

No. 985-215

In the

Supreme Court of the United States

SIHEEM KELLY,
PETITIONER

- against -

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

RESPONDENTS.

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

BRIEF FOR PETITIONER

TEAM 12

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QUESTIONS PRESENTED

1. Is RLUIPA violated by a prison policy that prohibits a minority group, The Nation of Islam, from engaging in nightly prayer services?
2. Is RLUIPA violated by a prison policy that forcibly removes dietary accommodations from an inmate who has already been approved for a vegetarian diet in accordance with his firmly held religious beliefs?

JURISDICTIONAL STATEMENT

Kelly filed a Complaint alleging a violation of federal law – the Religious Land Use and Institutionalized Persons Act of 2000. R. at 2. The United States District Court for the Eastern District of Tourovia has original jurisdiction pursuant to 28 U.S.C. § 1331 (2012), which grants “federal courts [. . .] jurisdiction [over] all civil actions arising under the Constitution, laws or treaties of the United States.” The Twelfth Circuit Court of Appeals had jurisdiction over this appeal pursuant to 28 U.S.C. § 1291 (2012), as the appeal was taken from a final order of a United States District Court. The final order from which the appeal was taken is dated June 1, 2015. Pursuant to 28 U.S.C. § 1254(1) (2012), the United States Supreme Court has jurisdiction to hear this case, as 28 U.S.C. § 1254(1) permits the Supreme Court to review decisions of a federal court 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.” This Court granted certiorari on July 1, 2014.

STATEMENT OF THE CASE

Summary of the Facts

Mr. Siheem Kelly (“Kelly” or “Petitioner”) began serving a prison sentence at the Tourovia Correctional Center (“TCC” or “prison”) in 2002. Record (“R”) at 2. In 2004, Kelly found faith with The Nation of Islam (“The Nation” or “NOI”), a subgroup of the traditional Sunni Muslim religion. R. at 3. Upon converting, Kelly changed his name to “Mohammed” and requested that the prison address him by his new name.¹ R. at 3. After filing the proper paperwork with the TCC – and after gaining consent from the prison Warden – Kelly was recognized by the prison as a member of The Nation. Id. Kelly has been partaking in religious services and adhering to religious dietary restrictions at the prison for over a decade. Id.

The Nation’s members adhere to a few mandated religious services and dietary restrictions as an integral part of their faith. Id. The Nation requires that their members pray five times a day in accordance with the *Salat* – including once after sunset in the late evening. R. at. 3-4. In order for members to adequately complete the prayers, The Nation requires a very clean, solemn environment. R. at. 4. Before praying, members must wash themselves and their clothes, and kneel on a clean surface to face Mecca. Id. Once a member has begun the prayer, they cannot be interrupted. Id. Members of The Nation prefer to pray with each other, and must pray with each other as mandated by the religion during the month of Ramadan and on Friday evenings. Id. The Nation also requires members to adhere to a strict vegetarian diet, and to fast during Ramadan and other appropriate holidays. Id.

¹ The District Court declined to use Kelly’s new, preferred name in its opinion, and therefore his name remains Kelly in these proceedings. R. at 3.

The TCC restricts religious services against The Nation pursuant to Tourovia Directive #98 (“the Services Directive”). Id. Before the Services Directive was instituted, prison volunteers were able to lead religious services. Id. The Services Directive now requires that an official prison Chaplain be present for any inmate services or programs. R. at 25. Before the Services Directive was instituted, prison volunteers were able to lead religious services. R. at 4. The Services Directive also requires that there be at least ten members of a specific religion in order for the Chaplain to be able to lead services. R. at 25. There are seven members of The Nation at the prison. R. at 3. The Chaplains are also only authorized to work during the three designated prayer times, or in emergency situations. R. at 4. The Services Directive also expressly prohibits any prayer services after the last head count at 8:30 p.m. R. at 25. If any inmate fails to be present in their cells by 8:30 p.m., they risk being placed in solitary confinement as punishment. R. at 4.

In February 2013, Kelly filed a written request on behalf of all incarcerated NOI members for an additional prayer service in order to fulfill the final prayer requirement after sunset. R. at 5. This request, per TCC procedure, was addressed to Saul Abreu (“Abreu” or “Respondent”), the Director of TCC’s Chaplaincy Department. Id. In compliance with the Services Directive, Kelly asked that the service be held at 8:00 p.m., after the last meal, but before the final head count at 8:30 p.m. Id. Abreu denied Kelly’s request one week later, indicating that the three services provided were adequate, and that the inmates could simply pray in their cells. Id. Kelly tried to reason with Abreu, stating that one additional service could support his last two prayers of the day with his brothers if the service was conducted away from other inmates and with an affiliated NOI Chaplain. Id. Abreu ignored this request. Id.

Kelly then filed two grievances with the prison. Id. The first grievance concerned The Nation members’ inability to pray in their individual cells. Kelly argued that he and The Nation

members requested additional prayer services because on multiple occasions, and that The Nation encountered incidents of their cellmates intentionally ridiculing them during prayer and engaging in other lewd behavior on nights when they had individually attempted to pray. Id. This grievance was denied. Id. Kelly subsequently sent a letter to Abreu stating that praying in his cell, next to a toilet, was a disgrace to Allah's preference that he pray in a clean and solemn environment with other members of his faith. Id. This grievance was also denied. Id.

Kelly then filed a formal grievance with the prison that included the two previous claims. Id. He formally requested a nightly NOI service with his brothers to be held somewhere other than his cell. Id. Kane Echols, ("Echols" or "Respondent"), the prison Warden, replied that the request violated prison policy, and that allegations against his cellmate ridiculing him could not be substantiated. R. at 5-6. Echols also told Kelly to request a transfer out of his cell and to hope that his new cellmate would be more respectful. R. at 6.

The prison also restricts religious dietary regulations pursuant to Tourovia Directive #99 ("the Dietary Directive"). Id. The Dietary Directive states that when the prison has "adequate reason to believe that the religious alternative diet is not being adhered to, the prison can revoke diet privileges indefinitely." R. at 26. Two weeks after Kelly was denied his request for prayer services, allegations surfaced from Kelly's new cellmate that Kelly was threatening him for his dinner, which was meatloaf. R. at 6. During a search of Kelly's cell, prison officials discovered uneaten meatloaf wrapped inside of a napkin underneath Kelly's mattress. Id. Although Kelly denied that the meatloaf was his, the prison immediately removed Kelly from the prison's vegetarian diet program. R. at 6. The prison also prohibited Kelly from attending any worship services for one month as further punishment for finding the uneaten meatloaf. Id.

With no religious dietary accommodations available to him, Kelly began a hunger strike. Id. Kelly refused to eat anything from the standard menu options at the prison for two days. Id. As a result, prison officials began to forcibly tube-feed Kelly to end his hunger strike. Id. Due to the heavy pain inflicted on him by the invasive tube-feeding, Kelly finally broke his diet and complied with eating the standard, meat-filled prison food, violating his firmly held religious beliefs and practices. Id.

Procedural History

Kelly filed a Complaint in the United States District Court for the Eastern District of Tourovia against the Warden of TCC, Echols, and the Director of TCC Chaplaincy Department, Abreu. R at 2. Kelly sought declaratory and injunctive relief for violations of his First Amendment rights, specifically under the Religious Land Use and Institutionalized Persons Act (“RLUIPA”) alleging, *inter alia*, that the prison substantially burdened his exercise of religion by denying Islamic prisoners designated prayer times and by removing him from his religious diet. Id. In essence, Kelly argued that the prison deprived him of his diet and prayer services, which in turn forced him to disobey the laws of The Nation.

The prison moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, arguing that a substantial burden was not imposed on Kelly’s religious freedom when he was denied a nightly congregational service because the prison was providing all religions with appropriate and sufficient Designated Prayer Times. Id. The prison further argued that the denial of additional prayer services was warranted due to both security and administrative concerns, and that Kelly broke his own diet. Id. The District Court denied the prison’s motion for summary judgment, finding no dispute of material fact that the prison’s policies violated RLUIPA. Id.

TCC appealed the District Court's decision to the United States Court of Appeals for the Twelfth Circuit. The Twelfth Circuit reversed the District Court's decision that RLUIPA was violated in denying prayer accommodations and depriving Kelly of his religious diet. R. at 16. Kelly appeals to the Twelfth Circuit's decision to this Court.

OPINIONS BELOW

The opinion of the Twelfth Circuit Court of Appeals is reported at 983 F.3d 1125 (12th Cir. 2015), and can be found in the Record at pages 16-26. The opinion of the District Court for the Eastern District of Tuorovia is reported at 985 F. Supp. 2d 123 (N.D.T.O. 2015), and can be found in the Record at pages 2-15.

SUMMARY OF THE ARGUMENT

- I. TCC's prison policy, which bans nightly congregational of prayer, violates RLUIPA. RLUIPA provides a statutory cause of action for prisoners to challenge and obtain relief for any infringement on their religious exercise. 42 U.S.C. § 2000cc-2(a). In order to bring a successful claim under RLUIPA, the claimant must show that there has been a substantial burden placed on their religious exercise. After showing a prima facie case of substantial burden, the burden shifts to the prison to prove that the Services Directive passes strict scrutiny. The strict scrutiny analysis requires the prison to show that its policy is in furtherance of a compelling governmental interest, and uses least restrictive means to do so. Kelly's religious exercise is substantially burdened by the denial of the opportunity to conduct five prayers a day, in a clean and solemn environment, as mandated by his religion, the NOI. If Kelly follows the requirements of the *Salat* and prays five times a day in clean, solemn conditions, however, he faces punishment by the prison because of the Services Directive. Kelly has sent requests to the prison that have gone unanswered and have resulted in a ban on prayer with his brothers of The Nation.

In addition to the substantial burden imposed on Kelly's religious exercise, the prison has not met its burden of showing that the intent of the Services Directive is in furtherance of a compelling government interest, since the adaptation of the policy was partially to punish the inmate. The prison fails to show that other prisons use such a policy as its Services Directive, or that the Services Directive is a customary practice. The prison's argument that the policy further prison security is merely conclusory; there is no threat of security that the policy alleviates. Additionally, over-burdensome costs are not placed on the prison to justify the Services Directive. Furthermore, the prison has failed to prove that the policy prohibiting the nightly prayer uses least restrictive means. To satisfy least restrictive means the prison must offer evidence that narrower solutions are not plausible. Kelly, in his second grievance, proposed an alternate solution, which is evidence of a proposal of least restrictive means the prison has not considered.

II. The prison's Dietary Directive that removes Kelly from his vegetarian diet is also a violation of RLUIPA. As a threshold issue, Kelly has proven that his vegetarian diet is a religious exercise deserving of RLUIPA protection. The prison policy that removes Kelly from his diet is a substantial burden on Kelly's religious exercise. As held by the Fourth Circuit Court of Appeals, removing backsliding prisoners from religious dietary programs is indeed a substantial burden. Sincerity, should it factor into the substantial burden analysis, falls in favor of Kelly as a faithful Nation of Islam adherent. By not being able to adhere to a vegetarian diet, Kelly fails to satisfy his religious obligations, which substantially burdens his religious exercise.

The Dietary Directive also does not meet strict scrutiny. The prison has failed to provide a compelling governmental interest for instituting the Dietary Directive. The prison has also failed to show any compelling reason why Kelly should be denied his vegetarian diet.

Furthermore, the prison has failed to enact the policy in the least restrictive means possible. The prison could have enacted a Directive requiring more evidence that a prisoner actually broke their diet. The Dietary Directive now unjustly allows punishment for “mere possession” of non-religious food. Put simply, the policy fails strict scrutiny and violates RLUIPA.

ARGUMENT

I. THE PRISON’S SERVICES DIRECTIVE VIOLATES RLUIPA BY SUBSTANTIVELY BURDENING KELLY’S RELIGIOUS EXERCISE THROUGH PROHIBITING NIGHTLY PRAYER AND BANNING RELIGIOUS ACTIVITY.

The prison’s Services Directive halts the practice of prayer and coerces the members of the NOI to act against the principles of their religion. RLUIPA mandates that “no governmental interest shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution...” 42 U.S.C. § 2000cc-1(a). A prison may not impose regulation of an inmate’s access to religious services, prayer, or worship to the extent that it creates a substantial burden, unless the burden: 1) is in furtherance of a compelling governmental interest; and 2) is the least restrictive means of furthering the compelling government interest. *Id.* RLUIPA serves the very important purpose of protecting “institutionalized persons who are unable to freely attend to their religious needs and are therefore, dependent on the government’s permission and accommodation for exercise of their religion.” *Cutter v. Wilkinson*, 544 U.S. 709, 721, 125 S. Ct. 2113 (2005). RLUIPA aims to protect the religious freedom of institutionalized persons such as Kelly, because a person’s constitutional rights extend beyond the confinement of prison walls. *See Cruz v. Beto*, 405 U.S. 319, 321 (1972)(arguing that constitutional rights apply to inmates, and the law should be especially preferential to prisoners).

Kelly successfully shows that designated prayer services constitute a valid religious exercise under RLUIPA. “Religious exercise” should be broadly construed to ensure protection

of religion, to the maximum extent that RLUIPA and the Constitution permits. 42 U.S.C. § 2000cc-3(g). The request for an additional prayer service and the act of engaging in prayer is indisputably a religious exercise, and a “quintessential religious practice.” Karen B. v. Treen, 653 F.2d 897, 901 (5th Cir. 1981). Prayer as a member of The Nation is intended to be a holy communication with Allah. R. at 8. Significantly, both the Twelfth Circuit Court of Appeals and the United States District Court for the Eastern District of Tourovia found no contention over prayer being considered a religious exercise. Siheem Kelly v. Kane Echols, et al., 983 F.3d 1125 (12th Cir. 2015); 985 F. Supp. 2d 123 (N.D.T.O. 2015). Kelly is requesting services of a prayer, a religious exercise under RLUIPA. 42 U.S.C. § 2000cc.

As the act of worship and prayer constitutes a “religious exercise,” Kelly is warranted RLUIPA protection. The prison has placed a substantial burden on Kelly from practicing his faith by coercing him with punishment and a complete ban on religious exercise. The prison’s prohibition on nightly prayer does not further any compelling governmental interest, but instead was adopted to punish inmates. And the prison fails to meet the evidence requirement to prove it uses least restrictive means to do so. Therefore, the decision of the Twelfth Circuit Court of Appeals must be reversed.

A. The Services Directive Substantially Burdens The Nation’s Religious Exercise By Coercion Via Punishment And Placing a Complete Ban on Kelly’s Requests.

The Services Directive substantially burdens Kelly’s religious exercise by coercing and forcing him to forsake his religious mandates of praying five times a day in solemn and clean conditions, without interruption.² The Services Directive permits inmates to conduct

² As a member of the NOI, the *Salat*, an Arabic prayer guide, mandates adherents to participate in “Obligatory and Traditional Prayers” five times a day at the following times: 1) dawn, 2) early afternoon, 3) late afternoon, 4) sunset, and 5) *late evening*. R. at 3-4. The *Salat* also requires adherents to maintain a clean and solemn environment in which they pray, requiring them to wash themselves and their clothes. R. at 4.

congregational services *only* at Designated Prayer Times: 8:00 a.m., 1:00 p.m., and 7:30 p.m. R. at 25. The congregational services are even further restricted by requiring an Official Chaplain. Id. No prayer services are permitted after 8:30 p.m. Id. Circuit Courts have differing interpretations of “substantial burden,” since the RLUIPA statute does not define it. However, this Court has interpreted “substantial burden” in Thomas v. Review Bd. Of Ind. Emp’t Sec. Div., stating that a substantial burden is “any policy that puts substantial pressure on an adherent to modify his behavior and to violate his beliefs. Thomas v. Review Bd. Of Ind. Emp’t Sec. Div., 450 U.S. 707, 718 (1981) (holding that forcing a Jehovah Witness inmate to produce weapons when such acts is prohibited by his religion is a violation of his First Amendment rights). Whether a substantial burden is imposed is a fact-specific and case-by-case analysis. Id.

Courts have held that one’s religious practices are substantially burdened when an adherent is restricted in conducting services. In Spratt v. R.I. Dep’t of Corr., Spratt, a prisoner in a maximum security unit, was banned from preaching during Christian services in the prison – something he had done for years. Spratt v. R.I. Dep’t of Corr., 482 F.3d 33, 35 (1st Cir. 2007). After a new warden was employed with the prison, Spratt was notified of the recently changed policy forbidding him to preach. Spratt, 482 F.3d at 36. The prison alleged that placing an inmate in a leadership role within the prison confines threatened security. Id. at 37. The court held that the prison policy substantially burdened Spratt’s religious exercise by coercing him to modify or change his behavior and by threatening punishment if Spratt continued preaching. Id. at 38; *citing* Thomas, 450 U.S. at 718; *citing* Lovelace v. Lee, 472 F.3d 174, 187 (4th Cir. 2006). Similar to Spratt, Kelly is coerced to change his religious behavior of praying in a clean and uninterrupted space by having no other choice than to pray in his cell because the Respondent fails to listen to

his requests and religious needs. R. at 5. Kelly has been coerced because he only has two options: violate his religious beliefs or violate the prison mandates.

Likewise, the Ninth Circuit Court of Appeals held in Greene v. Solano County Jail that a prisoner's inability to engage in group worship while awaiting trial in a maximum security jail substantially burdened his ability to exercise his religion. Greene v. Solano County Jail, 513 F.3d 982,982 (9th Cir. 2008). The court held that any outright ban on a religious group exercise, such as group worship in this case, was a substantial burden on that exercise. Id. at 988. The inmate's deprivation in Greene parallels the unwarranted ban on Kelly's religious exercise. Kelly is mandated by the *Salat* to partake in five clean and uninterrupted daily prayers, which the prison is denying him from completing. Kelly has been told on multiple occasions that the prison will not, and cannot, accommodate the prayer required by The Nation because of the Services Directive. R. at 5. This Directive, however, violates RLUIPA.

Punishment is a factor in whether a substantial burden is placed on an adherent's religious practice. The Ninth Circuit Court of Appeals held in Warsoldier v. Woodford that Billy Soza Warsoldier was substantially burdened by a prison policy stating that inmates must not have hair longer than three inches. Warsoldier v. Woodford, 418 F.3d 989, 989 (9th Cir. 2005). Warsoldier's religious beliefs instruct that he must not cut his hair, for doing so would cost him his wisdom and strength. Warsoldier, 418 F.3d at 992. Because of his refusal to cut his hair, Warsoldier was subjected to multiple punishments, including: moving to a less desirable work group that did not receive as many privileges; reducing his monthly store draw from \$180 to \$45; and losing his phone privileges, among many other consequences. Id. at 996; Sherbert v. Verner, 374 U.S. 398 (1963) (recognizing that punishment to coerce an adherent to forgo their religious beliefs is an infringement on religious exercise after a Jewish woman was given the option between

unemployment benefits or working on Saturdays, the Holy Sabbath). The court found that because the prison's grooming policy put significant pressure on Warsoldier to either abandon his religious beliefs or be punished, it placed a substantial burden on his religious exercise. Id. at 996. Here, the prison's Services Directive clearly states that it will punish inmates who are not in their cell before headcount; thus, Kelly has no option other than to abandon his religion or not abide by the policy and be forced into solitary confinement. R. at 4.

Disruptions to religious exercise and unclean conditions substantially burden an adherent's religious exercise. In Walker v. Beard, Dennis Walker, a devout racist and Aryan Christian whose religion forbids him from integrating with members of a race other than his own, was substantially burdened by the prison's housing policy. Walker v. Beard, 789 F.3d 1125, 1130 (9th Cir. 2015). The Ninth Circuit Court of Appeals found that there was a substantial burden placed on Walker's warding ritual, a religious practice that was hindered by having members of another race present. Walker, 789 F.3d at 1135. The court compared the burden placed on Walker as parallel to the burden placed on Warsoldier, where it was impracticable to comply with religious exercise mandates and follow prison policy. Id. The lewd behavior and ridicule aimed at Kelly by his cellmate, making it impractical to pray as the *Salat* requires, demonstrates a parallel to the burdens the inmates were faced with in the Walker and Warsoldier cases.

In Shakur v. Schriro, the Ninth Circuit Court of Appeals held that a Muslim inmates diet that caused him gastro-intestinal problems substantially burdened the clean conditions he needed for prayer. Shakur v. Schriro, 514 F.3d 878, 878 (9th Cir. 2008). The court reasoned that the prison focused more on Shakur's status as an inmate, than as a Muslim. Shakur, 514 F.3d at 878. Shakur changed his religious designation from Catholic to Muslim while incarcerated with the Arizona Department of Corrections, and thereby received a lacto-vegetarian diet that consisted of eggs and

milk. The dairy products caused gastrointestinal issues; therefore, he could not remain pure and clean as he needed to be for prayer. As a result, Shakur requested a full kosher meal. Id. Similar to Shakur, Kelly is aggrieved by having to conduct his holy prayer next to a toilet, and in conditions unacceptable to his religion. R. at 4. Kelly, like Shakur and Walker, is disrespecting Allah by being forced to pray in an unclean, not solemn, and interrupted area. Id. The Shakur court held that Shakur was substantially burdened because he was told he must choose between eating a vegetarian Halal diet that causes disruptive effects on his religious activities, eating the regular diet that is forbidden by his religion, or changing his religious status to Jewish to receive the Kosher diet. Id. at 889. Since the Ninth Circuit has determined that praying with gastro-intestinal issues substantially burdens Muslims' requirement of clean prayer conditions, this Court should agree that praying next to a toilet, as Kelly must, violates clean prayer conditions. R. at 4.

TCC's mandate for an official Chaplain to be present also substantially burdens Kelly and the six other NOI inmates. TCC's policy violates RLUIPA because it renders Koger's religious exercise effectively impracticable. See Koger v. Bryan, 523 F.3d 789, 799 (7th Cir. 2008). "The rights of inmates belonging to minority or non-traditional religions must be respected to the same degree as the rights of those belonging to larger and more traditional denominations." Koger, 523 F.3d at 799; citing Al-Alamin-Gramley, 926 F.2d 680, 686 (7th Cir. 1991). The Nation inmates at TCC are a small fraction of the prison population, and the requirement of an official Chaplain severely limits the likelihood of them being able to conduct group services.

The Twelfth Circuit's reliance on Adkins v. Kaspar, where the court held that inmates who were denied the right to hold services on their own and assemble as a group were not substantially burdened, is distinguishable. Adkins, 393 F.3d 559, 559 (5th Cir. 2004). Although the Fifth Circuit Court of Appeals properly refused to analyze whether the religious exercise was "central to the

adherent's religious belief system," as rejected by this Court in Lyng v. Northwest Indian Cemetery Protective Association, and the Court also declined to adopt a bright-line rule to determine whether a substantial burden was imposed, stating that the test requires a case-by-case, fact-specific inquiry to determine whether the government action results in a substantial burden to the adherent's faith. Id. at 572. The group of inmates were able to listen to tapes on Mondays, congregate on holy days, and congregate *whenever* a volunteer was available. Id. These facts are distinguishable from Kelly's scenario because the court's concerns with Adkins' access to religious exercise were diminished by the facts that YEA members had access to additional religious materials and the prison's promise that additional volunteers would be available and permitted to conduct religious meetings and services with YEA members *whenever* available, and the prison was able to show a frequent availability of volunteers. Id. at 563. Kelly and his NOI brothers are not permitted to bring in a volunteer *whenever*, nor has the prison shown that there are a number of official Chaplains available to conduct services.

Additionally, and significantly, the Fifth Circuit Court of Appeals has recently ruled that a substantial burden is imposed where there are no volunteers available to provide group services, the inmate did not have alternate means of worship, and the prison applied the requirement differently for religions. Mayfield v. Tex. Dep't of Corr., 529 F.3d 599, 614-15 (5th Cir. 2008). Mayfield should lead this Court to the conclusion that Kelly, and his NOI members, have been substantially burdened.

The Respondent may also argue that Kelly's request was excessive under Cutter; however, the religious adherents in Cutter were not mandated to pray five times a day. Cutter, 544 U.S. at 718. Further, the Cutter facts are significantly different than Kelly's. Here, Kelly's request for additional services of prayer is not excessive because it is not his preference, but the *Salat*, that

requires five prayers. Kelly's requests are proof that he was not interested in getting time out of his cell for himself, as he requested the prayer services also for his brothers, demonstrating his sincerity and rooted belief as a member of The Nation. The Twelfth Circuit also reasoned that Kelly's request for three prayer services was excessive because no other religious group requested five daily prayers; this reasoning is flawed because unless another religious group has a mandate of more than three daily prayers, this Court should not be concerned with other inmates requesting additional nightly prayers. Thus, with a finding of substantial burden, the decision of the Twelfth Circuit should be reversed.

B. The Directive Does Not Satisfy Strict Scrutiny, As There Is No Founded Compelling Governmental Interest, And The Directive Does Not Provide Alternatives To Achieve Its Goals In The Least Restrictive Means.

Kelly satisfies a prima facie case of showing that the prison's Services Directive places a substantial burden on his nightly prayer; therefore, the burden shifts to the prison to show that its restriction on his religious exercise fulfills a compelling governmental interest and uses least restrictive means to do so. 42 U.S.C. § 2000cc-1(a). Here, the prison fails to show a compelling interest; although TCC claims prison security as a compelling interest, there is a lack of evidence that there was a security threat cured by the Services Directive. Furthermore, the prison has noted punishment as a reason for enacting the Services Directive, which is not a compelling interest. Additionally, the prison must also show evidence the the Services Directive uses the least restrictive means. However, there is no evidence that it considered any alternatives, such as Kelly's proposed compromise. The decision of the Twelfth Circuit Court of Appeals should, therefore, be reversed.

- i. The Services Directive Does Not Satisfy A Reasonable Belief Held by the Prison To Meet A Compelling Government Interest.

TCC does not hold a viable compelling government interest in enacting the Services Directive. The court in Davis v. Powell held that banning a Muslim's use of prayer oil violated RLUIPA. Davis v. Powell, 901 F. Supp. 2d 1196, 1230 (2012). In support of its position, the prison claimed that the prison oil was flammable, and thereby a safety hazard in the prison. Davis, 901 F. Supp. 2d at 1197. The court articulated that there was no reasonable belief or evidence showing that the prayer oil was hazardous; therefore, the prison failed to prove a compelling governmental interest. Id. at 1232. Hence, the prison's Motion to Dismiss Davis's RLUIPA claim was denied. Id.

Here, the prison alleges that the Services Directive furthers the compelling governmental interest of thwarting gang activity by requiring a Chaplain, and also enhances prison security by requiring all members in their cells before headcount. R. at 4. TCC never had a problem with NOI inmates prior to placing a blanket ban on worship, however, simply deeming it an interest in "prison security." R. at 5. In fact, prior to the Services Directive, an option was available for the utilization of prison service volunteers, until it was believed that the volunteers were participating in gang-related communications. Id. With no compelling interest, the Services Directive cannot pass strict scrutiny.

ii. The Prison Fails To Provide Evidence That The Services Directive Uses Least Restrictive Means By Failing To Consider Other Alternatives.

Denying religious services by requiring an official Chaplain is not the least restrictive means available, and therefore, the Directive violates RLUIPA. The Services Directive is not a least restrictive means policy, because it fails to directly advance the prison's goals of prison security – although, it may directly advance the prison's secondary goal of punishing inmates. As noted above, Respondent has failed to show evidence of furthering the goal of prison security. The prison must show that whatever means it chooses to use in furtherance of its interest have been

considered, and that other alternatives that did not use least restrictive means have been ruled out. Warsoldier, 418 F.3d at 1003.

This Court held in Holt v. Hobbs that a state prison policy preventing an inmate from growing a short beard violated RLUIPA. Holt v. Hobbs, 135 U.S. 853,853 (2015). While prison security is a compelling government interest, the unlikelihood that an inmate would be hiding contraband did not exemplify least restrictive means. Holt, 135 U.S. at 857. The prison policy did not provide an exemption for inmates on religious grounds, but provided an exception for inmates with dermatological issues, permitting them to wear facial hair no longer than a quarter inch. Id. at 860. The prison argued that prisoners that were permitted to keep a beard for medical reasons were easier to account for and track, compared to trying to keep track of prisoners permitted to wear a beard for religious purposes. Id. The prisoners argued that it was absurd to believe that contraband could be hidden in a beard, when there are many other alternatives, such as clothing, in which a prisoner could hide contraband. Id. at 861. The prison officials could also not point to a specific instance where they had found contraband hidden in a beard. Id.

The Court agreed that the state had a compelling interest in staunching the flow of contraband into its facilities; however, to state that this interest was furthered by banning inmates from growing a ½-inch beard was “hard to take seriously.” Id. at 863. As in Holt, preventing Kelly and his NOI brothers, inmates who remain in good standing, from additional prayer services in fear of gang-related conduct is speculative and simply conclusory; neither Kelly, nor his NOI brothers have ever displayed conduct that justifies TCC’s restriction on prayer. R. at 4.

Furthermore, the Ninth Circuit Court of Appeals held in Warsoldier v. Woodford that the burden remains on the prison to show that the grooming policy uses least restrictive means, to which the court held that the prison failed to do. Warsoldier, 418 F.3d at 999. At the bare

minimum, the court pointed to other prison systems, including the Federal Bureau of Prisons, that did not have such hair requirements. Id. at 1006. Failure of a defendant to explain why another institution was able to accommodate the same religious exercises may constitute failure to establish that a defendant was not using the least restrictive means. Id.; *citing* Cheema v. Thompson, 67 F.3d 883, 885 n. 3 (9th Cir. 1995). The prison in Warsoldier also could not explain why women prisons did not have the same grooming policy. Id. at 1005.

Similar to Warsoldier, TCC has yet to provide evidence showing the prohibition on inmate's leaving their cell before headcount is customary and consistent with prison regulations. Here, the Record remains barren of facts showing other prisons that have adopted such strict policies, and that the prison keeps its policy consistent by prohibiting any inmate, for any other purpose, from leaving their cell before headcount.

The First Circuit Court of Appeals, in Spratt v. R.I. Dep't of Corr., stated that a prison cannot justify a policy by "mere speculation, exaggerated fears, or post-hoc rationalizations." Spratt, 482 F.3d at 36. In Spratt, the court noted that the prison offered incomplete reasoning for a blanket ban on preaching, which was not shown to be the use of least restrictive means. Id. at 39. On behalf of his NOI brothers and himself, Kelly not only requested evening services, but offered alternatives such as conducting at least one additional service at 8:00 p.m. that would fall after the last meal, but before headcount. R. at 5. Kelly received no answer to this request. Id. The lack of response alludes to the presumption that alternative means were not considered, and from the Record, no additional proffered evidence suggests that these types of discussions were ever held within the TCC. Conclusory statements and post hoc rationalizations, such as the reasoning offered by the prison, is not sufficient to meet Respondent's burden of least restrictive

means. Thus, by substantially burdening religion and failing strict scrutiny, the Services Directive violates RLUIPA. The decision of the Twelfth Circuit must, therefore, be reversed.

II. THE PRISON’S FORCIBLE REMOVAL OF KELLY FROM HIS VEGETARIAN DIET SUBSTANTIALLY BURDENS KELLY’S RELIGIOUS EXERCISE AND VIOLATES RLUIPA.

The prison’s removal of Kelly’s religious dietary accommodations violates RLUIPA because the removal substantially burdens his religious exercise. Also, the removal was not performed in accordance with any compelling governmental interest nor was it the least restrictive means of furthering any interest. RLUIPA provides a statutory cause of action for prisoners to challenge and obtain relief for any infringement on their religious exercise. 42 U.S.C. § 2000cc-2(a). Once a prisoner shows that the prison substantially burdened their religious exercise, the prison’s actions are subject to strict scrutiny review. 42 U.S.C. § 2000cc-1(a). Then, the burden shifts to the prison to show that there was a compelling governmental interest, and that the restriction was narrowly tailored to further that interest by using the least restrictive means available. U.S.C. § 2000cc-1(a).

Kelly’s sincere adherence to a religious diet constitutes a valid religious exercise that warrants RLUIPA protection. Also, the prison has substantially burdened Kelly from practicing his faith by forcibly removing him from his religious diet. Further, the prison has failed to show that the Dietary Directive serves a legitimate governmental interest, and even if this Court finds it does, the Dietary Directive is not the least restrictive means to further any interest. The decision of the Twelfth Circuit Court of Appeals, therefore, must be reversed.

A. Kelly’s Sincere Adherence To A Vegetarian Diet As A Prisoner Is A Valid Religious Exercise Under RLUIPA.

Adherence to a diet is a religious exercise that warrants RLUIPA protection. RLUIPA defines “religious exercise” to include any exercise of religion, whether or not compelled by, or

central to, a system of religious belief. 42 U.S.C. § 2000cc-5(7)(A). Section 5(g) of RLUIPA states that “[this Act] shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by terms of this Act and the Constitution.” 42 U.S.C. § 2000cc-3(g). There is substantial evidence to conclude that as a matter of law, Kelly’s adherence to a religious diet is a protected religious exercise under RLUIPA. In Cutter, this Court determined that “RLUIPA bars inquiry into whether a particular belief or practice is central to a prisoner’s religion.” Cutter, 544 U.S. at 725. A religious diet is a practice that courts have considered a religious exercise under RLUIPA. Koger, 523 F.3d at 789.

While the District Court for the Eastern District of Tourovia and the Twelfth Circuit Court of Appeals disagree as to whether sincerity is a cognizable issue in order to determine religious exercise and substantial burden, it is nonetheless established in this case that Kelly’s adherence to his religious diet is sincere. Kelly has been a devout adherent with The Nation for over a decade. R. at 3. Kelly has been following a religious diet throughout his time at the prison. Id. Kelly has even been advocating for other members of The Nation at the prison as a leader. R. at 4. And after having his dietary privileges stripped from him, Kelly underwent a hunger strike for two days and was forcibly tube-fed by the prison. R. at 6. Kelly’s adherence to a religious diet is a religious exercise under RLUIPA, and his adherence is sincere.

B. The Prison’s Forcible Removal Of Kelly, A Sincere NOI Adherent, From His Vegetarian Diet Is A Substantial Burden On His Religious Practice.

The prison’s forcible removal of Kelly from his vegetarian diet constitutes a substantial burden on his religious exercise. RLUIPA does not statutorily define substantial burden; however, the legislative intent of RLUIPA reflects its purposes of increasing religious protections and, “accord[ing] religious exercise heightened protection from government imposed burdens.” Cutter, 544 U.S. at 714. This Court should keep the intent of RLUIPA in mind, and also adopt its

substantial burden interpretation from Thomas v. Review Bd. Of Ind. Emp't Sec. Div as discussed in Section I, *supra*. In Thomas, this Court stated that a substantial burden is “any policy that puts substantial pressure on an adherent to modify his behavior and to violate his beliefs.” Thomas, 450 U.S. at 718. The prison’s forcible removal of Kelly from his dietary accommodations via the Dietary Directive put substantial pressure on him to modify his behavior, and forced Kelly to violate his religious beliefs.

In Lovelace v. Lee, an Islamic prisoner was removed from a cohesive Ramadan program, consisting of special diet and services, after he was accused of breaking his Ramadan fast. Lovelace, 472 F.3d 174, 188 (4th Cir. 2006). The policy in Lovelace regarding dietary restrictions is comparable to the TCC’s Dietary Directive, stating that once prison staff submit reports that they observe a prisoner breaking their diet, the inmate is to be removed from their dietary accommodations and from Ramadan prayer sessions. Id. at 182. After a contentious interaction between Lovelace and the prison staff over expired food, a security officer submitted a report stating that Lovelace had taken a tray of non-Ramadan food in the cafeteria. Id. at 183. Similar to Kelly, no evidence was provided that Lovelace actually consumed the non-religious food. Id. And, also similar to Kelly, Lovelace was removed from the dietary accommodations list and barred from receiving meals and participating in services. Id. at 184. As a result, Lovelace brought a claim under RLUIPA. Id. The Fourth Circuit Court of Appeals, applying the substantial burden standard in Thomas, held that the removal from the Ramadan program due to “backsliding” (a term used for breaking a religious diet) was a substantial burden under RLUIPA. Id. at 188.

The Fourth Circuit Court of Appeals reasoned that since Lovelace could not receive special meals, he could not fast during daylight hours and thus could not fulfill one of the five pillars of Islam. Id. at 187. Since the punishment for backsliding also included the removal of Lovelace’s

religious services, the court reasoned that the removal further burdened Lovelace's religious exercise. Id. Here, Kelly was removed from his religious dietary program, and therefore could no longer fulfill his religious obligations. R. at 6. Kelly was also removed from attending The Nation's religious services as punishment, which further burdened his religious practice. R. at 6. Kelly's removal from both the religious dietary program and his religious services with The Nation as punishment puts substantial pressure on him to modify his behavior and violate his religious beliefs, satisfying the Thomas substantial burden standard developed by this Court.

In Colvin v. Caruso, the Sixth Circuit noted that a prison's "policy of removing a prisoner from the kosher meal program for 'mere possession' of a non-kosher food item may be overly restrictive of inmates' religious rights." Colvin v. Caruso, 605 F.3d 282, 296 (6th Cir. 2010). In Colvin, a prisoner was removed from his kosher dietary program after he had been seen eating non-kosher food multiple times. Colvin, 605 F.3d at 286. While the court dismissed the RLUIPA claim as moot, it did side with the Fourth Circuit in deciding that removing a backsliding prisoner from his religious diet was a substantial burden on that prisoner's religious exercise. Id. Here, Kelly was accused of backsliding – he was removed from his dietary program for "mere possession" of a non-Halal food item. R. at 6. He was never found to have actually broken his diet or to have consumed any meat. Id. This Court should follow the Fourth and Sixth Circuits in Lovelace and Caruso – that the forcible removal of Kelly is a substantial burden on Kelly's religious exercise.

Before RLUIPA was passed, courts had a more religious-restrictive view of the substantial burden analysis. In Brown-El v. Harris, the Eighth Circuit Court of Appeals found that a prisoner's rights had not been violated by a dietary policy that provided for automatic removal in the instance of a single violation. Brown-El v. Harris, 26 F.3d 68, 69 (8th Cir. 1994). The prisoner had been

found breaking his Ramadan fast, and he asserted, but did not support this assertion with documentation, that his religion provided for an exception in the event of an injury. Id. The court relied on an earlier Eight Circuit Court of Appeals substantial burden standard rather than the Thomas standard, stating that a prisoner must establish that the policy “restricts an inmate’s free exercise of a sincerely held religious belief.” Brown-El v. Harris, 26 F.3d at 71; *citing* Iron Eyes v. Henry, 907 F.2d 810, 813 (8th Cir. 1990). RLUIPA was not available to the prisoner, and the prisoner did not bring his claim under the Religious Freedom Restoration Act (“RFRA”), which was passed a year earlier. Id. Since the prisoner did not bring his claim under RLUIPA or RFRA, the removal policy was not analyzed under strict scrutiny. Id.

RFRA, like RLUIPA, would have afforded Brown-El a strict scrutiny analysis. Under RFRA, however, courts have not been as accommodating to religious freedom as they have been under RLUIPA. In Daly v. Davis, relied upon by the Twelfth Circuit, the Seventh Circuit Court of Appeals found that a prisoner who broke his kosher diet on three separate occasions was not substantially burdened because the kosher food program only prohibited the purchase and consumption of non-kosher food, which the court considers “non-religious in nature.” Daly v. Davis, No. 08-2406, 2009 WL 773880 (7th Cir. 2009). But both Brown-El and Daly are distinguishable from Kelly’s case. First, Brown-El was decided before the passage of RLUIPA, which gave much more religious freedom to incarcerated claimants. Second, Daly’s conduct was considered non-religious in nature. Kelly’s conduct is undeniably religious, as provided in the *Qu’ran* and shown by the great lengths that he took in trying to maintain his religious diet even after the prison took it from him. R. at 4.

The contested issue of sincerity in backsliding prisoners underlines the most insensitive and unjust portions of the Directive – that transgression from breaking a diet is improperly treated

as a “proxy for insincerity”. Shannon A. Burns, *Perfect Piety? Transgression and Redemption Within the Legal Structures Affording Prisoners the Right to a Religious Diet*, 50 U. Louisville L. Rev. 153, 173 (2011). The issue of sincerity in breaking religious diets has often proved to be a dispositive one in determining substantial burden. *Id.* A court in New Hampshire warns in Kuperman v. Warden about using sincerity to determine substantial burden. Kuperman involved an Orthodox Jewish inmate who was removed from a kosher dietary program for breaking his diet three times. Kuperman v. Warden, 2009 WL 4042760 (D. NH 2009). The court posited that a policy which punishes “deviation” from a religious exercise that occurs multiple times a day, such as a religious diet, would be a greater substantial burden on religious exercise. *Id.* at *5. Courts should not allow prisons to punish and substantially burden other religious exercises for sincere prisoners for small, isolated transgressions in dietary adherence. Kelly is a sincere adherent, and his forcible removal from his dietary accommodations constitutes a substantial burden under RLUIPA.

C. The Dietary Directive Does Not Satisfy Strict Scrutiny Because The Prison Has Failed To Assert A Compelling Interest And The Directive Is Not Narrowly Tailored.

This Court should also find that the Dietary Directive does not further any compelling interest of the prison and is not narrowly tailored to further any asserted interest, because the Dietary Directive does not require that the prison prove the prisoner actually broke their diet. If a plaintiff meets its burden and proves that a religious exercise has been substantially burdened, the court will analyze the state’s action under strict scrutiny. 42 U.S.C. § 2000cc-2(a). The burden then shifts to the government to show: “that imposition of the burden on that person, assembly, or institution (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive

means of furthering the compelling governmental interest.” Id. Here, the prison fails to satisfy both elements of the statute.

i. The Prison Has Failed To Show A Compelling Governmental Interest In Instituting The Dietary Directive.

The prison fails to assert a compelling governmental interest in its right to remove backsliding prisoners from their religious dietary programs. As stated in Section I, *supra*, the Cutter standard states that “context matters” in applying the compelling governmental interest standard. Cutter, 544 U.S. at 723. In the prison context, courts have given “particular sensitivity” to prison security. Id. at 722. It is unclear, however, what security benefits the prison gains from removing religious adherents from their access to vegetarian food, and whether that security interest is actually compelling.

The prison asserts that since Kelly’s cellmate alleges Kelly threatened him for his food, there is a compelling safety interest in removing Kelly from his diet. R. at 14. However, this allegation does not have any relation to the intent of instituting the Dietary Directive. R. at 6. Kelly was not incarcerated at the prison when the Dietary Directive was instituted. Id. Kelly does not have any history of physical violence at the prison outside of this allegation. Id. Kelly has also maintained his religious diet even in the face of these allegations, enduring forced tube-feeding in order to maintain his diet when the prison took it away from him. R. at 7. The power to remove Kelly from his religious diet, a highly sacred religious observance to him, during the month of Ramadan due to an unsubstantiated threat and baseless allegation does not purport to show a compelling governmental interest. The prison has not asserted any compelling governmental interest in forcibly removing Kelly from his diet – there is no security concern, nor is there any financial concern asserted in instituting the Dietary Directive.

Aside from safety, the prison does not have any potential interests to assert. Lovelace is the only dietary backsliding case which has reached the issue of compelling governmental interest. Brown-El never made it to the issue of compelling governmental interest, because the court decided that the prison directive at issue did not satisfy a less stringent substantial burden standard. Brown-El, 26 F.3d at 69. Colvin never reached the issue of compelling governmental interest because the dietary removal issue was moot. Colvin, 605 F.3d at 296. Daly never reached the issue of compelling governmental interest because he was found to not have incurred any substantial burden. Daly, No. 08-2406, 2009 WL 773880. In Lovelace, the prison asserted that “a legitimate interest in removing inmates from religious dietary programs exists where the inmate flouts prison rules reasonably established in order to accommodate the program.” Lovelace, 472 F.3d at 190. The court found that punishing a prisoner for a simple instance of backsliding did not assert any compelling governmental interest at all. Id.

With the prison in Lovelace failing to assert that punishing prisoners who broke rules was a compelling interest, there is not a remaining compelling interest for the prison here to assert. The Kuperman court in New Hampshire opines that “while the prison certainly has a valid interest in weeding out insincere requests for religious diets, there is some question whether that interest is truly compelling.” Kuperman, 2009 WL 4042760. The prison cannot use weeding out of insincere requests for religious diets as a compelling governmental interest. The prison cannot assert that when instituting the Dietary Directive that security or insincere requests was a compelling governmental interest. There is no evidence on the Record that shows that at the time the prison instituted the Dietary Directive, there was a security concern in being able to deny vegetarian diets to religious prisoners. There is simply no compelling governmental interest available to the prison in instituting the Dietary Directive.

ii. The Dietary Directive Is Not Narrowly Tailored Because The Prison Does Not Have To Prove A Prisoner Actually Broke Their Diet.

The Dietary Directive, and Kelly's removal from his diet, does not use the least restrictive means of furthering any alleged interest. Even if this Court finds that the Dietary Directive serves a compelling governmental interest, the prison has the burden of proving that the Dietary Directive is the least restrictive means of furthering that interest. 42 U.S.C. § 2000cc-2(a).

In Lovelace, the court ruled both the prisoner's dietary accommodations and his ability to attend religious services were removed as punishment for backsliding, the removal provision was far reaching, and therefore not narrowly tailored to the least restrictive means. Lovelace, 472 F.3d at 191. Here, while the Dietary Directive does not state that the prison may remove Kelly from other religious services as punishment, Kelly was barred from attending religious services as punishment from allegedly deviating from his religious diet program. R. at 6. Because the Dietary Directive is overly restrictive, and has far reaching implications in practice, the prison did not narrowly tailor the directive to its most restrictive means.

Moreover, the Dietary Directive is overly restrictive because it does not require that the prison actually prove a prisoner broke his diet. R. at 26. The Dietary Directive states "[I]n the event that an inmate gives prison administration adequate reason to believe that the religious alternative diet is not being adhered to, [the prison] reserves the right to revoke religious alternative diet privileges for any designated period of time or revoke the privilege permanently." R. at 26. This allows for a situation like in Lovelace to occur, where a prisoner was alleged to have broken his Ramadan fast. Lovelace, 472 F.3d at 194. Kelly was never actually seen breaking his fast. R. at 6. The only evidence the prison has to support its claim is a piece of meatloaf was found under Kelly's bed. R. at 6. The Record does not delve into the multitude of reasons for the meatloaf ending up under Kelly's bed, such as it being planted by another inmate. In Lovelace, an affidavit

eventually was presented that the security guard was mistaken, and that the prisoner had never actually broken his fast. Lovelace, 472 F.3d at 194. Thus, while prison administration may have had “adequate reason” to believe that Kelly broke his diet, it could have been less restrictive to religious prisoners in that the prison actually witness or prove that the religious alternative diet “is not being adhered to.”

As cited in Colvin, a “policy of removing a prisoner [from his religious diet] for ‘mere possession’ [of a non-religious food item] may be overly restrictive of inmates’ religious rights.” Colvin, 605 F.3d at 296. The Dietary Directive is overly restrictive because it allows the prison to revoke religious dietary privileges for “mere possession” of a non-religious food item. The prison’s directive is not narrowly tailored, nor enacted with the least possible restrictive means. This Court should find that the Dietary Directive and the prison’s removal of Kelly from his religious diet fails strict scrutiny, and thus violates RLUIPA. The decision of the Twelfth Circuit should therefore be reversed.

CONCLUSION

This Court should reverse the decision of the Twelfth Circuit Court of Appeals that the prison policy denying Kelly of a nightly congregational prayer and removal from his religious diet does not violate RLUIPA. Respondents have substantially burdened Kelly's religious exercise, and both the denial and the removal was made inconsistent with a compelling governmental interest that failed to use the least restrictive means available.