formulation of the 'classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions.'" *Holt*, 135 S. Ct. at 866 (quoting *Gonzalez v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)).

TCC's policy prohibiting all nightly congregational prayer services acts to put a substantial burden on Kelly's religious exercise, because the policy pressures him to modify his behavior and violate his religious beliefs. The policy forces Kelly to bypass the late evening prayer time, which is mandated by the Qu'ran and essential to a practicing Muslim. Furthermore, disallowing the group prayer accommodation request substantially pressures Kelly to pray in a chaotic, hostile, and unsanitary environment. Finally, TCC's policy threatening serious disciplinary action in response to following one's religious beliefs constitutes a pressure to conform, because it puts Kelly to a Hobson's choice: either pray outside of your cell and be thrown in solitary

confinement or pray in your cell in an atmosphere that effectively derogates your religious beliefs. Thus, TCC's policy imposes a substantial burden on Kelly's religious exercise in violation of RLUIPA.

B. Prison Officials Did Not Adequately Demonstrate That They Explored Or Adopted The Least Restrictive Means To Further Their Interests, Because Officials Failed To Consider What Effort Would Have Been Involved In Conducting A Nightly Prayer Service.

Since Kelly has demonstrated that his religious practices have been substantially burdened, the onus shifts to TCC officials to show that the prison policy is the "least restrictive means of furthering a compelling state interest." § 2000cc(a)(1)(B). "Context matters" in applying the compelling governmental interest standard, so that due deference is given to the "experience and expertise of prison and jail administrators in establishing necessary regulations and procedures…" *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005).

RLUIPA recognizes the institutional need to maintain good order, safety, and discipline…" *See Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006). It is undeniable that a prison has a compelling interest in institutional security. *Murphy*, 372 F.3d at 988. However, Congress, in crafting RLUIPA, sought to prevent prison officials from relying on "exaggerated fears" as a basis for prohibiting prisoners from exercising their religious rights. *Spratt v. R.I. Dept. of Corrections*, 482 F.3d 33, 39 (1st Cir. 2007) (quoting 146 Cong. Rec. S7775) (daily ed. July. 27, 2000). Thus, the prison must do more than merely assert a security concern – they must demonstrate the security concern. *Murphy*, 372 F.3d at 988.

Respondents assert, in general terms, that the denial of an additional prayer service is warranted due to the past misconduct of gang-affiliated individuals and limited prison resources. R. at 7. To satisfy RLUIPA's higher standard of review, prison authorities must provide some basis for a *current* concern of possible gang-related or other illegal activities that might result

from granting the prayer request. *Murphy*, 372 F.3d at 989. Because authorities have failed to establish a basis for any current concerns, TCC's prison policy, as it relates to nightly congregational services, seems to be predicated upon some uncorroborated fear of inmates conducting illicit activity during prayer services at night.

To support the validity of their security concerns, Respondents provided an affidavit recalling the history of their policy change, which was compelled by gang-related activity that occurred over a decade ago, activity that was not religious in nature and did not involve Muslim inmates. R. at 4. We recognize this as a perfectly legitimate reason to justify a general policy change, *Turner*, 482 U.S. at 89 (a regulation is valid if it is reasonably related to penological interests), but RLUIPA contemplates a "more focused" inquiry. Religious Freedom Restoration Act, § 2000bb-1(b); *Hobby Lobby*, 134 S. Ct. 2751. "RLUIPA requires [a court] to scrutinize the asserted harm of granting specific exemptions to particular religious claimants and to look to the marginal interest in enforcing the challenged policy in that particular context." *Holt*, 135 S. Ct. at 863 (quoting *O Centro*, 546 U.S. at 431). In this case, that means the enforcement of TCC's policy to deny Kelly an additional nightly prayer service. *Id*.

TCC officials first contend that the blanket ban on nightly congregational services is imperative to prevent inmates from engaging in illicit misconduct during such services. R. at 4. Although security in prisons deserves "particular sensitivity," authorities have failed to show what additional threats to security may result from granting NOI members a nightly prayer service. *Cutter*, 544 U.S. at 722. NOI members have maintained satisfactory behavioral standing with TCC for the last five years. R. at 3. No current NOI members have any record or history of violence within the prison. *Id.* NOI's five-year track record of satisfactory behavioral standing,

which is apparently unblemished by any hint of violent activity, at the very least casts doubt on the strength of the link between NOI's activities and institutional security. *Spratt*, 482 F.3d at 40.

Respondents argue that the blanket ban on night services is necessary because prison gangs often use religious activity to cloak their illicit conduct. R. at 4. However, Respondents' stated interest in maintaining security is weakened by the fact that the same potential for inmate misconduct exists during the daytime prayer services. Thus, it is unlikely that banning only night services will ensure prison safety, and even more unlikely that it is the only way of doing so. The general security interests on which Respondents base their decision to reject Kelly's prayer request are insufficient as they constitute an "exaggerated fear" in curbing gang-related activity at TCC.

Even if we assume that TCC has shown a link between NOI's requested accommodation and institutional security, they have not shown that a blanket ban on all night services is the least restrictive means available to achieve such interest. Abreu's affidavit, provided by TCC, attesting to the validity of the prison's reasons for the prayer policy, was insufficient, as it merely mentioned facts that influenced the change in their prior policy. R. at 7. "[A] prison 'cannot meet its burden to prove the least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.'" *Shakur v. Schriro*, 514 F.3d 878, 890 (9th Cir. 2008) (quoting *Warsoldier*, 418 F.3d at 996). The affidavit does no more than summarize the prison's security concerns; it makes no attempt to estimate the magnitude of any additional threats to safety that allowing Kelly's request would bring about. Rather than consider alternatives, TCC argues that evening group prayer is an "all or nothing" issue: any nightly congregational prayer service, it contends, is dangerous to institutional security under any circumstances. *Spratt*, 482 F.3d at 41. As such, TCC argues, no

less restrictive alternatives exist. *Id.* However, at no point in time does it appear that prison officials even considered an approach less restrictive than an absolute ban on all night services. *Id.*; *see Warsoldier*, 418 F.3d at 999. Because TCC has not shown that it actually considered creating an exception for Kelly, TCC has failed to sustain its burden of proving that it adequately explored or adopted the least restrictive means to further its interests. *O Centro*, 546 U.S. at 126 (requiring the government to engage in individualized consideration of the necessity of a burden on religious exercise).

Respondents further argue that granting nightly prayer services would require an additional employee to be staffed in the service and that this, in turn, will increase TCC's administrative costs. R. at 7. In support of this contention, the affidavit provided by TCC included an addendum with the prison's documented cost containment stratagems. *Id.* The affidavit, however, contains only conclusory assertions that denying Kelly the night prayer service was the least restrictive means of furthering its interest in cost containment. *Id.* We do not contest that controlling costs is a compelling government interest. *Cutter*, 544 U.S. at 723. However, RLUIPA "may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise." § 2000cc-3(c).

TCC has not carried its burden of showing that the policy is the least restrictive means of advancing its compelling interest in controlling costs. The affidavit makes only general reviews about costs, but contains no evidence suggesting that TCC actually looked into providing a nightly prayer service to NOI members. *Shakur*, 514 F.3d at 887. There is no indication that TCC investigated the cost of bringing in an additional Chaplain to conduct night services or the cost of extending the hours of an on-duty Chaplain to cover the night services, or that it in any way studied the effect that accommodation would have on operating expenses. *Id.* There is also no

indication that any additional cost to the prison would be prohibitively significant, as there is no evidence that other religious prisoners would demand an evening prayer service if Kelly's request were granted. *Id.*

TCC contends that the denial of an additional prayer service was warranted due to prison security concerns and administrative restrictions. R. at 7. While we concede that these are compelling interests, Respondents have failed to satisfy their burden of showing that, on balance, these interests are more compelling than allowing a low-risk religious group to conduct one more prayer service before final head count. There is nothing to suggest that a peaceful religious group might be feigning their interest in a congregational prayer service as a mean of cloaking illicit conduct. Furthermore, it is unclear how the prison's security interest in preventing gang-related activity is more than marginally furthered by banning a night prayer service, as the same potential for inmate misconduct exists during all prayer times. Also unclear is whether TCC seriously considered and actually rejected the efficacy of alternatives less restrictive than the total preclusion of group worship. As a result, Respondents have not met their burden of proving that their policy was the least restrictive means of ensuring prison safety.

Respondents also failed to provide competent evidence as to the additional costs or administrative burdens that allowing Kelly's request would bring about. The affidavit detailing the prison's cost containment stratagems suggests only that their costs would increase, but does not attempt to approximate the amount of these costs. Because the evidence provided by Respondents is far too speculative to be reliable, Respondents have not satisfied their burden of proving that their policy was the least restrictive means of controlling administrative costs.

II. THE TOUROVIA CORRECTIONAL CENTER'S POLICY REMOVING AN INDIVIDUAL FROM THE RELIGIOUS DIET PLAN AFTER JUST ONE INDISCRETION VIOLATES RLUIPA, BECAUSE THE POLICY SUBSTANTIALLY BURDENS INMATES AND IS NOT THE LEAST RESTRICTIVE MEANS OF FURTHERING A COMPELLING GOVERNMENT INTEREST

Under RLUIPA, TCC cannot substantially burden Kelly by removing him from the religious diet plan, unless they can demonstrate that the burden furthers a compelling government interest, and that it is the least restrictive means of doing so. § 2000cc-1(a). Once the conduct at issue is determined to be a religious exercise under RLUIPA, the plaintiff inmate bears the burden of persuasion as to whether the challenged practice substantially burdens their exercise of religion. §§ 2000cc-2(b), 5(7)(A). The burden then shifts to the government to establish that the burden at issue is the least restrictive means of furthering a compelling government interest. *Wygant v. Jackson Bd. Of Educ.*, 476 U.S. 267, 280 n. 6 (1986). The Tourovia Correctional Center substantially burdened Kelly when they removed him from the religious diet plan, and such action did not further a compelling government through the least restrictive means.

A. TCC'S Policy Removing An Inmate From The Religious Diet Plan And Prayer Service Privileges Violates RLUIPA, Because It Substantially Pressures Kelly To Violate His Religious Diet Program After Only One Unsubstantiated Incident Of "Backsliding"

The plaintiff bears the burden of persuasion as to whether the challenged practice substantially burdens their exercise of religion. §2000cc-2(b). Absent an express definition under RLUIPA, a "substantial burden" has been held to exist where government action coerces an individual to act contrary to their beliefs. *Thomas*, 450 U.S. at 718 (defining "substantial burden"); *see e.g.*, *Warsoldier*, 418 F.3d at 989 (holding that a coercion existed where an inmate was given a choice to either cut his hair or continue to be punished). In determining whether a substantial burden exists, courts have inquired into the sincerity of the inmate. *Reed v. Faulkner*,

842 F.2d 960, 963 (7th Cir. 1988) (holding that although sincerity is relevant, it is not determinative, and it further pressures inmates and guards to act as religious police); *see e.g. Lovelace*, 472 F.3d at 187 (where the plaintiff was falsely accused of breaking his religious practice of fasting during the day). Further, in *Colvin v. Caruso*, the prisoner was removed from his Kosher diet for merely possessing non-Kosher protein powder, which the court held as overly restrictive. 605 F.3d 282, 296 (6th Cir. 2010).

Congress intended for RLUIPA to provide broad protection of religious exercise. *Lovelace*, 472 F.3d at 185. Yet, prisons have construed policies that, in essence, are restrictively zero-tolerance. While evidence of "backsliding" is relevant to determine the religious adherents sincerity, policies that justify removal based on minimal indiscretions are overly restrictive. As was the case in *Colvin*, where the prisoner was removed from the Kosher list for merely possessing protein powder that was not kosher. 605 F.3d at 296. Further was the case in *Lovelace*, where the prisoner was falsely accused of breaking his Ramadan fast once, and was subsequently removed from his diet program and barred from worship activities. F.3d at 185.

Likewise, Kelly has been substantially burdened by the overly restrictive TCC policy that has allowed unsubstantiated allegations as justification for removing him from both his religious diet and worship accommodations. The only evidence of Kelly "backsliding" is the one allegation and the meatloaf found under his mattress. R. at 6. Arguably, any person with access to Kelly's cell could have placed the meatloaf there. It is clear from the grievances Kelly filed, which stated that both he and other members of the Nation were being tormented while praying in their cells, that there are individuals who do not respect his religion. Therefore, like *Lovelace*, where the prisoner was falsely accused of deviating from his diet, it is possible that Kelly was falsely accused as well. F.3d at 185.

Even if there was conclusive evidence of “backsliding”, one isolated incident should put the prisoner on warning, not immediate removal. Even in 1988, the Seventh Circuit held that “the fact that a person does not adhere steadfastly to every tenet of his faith does not mark him as insincere”. *Reed*, 842 F.2d at 963. The court further warned that holding individuals to such strict standards puts others in the role of religious police. *Id.* Arguably, that is what happened in *Lovelace*, where the plaintiff was falsely accused. F.3d at 185. It would be bizarre to hold a one-time deviation as the threshold to disprove substantial burden of a statute that was intended to broadly protect the religious rights of prisoners.

Furthermore, after being removed from his religious diet program, Kelly protested by refusing to eat anything from the standard menu. R at 6. However, the prison forcibly fed Kelly through a feeding tube. *Id*. Given the choice between either breaking his religious adherence or continuing to be tube-fed, Kelly agreed to comply with the standard menu to avoid being put through the painful and invasive experience of being forcibly tube-fed. Similarly, in *Warsoldier*, the plaintiff was given the choice between being confined to his cell and cutting his hair to conform to prison policy. 418 F.3d at 996. Both Kelly and the plaintiff in *Warsoldier* were faced with an ultimatum of continued punishment for refusing to abandon their religious beliefs, or conform to the prison policy. The Ninth Circuit in *Warsoldier* held the challenged policy as a substantial burden because it coerced the prisoner into forgoing his religious beliefs. *Id*. It thus follows that Kelly, who was given a similar choice between conformity or punishment, was substantially burdened by punishment that coerced him into abandoning his religious beliefs. TCC’s policy is a substantial burden because it overemphasis sincerity, was based on mere allegations, and physically coerced Kelly into breaking his religious adherence.

B. Prison Officials Did Not Satisfy Their Burden Of Proving That The Policy Was The Least Restrictive Means Of Furthering Their Compelling Interests, Because Officials Failed To Show That They Seriously Considered And Actually Rejected The Efficacy Of Less Restrictive Alternatives

Once a plaintiff establishes that they suffered a substantial burden on their religious exercise, the burden shifts to the defendants to prove that the questioned policy is the least restrictive means of furthering a compelling governmental interest. *Lovelace*, 472 F.3d at 188, (citing *Cutter*, 544 U.S. at 723 (holding that context matters)); *see also* § 2000cc-1(a). Safety and security have been widely, if not unanimously, accepted as compelling state interests. *Warsoldier*, 418 F.3d at 995. However, even with the presence of a compelling state interest, a prison must show that they considered less restrictive means, and that those means were rejected because they would not effectively serve the interest at issue. *Wygant*, 476 U.S. at 280. It is the intent of Congress that due deference be given to the experience and expertise of prison administrators in construing policies, however, inadequate policies that are grounded on "mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirement." *Murphy*, 372 F.3d 979, 987 (citing 146 Cong. Rec. S7775) (daily ed. July. 27, 2000) (joint statement of Sen. Hatch and Sen. Kennedy on RLUIPA).

In *Shakur*, an affidavit showing how much the request would cost satisfied the prisons burden. 514 F.3d at 890. In *Warsoldier*, conclusory statements that the challenged policy was the least restrictive means did not establish that other modes of regulation were considered and rejected. 418 F.3d at 998. Further, in *Murphy*, the court held that testimony concerning the plaintiff's character did not support a claim for security concerns, nor did it show that other alternatives to the challenged policy were considered. 372 F.3d at 989. As a result of the failure to consider alternatives, the court held that the challenged law did not pass constitutional muster. *Id.*

Brown-El v. Harris, is factually distinguishable because it was decided six years prior to RLUIPA, and is not the correct standard for which this Court should rely upon. 26 F.3d 68 (8th Cir. 1994). In *Brown-El*, the Court recognized the new standard under Religious Freedom Restoration Act ("RFRA"), but declined to use it because the plaintiff did not raise or bring his claim under the act. *Id*. The case is further distinguishable, first, because the prisoner in *Brown-El* was seen voluntarily breaking his fast when he was placed in the infirmary following an altercation with a guard. *Id*. Second, the prisoner in *Brown-El* did not submit any support for his argument that his religion allowed an exception to fasting for those who were injured. *Id*. Thus, the Twelfth Circuit's reliance on *Brown-El* as the correct standard is misplaced.

Further, the Eighth Circuit, which decided *Brown-El*, has acknowledged and applied the least restrictive means standard under RLUIPA. In *Murphy*, the Eighth Circuit held that the government bears the burden to establish that they employed the least restrictive means to further a compelling government interest. 372 F.3d at 988. The court then elaborated that although prison officials have "wide latitude" to employ limitations, they 'must do more than offer conclusory statements and post hoc rationalizations for their conduct.'" *Id.*, (citing *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996)). The Eighth Circuit chose not to apply the "least restrictive means" standard in *Brown-El* because it did not apply in that particular case, however, they recognize and utilized the "least restrictive means" standard in *Murphy*, where it was applicable.

It is uncontested that safety and security are a compelling government interest. However, the Respondents must still establish that they had considered alternatives to the challenged policy. The respondents have not satisfied that burden. Rather, the respondents assert that their removal of Kelly from his diet was justified because (1) Kelly's recent conversion placed him on

a watch-list of inmates who cloak gang activity by assuming religious identities, (2) Kelly's former cellmate provided a statement that Kelly had threatened him for his meatloaf dinner, and (3) Kelly's own actions violated the principles of the NOI. R. at 7. These assertions may be useful for an inquiry into Kelly's sincerity, however, they do not satisfy TCC's burden to show that they considered any other means than the policy at issue.

While due deference is to be given to the experience and expertise of prison administrators, TCC has shown that they have based their policy on exaggerated fears and mere speculation. First, placing Kelly on a watch-list for gang-related activity is based on an exaggerated fear. Neither Kelly, nor any current member of NOI, has had any record of violence within the prison. R. at 3. Further, this fear is based on an incident over a decade ago concerning members of another religious community. R. at 4. Second, respondent's reliance on the statement by Kelly's former cellmate is factually similar to *Murphy*. In *Murphy*, the prison submitted testimony alleging the prisoner was a racist to support their safety concern. While the safety concern was legitimate, as it is here, such statements do not establish that the prison considered alternatives policies. Moreover, the respondent's reliance calls into question why the one allegation against Kelly was substantial enough to warrant investigation, but the allegations Kelly made in his grievance were not. In his grievance, Kelly alleged that his initial cellmate was intentionally ridiculing him and acting in a lewd manner when he prayed in his cell. R. at 5. However, Warden Echols claimed that this allegation could not be verified. R. at 6. Looking at the facts in the aggregate, one could argue that Echols was waiting for an opportunity to remove Kelly from his religious accommodations. Lastly, respondent's argument that Kelly violated his own religious beliefs is an inquiry into his sincerity. This argument, again, fails to show how TCC considered any alternatives to the policy in question.

Because TCC has not shown that they considered any alternatives to the policy at issue, they have not satisfied their burden to show that the challenged policy is the least restrictive means of furthering their interests.

CONCLUSION

This Court should reverse the decision of the United States Court of Appeals for the Twelfth Circuit and hold that TCC's policy prohibiting all evening congregational prayer services constitutes a substantial burden on Kelly's religious exercise in violation of RLUIPA, because the policy substantially pressures to modify his behavior and violate his beliefs. Additionally, TCC officials have not satisfied their burden of proving that the policy was the least restrictive means of furthering the prison's compelling interests in security and cost containment.

This Court should reverse the decision of the Twelfth Circuit and hold that TCC's policy removing an individual from his religious diet plan after one unsubstantiated indiscretion constitutes a substantial burden on Kelly's religious exercise in violation of RLUIPA, because policy substantially pressures Kelly to modify his behavior and violate his beliefs. Additionally, TCC officials have not satisfied their burden of proving that the policy was the least restrictive means of available, because there was no evidence that TCC actually considered and rejected the efficacy of less restrictive measures.

APPENDIX

CERTIFICATION FORM

We hereby certify that the Petitioner's brief of Team 4 is the work product solely of the undersigned and that the undersigned has not received any faculty or other assistance, except as provided for by the Competition Rules, in connection with the preparation of this brief.

Alyssa Feldman, s/ Alyssa Feldman, 03/07/2016
Print, Sign, and Date

Alexandra Rockoff, s/ Alexandra Rockoff, 03/07/2016
Print, Sign, and Date