2014

Brief for Constitutional Law Professors as Amici Curiae Supporting Appellee, Brown et al. v. Livingston

Leslie C. Griffin
University of Nevada, Las Vegas -- William S. Boyd School of Law

No. 14-20249

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BOBBY R. BROWN, individually and on behalf of all others similarly situated,
Plaintiff-Appellee,
WILLIAM E. SCOTT,
Intervenor Plaintiff-Appellee,
TYRONE DAY; KENNETH HICKMAN; R. WAYNE JOHNSON; TORRANCE FLEMINGS; KENNETH PRYOR; JULIAN A. RANDALL; LONNIE DEAN COLLINS; LAMONT EDWARD WILSON,
Intervenor Plaintiffs-Appellees,
v.
BRAD LIVINGSTON, Executive Director of the Texas Department of Criminal Justice,
Defendant-Appellant.

CONSOLIDATED WITH NO. 14-20444
BOBBY R. BROWN, individually and on behalf of all others similarly situated,
Plaintiff-Appellee,
TYRONE DAY; KENNETH HICKMAN; R. WAYNE JOHNSON; TORRANCE FLEMINGS; KENNETH PRYOR; JULIAN A. RANDALL; LONNIE DEAN COLLINS; LAMONT EDWARD WILSON,
Intervenor Plaintiffs-Appellees,
v.
BRAD LIVINGSTON, Executive Director of the Texas Department of Criminal Justice,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION
No. 4:69-cv-0074
THE HONORABLE KENNETH M. HOYT, JR., PRESIDING

AMICUS BRIEF OF CONSTITUTIONAL LAW PROFESSORS IN SUPPORT OF PLAINTIFF-APPELLEE BOBBY R. BROWN, et al.

LESLIE C. GRIFFIN, ESQ.
Counsel of Record
4505 S. Maryland Parkway
Box 451003
Las Vegas, NV 89154-1003
Tel: (702) 895-2071
leslie.griffin@unlv.edu
Counsel for Amici Curiae

SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The Undersigned Counsel of Record certifies that the persons and entities as described in Fifth Circuit Rule 28.2.1 as having an interest in the outcome of this case are those persons listed by Appellants and Appellees in their Opening Briefs. This certification is made so that the Judges of this Court may determine whether the case involves parties or issues that might require possible recusal.

/s/ Leslie C. Griffin

LESLIE C. GRIFFIN, ESQ.
Counsel for Amici Curiae

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CONSENT TO FILING OF AMICUS CURIAE BRIEF

Pursuant to Fed. R. App. P. 29(a), all parties to this appeal have consented to the filing of this amicus curiae brief.

STATEMENT OF INTEREST OF AMICI CURIAE

Amici are constitutional law professors who have special interest in religious freedom and civil rights. Professor Leslie C. Griffin is the William S. Boyd Professor of constitutional law at the University of Nevada, Las Vegas, Boyd School of Law. Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law, with a joint appointment in Political Science. David R. Dow is the Cullen Professor at the University of Houston Law Center, the Rorschach Visiting Professor of History at Rice University, and the Founder of the Texas Innocence Network. Sheldon H. Nahmod is a Distinguished Professor of Law at the Illinois Institute of Technology Chicago-Kent College of Law.

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed to funding the preparation or the submission of this brief. Amici are solely responsible for this brief.

STATEMENT OF THE ISSUE

This lawsuit arose from a successful Establishment Clause claim against the Texas Department of Criminal Justice (TDCJ) in *Scott v. Pierce*, *et al.*, Civil Action No. H-09-3391 (S.D. Tex. May 7, 2012). In *Scott*, the district court ruled that the State could not deny Jehovah's Witness William Scott the opportunity to meet with his coreligionists without a volunteer present while allowing Muslim prisoners to do so. In direct response to that ruling, and "solely" because of it, TDCJ cancelled the Muslims' right to meet for religious worship without a volunteer present. *Brown v. Livingston*, 17 F.Supp.3d 616, 628 (S.D. Tex. 2014). Instead of curing the original Establishment Clause violation, as TDCJ contends, that action violated the Establishment and Free Exercise Clauses of the First Amendment as well as the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc-1. Accordingly, amici urge this court to affirm the district court's ruling in *Brown v. Livingston*, 17 F.Supp.3d 616 (S.D. Tex. 2014), which correctly found Establishment, Free Exercise, and RLUIPA violations in the State's policy of restricting Muslim prisoners' religious worship.

SUMMARY OF ARGUMENT

TDCJ violated the Establishment Clause of the First Amendment when it gave preferential worship opportunities to Protestant, Catholic, Jewish, and Native American prisoners over Muslim inmates, thereby inhibiting the Appellees' practice of religion. The Establishment Clause requires "the principle of denominational neutrality," *Larson v. Valente*, 456 U.S. 228, 246 (1982), and prohibits the government from taking actions whose "principal or primary effect . . . inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). TDCJ contravened both Establishment Clause standards in this case.

TDCJ's actions restricting the Muslim prisoners' worship similarly infringed upon the fundamental principle of the Free Exercise Clause that "government may not enact laws that suppress religious belief or practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523 (1993). Because Appellees were "denied a reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts," a free exercise violation occurred. *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

TDCJ's policy preventing Muslim prisoners from practicing rituals central to their faith also violated RLUIPA, 42 U.S.C. § 2000cc-1, by

substantially burdening Appellees' religion without using the least restrictive means to further a compelling government interest. As this Court lately explained, "[r]ecent Supreme Court cases . . . have reaffirmed that the burden on the government in demonstrating the least restrictive means test is a heavy burden." *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 475-76 (5th Cir. 2014) (citing *Burwell v. Hobby Lobby Stores, Inc.*, ––– U.S. –––, 134 S. Ct. 2751, 2779, 189 L. Ed. 2d 675 (2014) and *McCullen v. Coakley*, ––– U.S. –––, 134 S. Ct. 2518, 2540, 189 L. Ed. 2d 502 (2014)). Appellants' volunteer policy does not meet that heavy burden. Therefore the district court's ruling should be affirmed.

ARGUMENT

The Establishment and Free Exercise Clauses of the First Amendment apply to the States through the Fourteenth Amendment. *Everson v. Board of Educ.,* 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940). Congress instructed prison officials to accommodate prisoners' religious freedom in RLUIPA. *See* 139 Cong. Rec. S14,465 (daily ed. Oct. 27, 1993) (statement of Sen. Hatch) ("[E]xposure to religion is the best hope we have for rehabilitation of a prisoner. Most prisoners, like it or not, will eventually be returning to our communities. I want to see a prisoner exposed to religion while in prison. We should accommodate efforts to bring religion

to prisoners."); *id.* at S14,466 (statement of Sen. Dole) ("[I]f religion can help just a handful of prison inmates get back on track, then the inconvenience of accommodating their religious beliefs is a very small price to pay."). TDCJ's proposed policy requiring Muslim prisoners to meet only with a volunteer present, thereby limiting their exercise of religion, violates the two Religion Clauses of the First Amendment and RLUIPA.

I. TDCJ violated the Establishment Clause by cancelling the Muslims' right to worship without a volunteer present.

The Establishment Clause requires the "principle of denominational neutrality." *Larson v. Valente*, 456 U.S. 228, 246 (1982). It also prohibits the government from taking actions whose "principal or primary effect . . . inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). TDCJ's policy on Muslim worship violates both *Larson*'s and *Lemon*'s Establishment Clause standards.

A. TDCJ's policy prefers non-Muslim Protestants, Catholics, Jews, and Native Americans to Muslims in violation of the Establishment Clause.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (No State may "pass laws which aid one religion" or that "prefer one religion over another"); *Zorach v. Clauson*, 343

U.S. 306, 314 (1952) ("[t]he government must be neutral when it comes to competition between sects."); *School District of Abington Township v. Schempp*, 374 U.S. 203, 305 (1963) ("[t]he fullest realization of true religious liberty requires that government . . . effect no favoritism among sects . . . and that it work deterrence of no religious belief."). The Supreme Court has stated that the prohibition against preferential treatment of religion is "absolute." *Larson*, 456 U.S. at 246.

The rule of *Larson* applies when a law or policy discriminates among religions, as TDCJ's policy does in this case. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012). *Larson* requires strict scrutiny. Once the government has set a policy of denominational preference, "that rule must be invalidated unless it is justified by a compelling governmental interest, [citations omitted] and unless it is closely fitted to further that interest." *Larson*, 456 U.S. at 247. Even in the prison setting, the "overwhelming majority" of courts that have heard prisoners' Establishment Clause challenges have applied strict scrutiny instead of deference toward prison administrators. *See Williams v. Lara*, 52 S.W.3d 171, 187–88 (Tex. 2001); *id.* at 188, n. 11 (collecting cases applying and not applying the deferential *Turner* standard to Establishment Clause cases); *Am. Humanist Ass'n v. United States*, No. 3:14-CV-00565-HA, 2014 WL 5500495, at *5 (D. Or. Oct. 30, 2014)

(identifying district courts that have applied strict scrutiny to prisoners' *Larson* claims).

During the 1970s, discrimination against Muslims in the Texas prison system led the State to enter into the consent decree that the State seeks to vacate in this case. *Brown v. Beto*, 4:74-CV-0069 (S.D. Tex. 1977). That consent decree ensured that Muslims received equal treatment with other non-Muslim prisoners, specifically "equal time for worship services and other religious activities each week as is enjoyed by adherents to the Catholic, Jewish and Protestant faiths." *Id.* Pursuant to that decree, "Muslim, Jewish, Catholic, Protestant, and Native American inmates have all enjoyed an average of six hours of religious activities each week." *Brown v. Livingston*, 17 F.Supp.3d 616, 621 (S.D. Tex. 2014). Under TDCJ's new policy, however, Muslims receive only one hour per week of religious programming while the other groups retain their six hours. *Id.* at 622. The Establishment Clause prohibits such preference of the Jewish, Catholic, Protestant, and Native American faiths to Islam.

Jewish and Native American prisoners are similarly preferred to Muslims in violation of the Establishment Clause because TDCJ grants them special accommodations unavailable to Muslims. "Jewish inmates are assigned to four particular units within the prison system *specifically* to

bring them closer to Jewish religious volunteers and [] Native American inmates are assigned to housing units *specifically* selected to make religious activities more available to them, while TDCJ makes no effort to house Muslim inmates in units close to the population centers where Muslim volunteers might be recruited." *Id.* at 631. Thus TDCJ has disobeyed the "clearest command of the Establishment Clause" by officially preferring several religious denominations to Islam. *Larson*, 456 U.S. at 244.

Larson requires that TDCJ's policy "must be invalidated unless it is justified by a compelling government interest, [citations omitted] and unless it is closely fitted to further that interest." *Larson*, 456 U.S. at 247. The State's usual compelling interests in safety and security in the prison setting are not relevant to the *Larson* analysis in this case. First, TDCJ enacted this policy "solely" in response to *Scott v. Pierce* and not for any safety- or security-related reasons. *Brown*, 17 F.Supp.3d at 628. Second, the district court found there were no safety or security violations during the 35 years that Muslims met without a volunteer present under the *Brown v. Beto* consent decree. *Id.* Third, "the purpose of outside volunteers is to improve the quality of the services, not provide security." *Id.* at 627. Thus the district court concluded that allowing Muslims to meet without a volunteer present had "no adverse impact on prison safety or the administration of criminal

justice. On the other hand, there are security concerns relating to increased reliance on and use of volunteers." *Id.* at 628.

TDCJ's policy is not closely fitted to a compelling government interest. TDCJ's policy cannot survive *Larson*'s exacting scrutiny; it violates the Establishment Clause.

B. TDCJ's policy inhibits Muslim religious exercise in violation of the Establishment Clause.

The Establishment Clause also prohibits the government from taking actions whose "principal or primary effect . . . advances [or] inhibits religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). Although most of the case law interpreting *Lemon* involves government efforts to advance religion, government action whose "principal or primary effect . . . inhibits religion" also violates the Establishment Clause, as TDCJ's policy does here. *Id.*; *see also Vasquez v. L.A. Cnty.*, 487 F.3d 1246, 1256 (9th Cir. 2007) ("it is far more typical for an Establishment Clause case to challenge instances in which the government has done something that favors religion or a particular religious group"). Although the government may not inhibit, disadvantage, or disapprove of religious practice, "there is ample room for accommodation of religion under the Establishment Clause." *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 338 (1987); *see also Cutter v. Wilkinson*, 544 U.S. 709, 713

(2005) ("This Court has long recognized that the government may . . . accommodate religious practices . . . without violating the Establishment Clause."). Allowing the Muslims to meet without a volunteer present properly accommodated their religious freedom for 35 years. In contrast, denying them the opportunity to meet for religious worship inhibits their religious freedom in violation of the Establishment Clause.

TDCJ's policy disadvantages and inhibits Muslim religious practice rather than accommodating it. Muslim inmates in Texas enjoyed equal access to religious worship for 35 years pursuant to the consent decree in *Brown v. Beto*. That policy allowed Muslims ample opportunity to participate in three religious practices—Jum'ah, Taleem, and Qur'anic studies—that are required by Islam. Instead of understanding how the consent decree accommodated religious freedom for 35 years, TDCJ's new policy replaced one Establishment Clause violation with another in response to *Scott v. Pierce*. The new policy restricted Muslim worship from six hours to one hour per week and failed to offer Muslims accommodations previously made for Jews and Native Americans. Because of the new policy, "Muslim inmates have not had access to Taleem or Qur'anic Studies, except when they are housed in units that are the home station of one of the five Muslim Chaplains. Even in those instances, access to all necessary religious

programs is not guaranteed." *Brown v. Livingston*, 17 F.Supp.3d 616, 626 (S.D. Tex. 2014). The Muslim prisoners' religion was inhibited by TDCJ's new policy.

"When government action violates the *Lemon* test by inhibiting religion, the Court's doctrine obviously works to protect religion from disadvantage." Daniel O. Conkle, *Toward A General Theory of the Establishment Clause,* 82 Nw. U. L. Rev. 1113, 1180 (1988). The district court's decision invalidating TDCJ's policy protects the Muslim religion from disadvantage; it should be affirmed here.

II. TDCJ's policy violates the Free Exercise Clause by singling out Muslims for unfavorable treatment in a non-neutral manner.

Prisoners retain their constitutional right to the free exercise of religion. *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348–50 (1987). This Court reviews prison regulations that impinge on free exercise under the deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987) and upholds regulations that are "reasonably related to legitimate penological interests." *Freeman v. Texas Dep't of Criminal Justice*, 369 F.3d 854, 860-61 (5th Cir. 2004).

The first part of *Turner*'s four-factor test, namely "whether there is a rational relationship between the regulation and the legitimate government interest advanced," is the most important factor for this Court to consider.

See Scott v. Miss. Dept. of Corr., 961 F.2d 77, 80-81 (5th Cir. 1992) (a court need not "weigh evenly, or even consider, each of these factors," as rationality is the controlling standard); *Adkins v. Kaspar*, 393 F.3d 559, 564-65 (5th Cir. 2004) ("In *Freeman,* we held that the TDCJ's religious accommodation policy is rationally related to legitimate government objectives, the first and 'paramount inquiry under *Turner.*'"). To survive *Turner*'s rationality scrutiny, the government's policy must be neutral; a "court 'must determine whether the government objective underlying the regulation at issue is legitimate and neutral, and that the regulations are rationally related to that objective.'" *Freeman*, 369 F.3d at 861 (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 414-15 (1989)); *see also Mayfield v. Texas Dep't of Criminal Justice*, 529 F.3d 599, 607 (5th Cir. 2008) ("*Turner*'s standard also includes a neutrality requirement.").

TDCJ's policy prohibiting Muslim inmates from meeting for religious worship without a volunteer present is not neutral. Therefore its impingement of prisoner free exercise rights is unconstitutional even under the deferential *Turner* standard of review.

As explained in Part I, TDCJ's policy is non-neutral between Muslims and members of other religious denominations, including Protestants, Catholics, Jews, and Native Americans who receive not only more hours of

religious worship but also better housing accommodations to gain access to volunteers. Because the Muslim inmates were "denied a reasonable opportunity of pursuing [their] faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State," and a free exercise violation occurred. *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

Moreover, TDCJ's policy is also non-neutral between Muslim prisoners who desire to exercise religion and other inmates who participate in secular activities. TDCJ allows prisoners to engage in secular activities without direct supervision while refusing the same privilege to Muslims. Numerous inmates meet to play dominoes, to practice foreign languages, to lead Safe Prison Program classes, to sing for the choir, to practice for the band, and to work with saws and propane torches in craft shop, all without direct supervision or a volunteer present. *Brown v. Livingston*, 17 F.Supp.3d 616, 628 (S.D. Tex. 2014). Yet Muslims may not meet to practice their religion under similar standards. "At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-34 (1993). TDCJ's policy both discriminates

against Muslim religious belief and prohibits conduct undertaken for religious reasons. The protections of the Free Exercise Clause apply here and require affirmance of the decision of the district court.

III. TDCJ's policy violates RLUIPA by imposing a substantial burden on Muslims' religious freedom without using the least restrictive means to further a compelling government interest.

According to RLUIPA, "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to [a jail, prison, or other correctional facility] unless the government demonstrates that imposition of the burden on that person--(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). TDCJ's policy violates RLUIPA by imposing a substantial burden on Muslim inmates' religious freedom without using the least restrictive means to further a compelling government interest.

Appellees easily meet their burden of establishing a RLUIPA claim because the 1) religious exercise of their 2) sincerely-held beliefs was 3) substantially burdened by the government's action. *See Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 790 (5th Cir. 2013) ("The threshold questions for applying RLUIPA are whether a 'religious exercise' is at issue and whether the state action places a 'substantial burden' on that

exercise. Subsumed within the substantial-burden inquiry is the question whether the inmate sincerely believes in the requested religious exercises.").

First, RLUIPA defines "religious exercise" broadly to include "'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Longoria v. Dretke*, 507 F.3d 898, 903 (5th Cir. 2007). Appellees were restricted in their ability to practice Jum'ah, Taleem, and Qur'anic studies, rituals that are "*indispensable* to a Muslim's exercise of his religious beliefs." *Brown v. Livingston*, 17 F.Supp.3d 616, 625 (S.D. Tex. 2014) (emphasis added). Appellees' complaint satisfies even the stricter, pre-RLUIPA definition that the litigated religious exercise must be "central to a system of religious belief." *Longoria*, 507 F.3d at 903 (5th Cir. 2007). Thus their claim easily satisfies the "religious exercise" element of RLUIPA.

Second, many Appellees have practiced Islam in prison for more than 10 years; the district court concluded that their sincerity is "undisputed" in this case. *Brown*, 17 F.Supp.3d at 625. Thus Appellees have crossed the sincerity threshold because "the plaintiff's 'sincerity' in espousing that practice is largely a matter of individual credibility" and is "rarely challenged" in court. *Tagore v. United States*, 735 F.3d 324, 328 (5th Cir. 2013); *see also Moussazadeh v. Texas Dep't of Criminal Justice*, 703 F.3d 781, 792 (5th Cir. 2013) ("Though the sincerity inquiry is important, it must

be handled with a light touch, or 'judicial shyness.' We limit ourselves to 'almost exclusively a credibility assessment' when determining sincerity. To examine religious convictions any more deeply would stray into the realm of religious inquiry, an area into which we are forbidden to tread.").

Third, this Court has employed a "fact-specific, case-by-case review" to determine whether TDCJ's volunteer policy substantially burdens a plaintiff's religion and has required the policy to be uniformly and neutrally applied. *McAlister v. Livingston*, 348 Fed.Appx. 923, 936-37 (5th Cir. 2009); *see also Mayfield,* 529 F.3d at 613-14 (discussing previous Fifth Circuit cases examining TDCJ's volunteer policy under RLUIPA and First Amendment); *Cutter v. Wilkinson*, 544 U.S. 709, 723-24 (2005) (Like the Establishment Clause, RLUIPA does not allow the state to "differentiate among bona fide faiths" or "single out a particular sect for special treatment."). As argued above in Parts I and II, TDCJ's policy is not neutral between Muslims and Protestants, Catholics, Jews, Native Americans and inmates who meet for secular reasons. Thus under this Court's precedents, the Appellees' religion is substantially burdened by the policy's lack of neutrality.

Moreover, the Supreme Court has recently warned that in assessing whether a plaintiff's religion is substantially burdened, "it is not for us to say

that their religious beliefs are mistaken or insubstantial. Instead, our 'narrow function . . . in this context is to determine' whether the line drawn reflects an honest conviction." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2779 (2014) (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707 (1981)). Here, as in *Hobby Lobby*, "there is no dispute" that Appellees share an honest conviction that the loss of "indispensable" religious rituals (Jum'ah, Taleem, and Qur'anic studies) has substantially burdened their religion. *Id.*

Because Appellees have established that their religion was substantially burdened by the government's regulatory scheme, "the burden is on the government to establish that the regulation (1) advances a compelling government interest; and (2) is the least restrictive means of furthering that interest." *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 472 (5th Cir. 2014). TDCJ cannot satisfy either prong of RLUIPA's test.

RLUIPA, like the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb, 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." *Merced v. Kasson*, 577 F.3d 578, 592-93 (5th

Cir. 2009) (quoting *Gonzales v. O Central Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430-31 (2006)); *see also McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 475 (5th Cir. 2014) (the governmental interest cannot be "couched in very broad terms" but must be "focused" on the particular claimant whose interest is substantially burdened); *Tagore v. United States,* 735 F.3d 324, 330-31 (5th Cir. 2013) ("RFRA requires the government to explain how applying the statutory burden 'to the person' whose sincere exercise of religion is being seriously impaired furthers the compelling governmental interest.").

In this case, the government's usual compelling interest in prison safety and security is not focused on these particular claimants. TDCJ enacted this policy "solely" in response to *Scott v. Pierce* and not for any safety- or security-related reasons. *Brown v. Livingston*, 17 F.Supp.3d 616, 628 (S.D. Tex. 2014). Moreover, there were no reported safety or security violations during the 35 years that Muslims met without a volunteer present under the *Brown v. Beto* consent decree while, during the same period, some security incidents occurred while guards or volunteers were directly supervising other religious groups. *Id.* at 621. Indeed, the presence of volunteers may increase security risks. "Chaplain Pierce testified that the purpose of outside volunteers is to improve the quality of the services, not

provide security. Therefore, TDCJ administrator's contention that the presence of an outside volunteer furthers its compelling state interest in prison security is unfounded and contradicted by the evidence." *Id.* at 627. Because TDCJ offered no "specific evidence that [the particular Muslim claimants'] religious practices jeopardize its stated interests," it does not have a compelling interest that satisfies RLUIPA. *Merced v. Kasson*, 577 F.3d 578, 587-88, 592 (5th Cir. 2009).

The Supreme Court has recently explained that cost is not a compelling interest that justifies the government's decision to restrict religious freedom:

> both RFRA and its sister statute, RLUIPA, may in some circumstances require the Government to expend additional funds to accommodate citizens' religious beliefs. Cf. 42 U.S.C. § 2000cc–3(c) (RLUIPA: "[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise."). HHS's view that RFRA can never require the Government to spend even a small amount reflects a judgment about the importance of religious liberty that was not shared by the Congress that enacted that law.

Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2781 (2014). TDCJ may be required to incur expenses in support of the important value of prisoners' religious freedom.

Even if this Court assumes that prison administrators have a compelling interest in safety and security, TDCJ did not employ the least

restrictive means of attaining that interest. This Court has recently recognized that "least restrictive means" is an "exceptionally demanding" test that places a "heavy burden" on the government. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 475-76 (5th Cir. 2014); *see also Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 332 (5th Cir. 2009) ("[t]he phrase 'least restrictive means' has its plain meaning."). "The very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist." *McAllen*, 764 F.3d at 475-76.

Numerous government-sanctioned alternatives that are less restrictive of religious freedom are available in this case. TDCJ could pursue the consent-decree strategy that successfully allowed Muslim prisoners to meet without a volunteer present for 35 years. *See Newby v. Quarterman*, 325 Fed.Appx. 345, 352 (5th Cir. 2009) (The "fact that Muslims regularly engage in communal worship without an approved religious volunteer is some evidence that the security and safety concerns identified by Texas can be addressed through less restrictive alternatives."). The less restrictive, indirect supervision that worked for those 35 years continues to be employed in other settings in Texas prisons today. Such indirect supervision includes closed-circuit observation, audio and video recordings of prisoners'

meetings, and roving patrols of security guards who look through windows at prisoners' meetings. *See Brown v. Livingston*, 17 F.Supp.3d 616, 621 (S.D. Tex. 2014); *see also Inzunza v. Moore*, No. 2:09-CV-0048, 2011 WL 1211434, at *2 (N.D. Tex. Mar. 31, 2011) (identifying possible alternatives that Muslim groups are "under visual and audio supervision at all times and the services are audio taped"); *McKennie v. Texas Dept. of Criminal Justice*, No. A-09-CV-906-LY, 2012 WL 443948, at *5 (W.D. Tex. Feb. 10, 2012) (considering testimony that volunteer groups could be policed by roving officers, listening devices, or video monitors). Those indirect supervisory practices have worked effectively for many years not only in Texas, but also in other jurisdictions like Florida and New York. *Brown*, 17 F.Supp.3d at 627. "Chaplain Shabazz testified that many prison systems throughout the United States have adopted the *Brown v. Beto* regime, employing indirect supervision of inmate-led religious activities thereby permitting Muslim inmates full participation in religious activities." *Id.* Because these less restrictive means permit full Muslim participation in religious activities, RLUIPA does not permit TDCJ to enact the more restrictive volunteers-present policy.

In sum, TDCJ "has not shown that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of

religion by the objecting parties in these cases." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2780 (2014). Therefore, its policy violates RLUIPA and should not be imposed on Appellees.

CONCLUSION

TDCJ violated the Establishment Clause of the First Amendment when it gave preferential worship opportunities to Protestant, Catholic, Jewish, and Native American prisoners over Muslim inmates, thereby inhibiting the Appellees' practice of religion. TDCJ's actions restricting the Muslim prisoners' worship similarly infringed upon the fundamental principle of the Free Exercise Clause that government not suppress religious practice in a discriminatory manner. TDCJ's policy preventing Muslim prisoners from practicing rituals central to their faith also violated RLUIPA, 42 U.S.C. § 2000cc-1, by substantially burdening Appellees' religion without using the least restrictive means to further a compelling government

interest. Therefore amici respectfully request this Court to affirm the ruling of the district court.

Respectfully submitted by,

/s/ Leslie C. Griffin

LESLIE C. GRIFFIN, ESQ.
4505 S. Maryland Parkway, Box 451003
Las Vegas, NV 89154-1003
Tel: (702) 895-2071
leslie.griffin@unlv.edu
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I certify that on January 12, 2015, the above and foregoing Amicus Brief of Constitutional Law Professors in Support of Plaintiff-Appellee Bobby R. Brown, et al. was served via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/, upon counsel for all parties.

Counsel also certifies that on January 12, 2015, the foregoing document was transmitted to Mr. Lyle W. Cayce, Clerk of the United States Court of Appeals for the Fifth Circuit, via the Court's CM/ECF Document Filing System, https://ecf.ca5.uscourts.gov/.

Counsel further certifies that 1) required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; 2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and 3) the document has been scanned with the most recent version of UNLV's antivirus software and is free of viruses.

/s/ Leslie C. Griffin
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 4649 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Mac 2011 Version 14.4.7 using 14-point Times New Roman font.

DATED: January 12, 2015

/s/ Leslie C. Griffin

LESLIE C. GRIFFIN, ESQ.
Counsel for Amici Curiae