APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 19-7634

BRAD FAVER,

Plaintiff - Appellant,

v.

HAROLD CLARKE, Director of VDOC,

Defendant - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Joel Christopher Hoppe, Magistrate Judge. (7:16-cv-00287-JCH)

Argued: October 27, 2021 Decided: February 1, 2022

Before WILKINSON, NIEMEYER, and MOTZ, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Wilkinson joined. Judge Motz wrote a dissenting opinion.

ARGUED: Dallas S. LePierre, HDR LLC, Atlanta, Georgia, for Appellant. Laura Haeberle Cahill, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee. **ON BRIEF**: Mario B. Williams, HDR LLC, Atlanta, Georgia, for Appellant. Mark R. Herring, Attorney General, Victoria N. Pearson, Deputy Attorney General, Toby J. Heytens, Solicitor General, Michelle S. Kallen, Deputy Solicitor General, Martine E. Cicconi, Deputy Solicitor General, Jessica Merry Samuels, Assistant Solicitor General, Zachary R. Glubiak, John Marshall Fellow, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

NIEMEYER, Circuit Judge:

Brad Faver, an inmate in the custody of the Virginia Department of Corrections and a practicing Muslim, commenced this action against the Department's Director (hereafter, "the VDOC"), alleging that the VDOC had denied him the ability to practice tenets of his Muslim religion, in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq*. Specifically, he alleged that, because of the VDOC's single-vendor policy for its commissaries, he was required to purchase "his perfumed oils [for prayer] from Keefe Commissary [Network, LLC]," which also happens to sell "swine and idols" to other inmates. While he did not allege that the prayer oil sold by Keefe was itself unsuitable, he did allege that "Islam prohibits the acquisition of religious accoutrements *from a company that sells* swine and idols." (Emphasis added). He sought, among other relief, an

injunction requiring the VDOC "to allow [him] at least one unobjectionable Muslim oil vendor [from which] to get his oils for prayer."

While the VDOC agreed that, under its single-vendor policy, Faver could purchase prayer oil only from Keefe, it explained that it had adopted the policy for operating its commissaries in 2013 to address substantial issues of security, safety, efficiency, and prison order and that to afford Faver the relief he requests would undermine the policy, thereby diminishing the benefits it provides to the VDOC. The VDOC explained that prior to 2013, when the VDOC had a multiple-vendor policy, it experienced "negative and harmful results" to the security, safety, and efficiency of its facilities. Accordingly, while the VDOC was agreeable to allowing Faver to purchase religious articles, including prayer oil, it would allow him to do so only through Keefe, the single vendor that it had selected to supply and run its commissaries.

Following a bench trial, the district court concluded that the VDOC did not violate Faver's rights under RLUIPA. While it found that Faver had a sincerely held religious belief and that his religious exercise was substantially burdened by the single-vendor policy, it nonetheless concluded that the policy furthered the VDOC's compelling interest of "preventing contraband, which promotes prison safety and security, and reducing the time prison personnel must devote to checking commissary shipments, which controls costs." The court found further that the policy was "the least restrictive means to further its compelling interests."

Because we conclude that the district court did not err in reaching those conclusions, we affirm.

I

Brad Faver, who was, when he filed his complaint, an inmate at Augusta Correctional Center in Craigsville, Virginia, and now is an inmate at the Lawrenceville Correctional Center in Lawrenceville, Virginia, identifies as an observant Muslim, practicing the religion of "Sunni Muslim Orthodox Islam." He asserted that his religion requires, among other things, that he have "prayer oils so [he] can smell good and not distract anybody around [him] in [his] state of prayer." He also maintained that he is not permitted by his religion "to buy any [religious] items[ ] from any store or vendor that sells idols, swine, or alcohol." He explained that items "that come from a place that sells swine or idols or alcohol" are "tainted in the sight of Allah, [his] higher power." "Idols" include items relating to "Christianity, Judaism, Pagan beliefs, or any other belief besides Islam," and "swine" includes "anything from the pig."

As an inmate of the VDOC, Faver was permitted to purchase items, including religious items and prayer oil in particular, only from Keefe Commissary Network, LLC, except for publications and eyeglasses. The VDOC adopted this single-vendor policy in 2013 in light of experience and for reasons of security, safety, and efficiency. But because, as Faver asserted, Keefe sold idols and swine, Faver could not, consistent with

his religion, purchase prayer oil from Keefe. As a consequence, he did not have the benefit of prayer oil as necessary for the practice of his religion. He contended that but for the VDOC's single-vendor policy, he could purchase prayer oil directly from "Halalco," an Islamic vendor that does not sell swine, idols, or alcohol.

The VDOC accepted the sincerity of Faver's religious beliefs but nonetheless required him to purchase prayer oil from Keefe because of its single-vendor policy. It explained that before 2013, when it adopted the single-vendor policy, it allowed multiple vendors to sell items to inmates, which resulted in numerous and substantial issues of prison security, inmate and employee safety, and administrative inefficiency in having to check and test the items purchased from various unknown vendors. Indeed, under the multiple-vendor policy, the VDOC had tested some prayer oil and found it to be "extremely flammable." It also highlighted its past serious problems arising from the smuggling of contraband, which could cause overdoses, and "a potential for assault, potential for fights." For example, it noted that when, in the past, items arrived from multiple vendors, "different items [had been] inserted into other property, like TVs," including drugs, cell phones, and weapons. Similarly, the VDOC also described how packages had been disguised to look as though they had been sent by a seemingly reputable third-party vendor but yet contained contraband. And items in liquid form, such as prayer oil, presented particular difficulties because they had to be tested, as the liquids "could be caustic or poisonous or could be drugs."

The VDOC explained that the multiple-vendor policy had also created a lack of uniformity in inmate property, which contributed to gang affiliation as well as fights over items that were different and more coveted. For example, "when [inmates] could purchase shoes from outside vendors . . . some offenders could purchase some very expensive shoes . . . that everyone wanted to have," resulting in "violence . . . when other inmates wanted to get to those shoes." Nonuniform items were also used as codes to denote gang affiliation.

The VDOC explained further that the multiple-vendor policy raised concerns about health and safety, especially about the "possibility [that] . . . something could enter the facility that could make people ill," particularly if it came "from an unclean environment."

Finally, the multiple-vendor policy required the VDOC, at substantial cost, to commit staff to test all items that entered the prison from multiple sources and to investigate both the vendors themselves and any potential relationships between the vendors and inmates.

As the VDOC "consider[ed] how [it] had been doing things and that wasn't working out" and how it could address the range of problems being experienced with the multiple-vendor policy, it adopted a single-vendor policy in 2013, as stated in its Operating Procedure 802.1. That procedure requires that all items purchased by inmates, with the exception of publications and eyeglasses, must be acquired through the facility

commissary, i.e., Keefe. Under the procedure, this includes "[r]eligious personal property items," such as prayer oil. Op. Proc. 802.1(IV)(B)(10); *see also* Operating Procedure 841.3 (authorizing inmates specifically to purchase prayer oil "through the facility commissary").

To implement the single-vendor policy, the VDOC entered into a comprehensive contract with Keefe that required Keefe to control the provision of items to inmates to make sure "everything [was] in compliance with security, sanitation, and safety [and] that there's consistency of services statewide." The arrangement with Keefe rendered the ordering process "completely blind" so as to preclude Keefe from knowing the identity of the inmate who placed the order. This mechanism, as the VDOC explained, alleviated many concerns from the past when "small vendors[,] maybe connected with a specific inmate[,] [had] things put in boxes and sent in."

The VDOC claims that since it adopted the single-vendor policy, it has not had, as far as it knows, a single incident of contraband entering the prison through the commissary, and it "has reduced the amount of time having to [be] spen[t] going through property coming from virtually anywhere."

Faver commenced this action under RLUIPA in June 2016, seeking, among other things, a declaratory judgment that the single-vendor policy violates RLUIPA and a permanent injunction requiring the

VDOC "to allow Faver at least one unobjectionable Muslim oil vendor to get his oils for prayer from."

Following a bench trial, the district court held that the VDOC was not violating Faver's rights under RLUIPA. It found as facts that Faver's religious beliefs required that he use prayer oils and that he not purchase them from vendors that sell idols, swine, or alcohol; that the VDOC's single-vendor policy required that inmates purchase such oils from Keefe, whom Faver believes sells idols and swine; and that therefore Faver has not been able to use prayer oils consistent with his stated beliefs. The court also found that the VDOC's experience with the multiple-vendor policy had led to adoption of its single-vendor policy in 2013. The VDOC had, it found, experienced "many security and operational problems from the ordering and delivery of products from [multiple] sources." And in particular, the court found that the VDOC's contractual relationship with Keefe was "especially important as it concerns the delivery of prayer oils because oils are difficult to screen for flammability or hidden contraband."

Based on these findings, the court concluded (1) that the single-vendor policy "substantially burdens" Faver's exercise of his religion; (2) that the single-vendor policy "serves compelling interests in maintaining prison security and efficiency"; and (3) that the policy is "the least restrictive means" to achieve these compelling interests. The court rejected Faver's argument that the VDOC did not consider adding a blanket exception to the policy for religious items, reasoning that such an exception would produce the very problems for

the VDOC that the single-vendor policy had sought to avoid. The court also rejected Faver's argument that the VDOC should allow case-by-case exceptions for the purchase of religious items, including entering into a contract with an Islamic vendor like Halalco. It explained that under a policy allowing exceptions for religious items,

> the VDOC could not rely on a single, systematic approach to screening packages from a single vendor, but would need to scan deliveries arriving from different vendors on different dates, and in different packages. Furthermore, because the VDOC would not necessarily control the terms of the ordering process, it could not ensure anonymity between buyer and seller such that inmates could more easily work with outside vendors to try and smuggle contraband into the facilities. Finally, the VDOC would not have the same guarantees as to the contents of products—such as religious oils—as it does with Keefe and would need to devote additional staff resources for testing and screening products shipped to its facilities. The single-vendor policy . . . has furthered all these goals. *The VDOC has reasonably determined, based on experience, that allowing exceptions would reignite the problems it sought to extinguish.*

(Emphasis added). The court further observed that there was no evidence that there was an Islamic vendor that would be willing to agree to the same stringent requirements of the VDOC's single-vendor contract with Keefe, such as submitting to audits, background

checks, and the requirements of Virginia's small business subcontracting plan. The court concluded,

> I find the VDOC has considered the use of multiple outside vendors . . . because it permitted exceptions to the single-vendor policy before 2013. That practice proved to undermine the VDOC's compelling interests in safety, security, and cost control, leading to [the] adoption of the single vendor policy. A contract with another outside vendor would again force the VDOC to work with multiple vendors, resurrecting at least some of the problems the VDOC experienced before its single-vendor policy, such as burdensome searches of commissary orders and increased risk of introduction of contraband into the facilities.

From the district court's judgment in favor of the VDOC, dated September 30, 2019, Faver filed this appeal.

II

The VDOC does not dispute that Faver's Muslim religion requires that he use prayer oil while praying and that he obtain the oil from an untainted source, i.e., a vendor who does not sell idols, swine, or alcohol. Its acceptance of his beliefs as to how his religion should be practiced is appropriate. Indeed, the VDOC "has no role in deciding or even suggesting whether [religious beliefs are] legitimate or illegitimate." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1731 (2018). Moreover, a government may

not impose regulations that are "hostile" to the exercise of religion. *Id.* This—and other fundamental religious rights—are secured by the First Amendment.

But Faver is a convicted felon serving a sentence of imprisonment, and with his confinement, he surrenders constitutional rights to the extent required by the VDOC's "legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). Nonetheless, Congress has specifically reaffirmed the First Amendment rights of inmates to the exercise of religion in prison with the enactment of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). That Act provides that no government may "impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that imposition of the burden on that person . . . is in furtherance of a compelling governmental interest . . . [and] is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc-1(a). The "compelling governmental interest" clause, however, must be read to accord "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (citation omitted); *see also Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019). And in this regard, "RLUIPA [is not meant] to elevate accommodation of religious observances over an institution's need

to maintain order and safety." *Cutter*, 544 U.S. at 722; *see also Couch v. Jabe*, 679 F.3d 197, 201 (4th Cir. 2012).

In this appeal, the VDOC does not dispute that its single-vendor policy *substantially burdens* Faver's religious exercise, and Faver does not dispute that the policy furthers a *compelling governmental interest*. *See* 42 U.S.C. § 2000cc-1(a) (requiring the inmate to prove that a policy imposes a "substantial burden" on his religious exercise and the government to prove that the policy furthers a "compelling governmental interest"). The parties disagree, however, on whether the policy is the "least restrictive means" of furthering the compelling governmental interest. *Id.* § 2000cc-1(a)(2). On this issue, the government has the burden of proof. *See Holt v. Hobbs*, 574 U.S. 352, 362 (2015); *Greenhill*, 944 F.3d at 250.

Because "least restrictive means" is a relative term that "implies a comparison with other means," the government must "acknowledge and give some consideration to less restrictive alternatives" to determine whether an alternative "might be *equally as successful* as the Policy in furthering the identified compelling interests," *Couch*, 679 F.3d at 203-04 (emphasis added). But in carrying this burden, the government "need not conceive of and then reject every possible alternative." *Greenhill*, 944 F.3d at 251. Rather, it must "demonstrate that it considered and rejected" the alternatives brought to the government's attention. *Id.* (citing *Holt*, 574 U.S. at 371-72 (Sotomayor, J., concurring)).

Faver has brought to the VDOC's attention two alternatives to the single-vendor policy that would allow him to obtain prayer oil that complies with his religious beliefs. First, he has proposed a "centralized exception" that would create an approved list of various religious vendors from which inmates could purchase approved religious items. Second, he has proposed that the VDOC enter into a contract with an Islamic vendor, similar to the contract it entered into with its single commissary vendor Keefe. Both alternatives would require that the VDOC engage at least one additional vendor and thus modify its single-vendor policy. When asked whether the VDOC had considered such alternatives or whether it had "considered [other] methods of providing religious materials to offenders," a VDOC representative stated, "We're always looking to see how we can do things better, but a lot of that involves reviewing history, looking at what problems . . . have been voiced, and balancing that in the name of . . . security and safety *and not going to a place where we were before.*" (Emphasis added).

Because both proposed alternatives would, in differing degrees, add vendors, they both would compromise the VDOC's single-vendor policy and necessarily reintroduce—at least to some degree—many of the same problems that had been resolved by that policy. As the court found—a finding that Faver has not challenged as clear error—"[a] contract with another outside vendor would again force the VDOC to work with multiple vendors, resurrecting at least some of the problems the VDOC experienced before its single-vendor policy, such

as burdensome searches of commissary orders and increased risk of introduction of contraband into the facilities." And VDOC testimony supports that finding. Its representative stated summarily, after having provided details, that by straying from the single-vendor policy, the VDOC would "regress from a security standpoint."

Logically, adding one Islamic vendor would surely be less problematic than adding a list of vendors. But even adding one vendor would diminish the benefits the VDOC obtained from its policy, rendering even that alternative not "*as successful* as the Policy in furthering the identified compelling interests." *Couch*, 679 F.3d at 204 (emphasis added). With each additional vendor, the VDOC would be adding incrementally to the problems of security, safety, and inefficiency that it had experienced with the multiple-vendor policy. Although it is true that the "classic rejoinder of bureaucrats through history: If I make an exception for you, I'll have to make one for everybody, so no exceptions" is often unpersuasive in RLUIPA contexts, *see Holt*, 574 U.S. at 368 (citation omitted), it is not so here where every additional contract would *directly undermine* the well-reasoned policy of having *only one* vendor.

Moreover, it is far from clear that the VDOC could simply add a *single* Islamic vendor. The VDOC has authorized more than 40 religious groups in its facilities, and members of each of these would be entitled to request an arrangement with another vendor should Faver prevail here. *See Cutter*, 544 U.S. at 724 (noting that RLUIPA should not be read to confer a "privileged

status" or authorize "disadvantageous treatment" for "any particular religious sect").

There would also be practical problems in qualifying each vendor. The vendor would have to be willing to fulfill the requirements imposed on Keefe, including background checks, audits, and specialized training. It would also have to be willing to use an ordering process for inmate purchases that would remain blind to the inmate. With each additional vendor, therefore, the VDOC would have to devote more staff time to administering the procurement of items, undermining an efficiency that the single-vendor policy provided.

And with respect to adding a vendor specifically to provide prayer oil, the VDOC would face unique security and safety problems, as the district court found in a well-supported finding. The VDOC explained it would be required to test each container of oil since prayer oil could be flammable, toxic, or even contain contraband drugs. As the VDOC representative testified:

> [W]e don't know where it came from, we don't know the flammability, the viscosity, we don't know what's in it.
>
> When it comes through the single-vendor, we understand what's actually in the oil. We have a contractual fiduciary relationship . . . with Keefe to procure the item that we specify in the correct container [so it] is the actual item that we know it is, that it hasn't been adulterated, that it doesn't contain any—in addition to oils and high flammability it doesn't

> contain anything else like a poison. We just simply don't know.

In short, the introduction of additional vendors would undermine the core purpose for the single-vendor policy of control, which the VDOC representative explained:

> Single-vendor policy, the purpose has been to control what is coming in and out of our facilities for security reasons. We are required to maintain good security and control of our facilities. Having the items coming in from one place where there is a contractual and fiduciary responsibility to procure items in a trustworthy manner has greatly increased the security of our facilities, and has reduced the amount of time [we] hav[e] to spend going through property coming from virtually anywhere.

And the district court agreed. It found, in a factual finding that Faver has not challenged, that the VDOC's years of experience trying to manage the safety, security, and staffing challenges associated with the multiple-vendor policy "drove the . . . VDOC's adoption of the single-vendor policy." And relying on this factual finding, it held that "the single-vendor policy was the least-restrictive means to further [the VDOC's] compelling interests."

Based on the evidence and the district court's findings, Faver's proposed alternatives are not "*equally as successful* as the [single-vendor] [p]olicy in furthering the identified compelling interests." *Couch*, 679 F.3d at 204 (emphasis added). It follows that the single-vendor

policy is the least restrictive means for serving the VDOC's compelling governmental interests.

III

While RLUIPA deliberately and explicitly provides broad protection of inmates' religious exercise, the Act is nonetheless enforced by balancing inmates' religious interests with a sensitivity to prison's needs "to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter*, 544 U.S. at 723, (citation omitted). Yet, in many circumstances, a prison's provision of "robust support for inmates' genuine religious exercise would actually enhance prison security and inmate rehabilitation," in furtherance of the prison's needs. *Greenhill*, 944 F.3d at 254. But occasionally, as here, the accommodation of a religious practice will directly undermine the prison's demonstrated compelling interests in security, safety, and efficiency and therefore the practice has to yield. In such a circumstance, the inmate's sentence of imprisonment denies him a measure of religious liberty that would otherwise be protected by the First Amendment.

We are not unsympathetic to Faver's religious requirements, but we also cannot be insensitive to the VDOC's legitimate needs in operating its prison facilities.

The judgment of the district court is accordingly

AFFIRMED.

DIANA GRIBBON MOTZ, Circuit Judge, dissenting:

The Government concedes that an inmate, Brad Faver, holds sincere religious beliefs. Faver challenges a prison policy as imposing a substantial burden on those beliefs in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). Under that statute, the Government bears the burden of showing that a challenged prison policy "is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000cc-1(a)(2). To satisfy this burden, the Government must "demonstrate that it considered and rejected" less restrictive alternatives proposed by the inmate. *Greenhill v. Clarke*, 944 F.3d 243, 251 (4th Cir. 2019). The Government has failed to do so here. Accordingly, I dissent from the majority's contrary holding.

I.

RLUIPA prohibits the Government from "impos[ing] a substantial burden on the religious exercise of a person residing in or confined to an institution . . . 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." § 2000cc-1(a).

Thus, to prevail on a RLUIPA claim, a plaintiff must initially demonstrate that a governmental policy substantially burdens his religious exercise. *Id.* § 2000cc-2(b); *see also Couch v. Jabe*, 679 F.3d 197, 200 (4th Cir.

2012). Here, the district court found that Faver established that his sincere religious exercise requires the use of prayer oils that must be obtained from a vendor that does not also sell pork products or non-Islamic religious items. The Government does not challenge this finding on appeal. And given that the Government has adopted a single-vendor policy requiring its inmates to purchase items through a vendor that does sell pork products and non-Islamic religious items, the Government does not claim on appeal that this policy does not substantially burden Faver's beliefs.

Once a plaintiff has demonstrated that he has a sincerely held religious belief burdened by a government policy, the Government must show that the policy is the least restrictive means of furthering its compelling governmental interest. § 2000cc-2(b); *see also Couch*, 679 F.3d at 200. Faver does not challenge the Government's asserted compelling interest in safety and security, but he does contend that the Government failed to establish that it considered and rejected less restrictive means of furthering that interest.

The least restrictive means test is "exceptionally demanding." *Holt v. Hobbs*, 574 U.S. 352, 364 (2015) (quoting *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014)). To satisfy the test, the Government must "demonstrate that it considered and rejected" all less restrictive alternatives proposed by the plaintiff, regardless of whether the plaintiff proposed them "prior to litigation as part of the prison grievance process [or] through the course of litigation in the district court." *Greenhill*, 944 F.3d at 251. If a less restrictive

means exists to achieve the same goals, "the Government must use it." *Holt*, 574 U.S. at 365 (quoting *United States v. Playboy Ent'mt Grp., Inc.*, 529 U.S. 803, 815 (2000)).

II.

Under the Virginia Department of Corrections' ("VDOC") single-vendor policy, inmates can only purchase items from one vendor—Keefe Commissary—with whom the VDOC has entered into a contract. Before the VDOC formalized that single-vendor policy, it had allowed ad hoc exceptions under which inmates could purchase certain items from vendors other than Keefe. The VDOC representative testified at trial that, when the VDOC allowed those ad hoc exceptions, the VDOC had to search items coming into its prisons "much more" to ensure the prisons' safety and security. The representative explained that eliminating those exceptions provided the VDOC with "greatly increased . . . security of [its] facilities" and "reduced the amount of time [it had] to spend going through property." Faver proposed two less restrictive alternatives that would allow him to purchase his prayer oils from a vendor that does not also sell pork products and non-Islamic religious items but that he contended would still meet the VDOC's security concerns.

First, Faver proposed that the VDOC establish a uniform religious exception under which inmates could purchase religious items from vendors other than Keefe. I agree with the district court that the

VDOC has demonstrated that it considered and rejected that proposal. Although the VDOC's history of allowing ad hoc exceptions is not precisely the same as a uniform religious exception, I agree in this case that this is, as the district court concluded, "a distinction without a difference." Based on the VDOC's history of allowing inmates to purchase items from vendors other than its chosen, contractually obligated vendor, the VDOC "could reasonably foresee that [the] problems it [previously] experienced . . . would return."

But Faver's second alternative is a different story. Faver also proposed that the VDOC enter into a *contract* with an Islamic vendor. Unlike Faver's first proposal, under which inmates would be able to purchase items from vendors who had not entered into contracts with the VDOC, his second proposal would permit purchase of prayer oils only from a vendor that had *specifically entered into a contract with the VDOC.*

After the VDOC representative emphasized at trial that it is the contract with Keefe that increased security and safety in the prisons, she conceded that the VDOC had not considered contracting with an Islamic vendor of prayer oils. Despite this testimony, the district court found that the VDOC had adequately considered and rejected the possibility of entering into a contract with an Islamic vendor. The court explained that entering into such a contract would create "at least some of" the same safety and security problems that the VDOC had experienced when it allowed ad hoc exceptions to its current single-vendor policy. In so finding, I believe the court clearly erred.

The VDOC representative testified at trial that "[w]hat gives [the VDOC] the confidence" in the safety and security promoted by its current single-vendor policy "is the *contractual obligations and the fiduciary responsibility*" that a contract with the vendor provides. (emphasis added). The prison representative offered no reason why entering into a contract with an Islamic vendor would fail to provide the VDOC with exactly the same "confidence." Of course, if the VDOC did enter into a contract with an Islamic vendor, the VDOC would receive items from at least one vendor other than Keefe. But the VDOC representative never testified that the mere fact of receiving items from one additional vendor (or even several) would create safety and security issues. Rather, when asked whether it was "the contract itself that provides . . . protections" from safety and security issues, the VDOC representative responded that that was correct. She explained that having "a financial contract" with a vendor creates an "expectation . . . that the service will definitely be provided or the contract will cease."

The VDOC offered no evidence that entering into a contract with an Islamic vendor would thwart the VDOC's goals. In fact, the VDOC representative testified that entering into such a contract was "possible." The only hesitation she expressed was that, if the VDOC were to enter into a contract with an Islamic vendor, it "would [also] have to do it for" other faith groups. Of course, that does not provide the VDOC an excuse to violate RLUIPA. The Supreme Court rejected that precise argument in *Holt v. Hobbs*, describing the

argument as "but another 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.'" 574 U.S. at 368 (quoting *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 436 (2006)). I would not ignore the Supreme Court's reasoning here.*

III.

A prison's interest in "security deserves 'particular sensitivity.'" *Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006) (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005)). But we cannot simply "rubber stamp or mechanically accept the judgments of prison administrators." *Id.* And we must construe RLUIPA "in favor of a broad protection of religious exercise, to the maximum extent permitted by [the statute] and the Constitution." § 2000cc-3(g). Here, the VDOC has failed to demonstrate that it considered and rejected a less restrictive alternative to its single-vendor policy. For this reason, I respectfully dissent.

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* I also note that the fear that vindication of Faver's RLUIPA rights would result in a cascade of new vendors seems unlikely given the nature of Faver's two-prong sincerely held beliefs. Faver has a sincerely held belief not only of a need for prayer oils but also that those oils cannot be obtained from a vendor that also sells pork or non-Islamic religious items.

FILED: February 1, 2022

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 19-7634
(7:16-cv-00287-JCH)

BRAD FAVER

Plaintiff - Appellant

v.

HAROLD CLARKE, Director of VDOC

Defendant - Appellee

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Roanoke Division

BRAD FAVER, Plaintiff,	)	Civil Action No. 7:16cv00287
	)	MEMORANDUM OPINION
v.	)	(Filed Sep. 30, 2019)
	)	By: Joel C. Hoppe United States Magistrate Judge
HAROLD CLARKE, Defendant.	)	

Plaintiff Brad Faver brings this action under the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, *et seq*. He alleges that Defendant Harold Clarke, the Director of the Virginia Department of Corrections ("VDOC"), through a single-vendor policy, infringed on Faver's religious rights by depriving him of the opportunity to order prayer oils from a vendor that conforms to his religious beliefs. This matter is before me by the parties' consent under 28 U.S.C. § 636(c), ECF Nos. 56, 57, following a bench trial held on November 29, 2018, ECF No. 96. Having considered the evidence presented by the parties at trial and the arguments of counsel in their post-trial briefs, ECF Nos. 104, 105, I find that the VDOC's single-vendor policy does not violate Faver's rights under RLUIPA and that Faver is not entitled to relief.

I. Background

A. Relevant Facts & Procedural History

At all times relevant to this dispute, Faver was an inmate in the VDOC and was housed at the Augusta Correctional Center ("ACC"). Compl. ¶ 3, ECF No. 1. Faver is a practicing Orthodox Sunni Muslim. Bench Trial Tr. 10:22-23 (Nov. 29, 2018), ECF No. 102 ("Tr."). His religious beliefs forbid him from purchasing items from stores or vendors that sell "idols, swine, or alcohol." Tr. 12:3-5. Idols, according to Faver, include any items associated with a religion other than Islam. Tr. 13:3-10. This tenant of his faith is particularly strict as it concerns the purchase of religions items, such as prayer oils. *See* Tr. 13:15-16.

Clarke, according to Faver, "is legally responsible for all policies being enforced in the VDOC." Compl. ¶ 4. Pursuant to VDOC Operating Procedure ("O.P.") 802.1, inmates must purchase all religious items, other than publications, from the facility commissary. O.P. 802.1 § IV(B)(10), Joint Ex. 2, ECF No. 97-2. The facility commissary for the VDOC is Keefe Commissary Network, LLC ("Keefe"). *See* Tr. 45:4-13. Keefe, according to Faver, sells both swine and idols. Compl. ¶ 17. Because Faver's religious beliefs require him to use prayer oils while in a state of prayer, Faver contends that VDOC policy violates his religious beliefs by forcing him to choose between purchasing oils from Keefe or not using oils while in prayer. Compl. ¶¶ 8, 33.

In June 2016, Faver filed this lawsuit against Clarke alleging that the VDOC's policy requiring him

to order prayer oils from Keefe violated his sincerely held religious beliefs under RLUIPA. Compl. ¶ 33.[1] He asserted that there was "no compelling reason for not allowing [him] to order his oils from a lawful source" and there were "less restrictive means to address any concerns" VDOC may have about him purchasing oils from other vendors by "naming one Islamically acceptable oil vendor." Compl. ¶ 34. He asked for relief in the form of a "declaration stating that [O.P. 802.1] imposes a substantial burden on the free exercise of his religion" and that such policy violates RLUIPA. Compl. ¶¶ 45-46. He further asked this court to "enjoin[ ] Harold Clarke, his successors, agents, and assigns, to allow Faver" to acquire his prayer oils from "at least one unobjectionable Muslim oil vendor." Compl. ¶¶ 45-46, 52.

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[1] Faver's Complaint also included allegations that VDOC policy infringed his religious beliefs by not permitting him to grow a fist-length beard and by preventing him from eating meat "ritually slaughtered in the [n]ame of Allah." *See* Compl. ¶¶ 7, 10. He alleged causes of action for each of his claims under RLUIPA and 42 U.S.C. § 1983 (First Amendment), and he sought both compensatory and punitive damages, as well as declaratory and injunctive relief. Compl. ¶¶ 31-55. In September 2017, United States District Judge Elizabeth K. Dillon dismissed, on summary judgment, Faver's claims under the First Amendment. *See* Order of Sept. 29, 2017, ECF No. 46; *see also* Mem. Op. of Sept. 29, 2017, ECF No. 45. She further dismissed his damages claims under RLUIPA because it "does not authorize damages against a public official under the Spending Clause." *See* Mem. Op. of Sept. 29, 2017, at 3 & n.2. In November 2018, Faver moved to voluntarily dismiss his beard and diet claims. *See* Pl.'s Mot. to Dismiss, ECF No. 94. Thus, at the time of the bench trial, the only remaining claim before this Court was Faver's religious oils claim under RLUIPA.

On November 29, 2018, the parties appeared before me for a bench trial at which I heard testimony from Faver as well as Marie Vargo, the Corrections Operations Administrator ("COA") for VDOC. Counsel for the parties agreed to present closing argument via written briefs. ECF Nos. 104, 105.

B. Summary of Bench Trial & Competing Evidence

As part of his case-in-chief, Faver called only himself and Vargo. Faver testified that he was an adherent of "Sunni Muslim Orthodox Islam." Tr. 10:22-23. Among other things, his religious beliefs require him to use prayer oils during prayer so that he could "smell good and not distract anybody around [him] in [their] state of prayer." Tr. 11:18-20. His religious beliefs forbid him from purchasing religious items from any store or vendor that sells idols, swine, or alcohol, as such items would be considered "tainted in the sight of Allah." Tr. 12:3-5, 11-13. He first learned that aspect of his belief around 2015, though he acknowledged that he did not get a "clear understanding" of it until 2016. Tr. 12:16-18.

Though there were other vendors acceptable to his religion from whom Faver could purchase prayer oils, the VDOC permitted Faver to purchase his religious oils only from Keefe. *See* Tr. 14:9-13. Once he came to fully understand the nature of his beliefs in 2016, Faver stopped purchasing prayer oils from Keefe. *See* Tr.

14:3-6.[2] Faver did continue to purchase other items from Keefe, such as hygiene products and over-the-counter medication, but he acknowledged that his religion was "not as strict" about the purchase of non-religious items from such vendors. *See* Tr. 13:15-16; 15:15-16:7.

Faver also testified that for several months after he stopped ordering oils from Keefe, he was able to procure oils from another inmate named Yahya Gaston. Tr. 20:16-24; 22:13-19. According to Faver, Gaston got his oils from Halalco, a vendor acceptable to Faver's religion. Tr. 20:19-21; 22:7-10. Faver believed the VDOC permitted Gaston to order from Halalco "for medical reasons." Tr. 22:21-23.[3] Faver exchanged other commissary items with Gaston for the oils, a practice that

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[2] In cross-examination, Faver acknowledged that Keefe's records reflected that he ordered prayer oils from Keefe twice after having signed his Complaint in this case. *See* Tr. 18:8-11, 20-25; 19:9-10, 19-23. He later explained, however, that he had not intentionally ordered oils from Keefe on these dates and that any orders reflected in the records were a product of administrative error on either his part or that of Keefe. Tr. 35:17-25; 36:1-2. There was no indication that Faver had ordered any oils from Keefe, deliberately or otherwise, after July 2016.

[3] Vargo subsequently testified that, according to VDOC records, Gaston had only been permitted by a major at ACC to make a single purchase of prayer oil sometime after 2013 from an outside vendor "to get the ingredient list" because of an alleged allergy to the oil offered by Keefe. *See* Tr. 118:23-25; 119:1-25; 120:1-20. The vendor did not provide the list of ingredients, and Gaston did not purchase any more oils. Tr. 119:7-17. Gaston had been permitted, however, to purchase oils from an outside vendor "a couple of times" prior to 2013 while at another facility. Tr. 118:14-22.

Faver acknowledged was prohibited by the VDOC. Tr. 21:14-17. Around November 2015, Gaston left ACC after being granted parole. *See* Tr. 22:14-16. Afterwards, Faver rationed the remaining oil he had received from Gaston and cut it with mineral oil "to make it last longer." Tr. 23:18-24. Faver acknowledged that he did not know the source of the mineral oil, but he maintained that as long as he did not know the source, he could use the mineral oil with his prayer oil and not violate his religious beliefs against obtaining prayer oil from a vendor that sold prohibited items. *See* Tr. 24:2-27:14. Faver exhausted his supply of prayer oil about two months before trial. *See* Tr. 23:1-4.

Faver next called Vargo, who was also the only witness for Clarke. She testified that as the COA for the VDOC, she was responsible for coordinating with others in the VDOC to recommend changes to policy, Tr. 39:13-5, including to O.P. 802.1, also known as the VDOC's "single-vendor policy," *see* Tr. 45:4-14. The VDOC implemented the single-vendor policy in 2013. Tr. 56:14-16. The single-vendor policy provides that inmates must purchase all religious personal property items through the facility commissary. O.P. 802.1 § IV(B)(10)(a); *see also* Tr. 45:12-14. Furthermore, any religious items offered for sale by the facility commissary needed to be precleared by the "Faith Review Committee"[4] and listed on the "Approved Religious

[4] The Faith Review Committee was a collection of individuals selected by the VDOC administration who meet quarterly to review items requested by inmates that are not offered on the Approved Religious Items list. *See* Tr. 47:9-18; 48:8-16.

Items" list. *See* O.P. 802.1 § IV(B)(10). Any item that an inmate sought to purchase that was not included on this list would need to be submitted to the Facility Unit Head for approval. *Id*. VDOC has entered into a products contract with Keefe to effectuate the single-vendor policy. Tr. 45:4-11.

According to Vargo, the purposes of the single-vendor policy are to bolster prison security and efficiently manage prison resources. *See* Tr. 53:11-19. These purposes are achieved largely because of the contractual relationship between the VDOC and Keefe. Under the contract, the VDOC controls key terms concerning both the products available for purchase by inmates and the procedures for ordering and delivering those products. Tr. 81:8-20; 85:15-24. In controlling the items available for purchase, the VDOC can create uniformity among products and avoid problems over inmate property. *See* Tr. 94:24-25; 95:1-4. For example, Vargo testified that before the VDOC implemented a single-vendor policy, inmates would get into fights over different types of shoes or use shoe color to affiliate with gangs. Tr. 94:15-95:2. Narrowing the type of shoes—or other products—available for purchase through Keefe helps prison officials manage these problems. *See* Tr. 95:3-5. Moreover, the VDOC's contract with Keefe provides it with control over the delivery process so that it can more easily screen deliveries for contraband entering the facility. VDOC's exclusive relationship with Keefe makes the screening process more predictable and efficient. *See* Tr. 99:1-17. As a further precaution, Keefe does not know the

identity of any inmate who places an order, Tr. 89:3-8, and this blind ordering process protects against inmates coordinating with the vendor to have contraband delivered, Tr. 89:3-14, 90:13-15. Vargo noted that before the single-vendor policy, inmates were able to collaborate with small vendors to have contraband hidden in packages. Tr. 89:11-14; 99:1-17. She testified that products sent to VDOC facilities by Keefe have never contained contraband. Tr. 99:18-20.

For similar reasons, the VDOC's single-vendor policy allows the VDOC to operate more efficiently when searching and processing products sent to its facilities. *See* Tr. 53:11-19. Specifically, Vargo stated that the VDOC's contract obligates Keefe to a "fiduciary responsibility to procure items in a trustworthy manner." *See* Tr. 53:11-19. This fiduciary relationship has in turn "reduced the amount of time" prison staff would otherwise have to spend "going through property coming from virtually anywhere." Tr. 53:14-19. As she explained, when a product arrives from Keefe, VDOC officials know that it has been purchased and preapproved and need only be searched and sent to the facility. *See* Tr. 97:1-4. In contrast, products submitted from multiple vendors would require additional staff time because prison personnel would need to check the product against the inmate's order and confirm that the inmate himself actually ordered and paid for the product. Tr. 97:5-12. If the shipment from an outside vendor were not approved, it would need to be repacked and sent back to the vendor, which Vargo testified "we used to do . . . quite a bit" before implementing

the single-vendor policy. *See* Tr. 97:16-23. Finally, using multiple vendors would also create logistical complications because it would be more difficult to anticipate when different shipments might arrive. *See* Tr. 97:1-12.

Vargo also explained why the shipment of prayer oils from outside vendors would pose unique safety and efficiency concerns. Unlike some products, oils cannot be screened for contraband merely by visual inspection, but instead must be tested for flammability, viscosity, and dangerous substances. *See* Tr. 100:7-12. Vargo testified that the VDOC's contractual relationship with Keefe, and the attendant financial incentives, ensures that Keefe procures the item in the correct container, that it has not been altered or mixed with poisonous additives, and that it is not highly flammable. Tr. 66:12-21. Alternatively, the VDOC would need to individually test every shipment of oils received from other vendors. Tr. 100:17-20. Vargo specifically referenced an instance at a VDOC facility prior to the single-vendor policy where an oil delivered to the facility from an outside vendor was found to be highly flammable. *See* Tr. 101:4-11. Vargo admitted she was not aware of the vendor from which Keefe obtained the prayer oils it offers for sale, but she did testify that Keefe would provide that information if asked and that the VDOC has "certification from Keefe" concerning the prayer oils that Keefe receives from its vendor. *See* Tr. 67:8-14; 69:8-10; 84:18-24. Additionally, Keefe offers for sale only those prayer oils that meet the VDOC's specifications. *See* Tr. 85:11-86:12.

In her testimony, Vargo also discussed two significant exceptions to the single-vendor policy. First, inmates may purchase publications from vendors other than Keefe. Under this policy, inmates can purchase publications from outside vendors so long as the publication does not:

> a. Pose a threat to the security, discipline, and good order of the facility and is not detrimental to offender rehabilitation
>
> b. Promote violence, disorder, or the violation of state or federal law
>
> c. Contain nudity or any sexually explicit acts, including child pornography or sexual acts in violation of state or federal law
>
> d. Violate any of the *Specific Criteria for Publication Disapproval*

O.P. 803.2 § IV(A)(4)(a)-(d), Joint Ex. 3, ECF No. 97-4. The VDOC added this exception, according to Vargo, because Keefe does not stock publications. *See* Tr. 58:2-4. Although publication vendors still need to be approved by the VDOC under this policy, Vargo testified that many of these vendors were on the approved list because of longstanding relationships between the vendors and the VDOC. Tr. 59:20-60:4. The VDOC does not, however, have a contractual relationship with publication vendors like it does with Keefe. *See* Tr. 60:9-10.

Second, inmates can receive religious items from sources other than Keefe if such items are donated to the facility, approved by the Faith Review Committee, and listed on the Approved Religious Items list. Tr.

50:10-16; *see* O.P. 841.3 § VIII(F), Joint Ex. 4, ECF No. 97-5. Outside individuals and organizations could donate approved items at any time, but inmates could receive them only once a year. Tr. 75:9-25. Prayer oils are not among the items approved for donation. *See* Tr. 66:7-11. According to Vargo, prayer oil donated by outside sources poses a security risk because the VDOC would have trouble determining the oil's contents, including its flammability or viscosity. *Id*. In addition, items approved for donation generally are non-consumable items that are more appropriate for inmates to receive annually, such as rugs or kufis. *See* Tr. 74:2-8.

Finally, Vargo discussed alternatives to the single-vendor policy that the VDOC has considered. She noted that the VDOC's policy for inmates to order items from outside sources has evolved over many years and moved towards adopting a single-vendor policy. Tr. 63:5-11; 121:7-16. Before 2013, the VDOC used commissaries at its facilities, but it did not have a single vendor. Tr. 56:8-16. Though inmates were generally required to order from the commissary, individual facilities allowed inmates to order items from outside vendors as an exception. *See* Tr. 57:1-5; 62:11-16; 64:12-16; 74:10-12; 91:24-92:3. In 2013, David Robinson, the VDOC's Chief of Corrections Operations, issued a directive requiring that all items be ordered through a single vendor. Tr. 57:8-9; 59:2-5, 74:16-21. Vargo acknowledged that the directive merely clarified an existing policy rather than created a new policy altogether. Tr. 57:10-12. She also testified, however, that

the VDOC had allowed orders from outside vendors prior to 2013 and so, in effect, a multi-vendor policy "had been considered." Tr. 62:21-25. Vargo did not know whether the VDOC had considered adding a specific vendor, "like Halalco," from whom prisoners could obtain prayer oils. Tr. 70:7-17. The VDOC's previous experience using multiple vendors "wasn't working out as well" and led to the adoption of the single-vendor policy. Tr. 70:13-17; 126:5-25. The principal reasons the VDOC stopped allowing inmates to obtain items from multiple vendors and adopted a single-vendor policy were maintaining security, preventing the introduction of contraband, promoting efficiency, providing uniform products, and ensuring products are sanitary. Tr. 91:23-24; 92:2-95:5; 96:12-21; 97:1-98:3.

II. Standard of Review

In any action tried without a jury, the Court must make specific findings of fact and state its conclusions of law separately. Fed. R. Civ. P. 52(a)(1). In doing so, "[t]he trial judge has the function of finding the facts, weighing the evidence, and choosing from among conflicting inferences and conclusions those which he considers most reasonable." *Select Auto Imps. Inc. v. Yates Select Auto Sales, LLC*, 195 F. Supp. 3d 818, 823 (E.D. Va. 2016). This task also involves evaluating the credibility of witnesses, and the trial judge may "disregard testimony of any witness when satisfied that the witness is not telling the truth, or the testimony is inherently improbable due to inaccuracy, uncertainty, interest, or bias." *Id.* (citing *Columbus-Am. Discovery*

Grp. v. Atl. Mut. Ins. Co., 56 F.3d 556, 567 (4th Cir. 1995); *Burgess v. Farrell Lines, Inc.*, 335 F.2d 885, 889 (4th Cir. 1964)). When articulating its findings of fact, "[a] trial court must do more than announce statements of ultimate fact." *United Am. Ins. Co. v. Fauber*, No. 5:16cv19, 2017 WL 3911019, at *3 (W.D. Va. Sept. 6, 2017) (citing *United States ex rel. Belcon, Inc. v. Sherman Constr. Co.*, 800 F.2d 1321, 1324 (4th Cir. 1986)). The Court is not, however, required "to make findings on all facts presented or to make detailed evidentiary findings. . . . The ultimate test as to the adequacy of the findings will always be whether they are sufficiently comprehensive and pertinent to the issues to provide a basis for decision and whether they are supported by the evidence." *Darter v. Greenville Cmty. Hotel Corp.*, 301 F.2d 70, 75 (4th Cir. 1962).

III. Findings of Fact

Based on the above background discussion of the competing facts and evidence presented at trial, the Court makes the following findings of fact:

1. At all relevant times, Faver was and continues to be a practicing Orthodox Sunni Muslim incarcerated with the VDOC.

2. Faver's religious beliefs require him to use prayer oils while in a state of prayer.

3. Faver's religious beliefs forbid him from purchasing religious items from vendors that sell "idols, swine, or alcohol." Faver

came to fully understand the nature of this belief in 2016.

4. VDOC policy generally requires that inmates purchase personal property from Keefe, the commissary for its facilities. This policy is known as the VDOC's "single-vendor policy."

5. The VDOC has exceptions to its single-vendor policy for religious texts and other publications because Keefe does not offer these products.

6. The VDOC has an exception to its single-vendor policy for approved religious items donated to its facilities. Prayer oils are not approved for donation to VDOC facilities.

7. VDOC policy does not permit inmates to purchase prayer oils from vendors other than Keefe, nor does the VDOC allow prayer oils to be donated to its facilities. There are no exceptions to this policy that would permit inmates to obtain prayer oils from any other source.

8. Faver's belief that Keefe sells pork products, or "swine," is grounded in his Orthodox Sunni Muslim faith.

9. Faver's belief that Keefe sells items associated with other religions, or "idols," is grounded in his Orthodox Sunni Muslim faith.

10. Faver has not purchased prayer oils from Keefe since July 2016.

11. Faver has not been able to use prayer oils consistent with his stated religious beliefs since approximately October 2018.

12. The VDOC's experience with using multiple vendors and its evolution in approach to the provision of commissary items led it to adopt a single-vendor policy in 2013, following a directive from David Robinson, the VDOC's Chief of Corrections Officer, requiring that inmates order all products through a single vendor.

13. The VDOC has entered into a contract with Keefe pursuant to which Keefe has agreed to act as the VDOC's vendor for providing personal property products, except publications, to VDOC facilities.

14. Prior to 2013, the VDOC relied heavily on commissaries to provide products for inmates, but there was no policy strictly requiring products to come from a single vendor. During that time, inmates were sometimes permitted to order products from other sources.

15. The purposes of the single-vendor policy are to bolster prison security, prevent the introduction of contraband, and more efficiently manage prison resources. The VDOC accomplishes these purposes through its contract with Keefe under which the VDOC can control the products available

for inmates to purchase and the procedures for ordering and delivering those products. This contractual relationship is especially important as it concerns the delivery of prayer oils because oils are difficult to screen for flammability or hidden contraband.

16. Prior to the implementation of the single-vendor policy in 2013, the VDOC experienced many security and operational problems from the ordering and delivery of products from sources other than Keefe.

17. No Keefe deliveries have ever contained contraband.

IV. Conclusions of Law

A. Applicable Law

Faver's only remaining claim before this Court is his cause of action under RLUIPA. In pertinent part, RLUIPA provides that

> [n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . unless the government demonstrates that the 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).

1. Substantial burden on Faver's religious exercise

To state a claim under RLUIPA, Faver must show that he seeks to engage in an exercise of his sincerely held religious belief, *Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015), and that the challenged practice "substantially burdens [his] . . . exercise of religion," *Lovelace v. Lee*, 427 F.3d 174, 186 (4th Cir. 2006) (quoting § 2000cc-2(b)). In his closing brief, Clarke does not challenge Faver on either of these issues. *See* Def.'s Closing Br. 2-10, ECF No. 104. Moreover, the evidence supports a finding that Faver has met his burden.

First, application of the VDOC's single-vendor policy implicates Faver's Sunni Islam religion. Faver testified that his religious beliefs forbid him from ordering products from vendors that sell "idols, swine, or alcohol." Tr. 12:3-5. Keefe sells swine and idols. Faver further testified that his religious beliefs require the use of prayer oils during prayer so that he could "smell good and not distract anybody around [him] in [their] state of prayer." Tr. 11:18-20.

Faver admitted at trial that he had ordered non-religious items from Keefe, such as hygiene products. *See* Tr. 14: 9-13. Nevertheless, he explained that his religion was "not as strict" regarding the purchase of non-religious items from these vendors. *See* Tr. 13:15-16; 15:15-16:7. Moreover, Faver does not need to establish that the challenged practice is "central to" his religious beliefs. *See* 42 U.S.C. § 2000cc-5; *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) ("RLUIPA bars

inquiry into whether a particular belief or practice is 'central' to a prisoner's religion."). Instead, he need only show that his requested accommodation is "sincerely based on a religious belief and not some other motivation," *Holt*, 135 S. Ct. at 862. I find Faver's testimony and other evidence sufficient to establish that he has a sincerely held belief that Sunni Muslims must use prayer oil to purify themselves at prayer and that prayer oil should not be obtained from an entity that sells swine or idols.[5]

Second, Faver must show that the practice in question "substantially burdens [his] . . . exercise of religion." *Lovelace*, 427 F.3d at 186 (quoting § 2000cc-2(b)). RLUIPA does not expressly define what constitutes a "substantial burden," but the Fourth Circuit has explained that such a burden

> is one that puts substantial pressure on an adherent to modify his behavior and to violate his beliefs, or one that forces a person to choose between following the precepts of his religion and forfeiting governmental benefits,

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[5] I am not persuaded by Clarke's suggestion at trial that Faver's beliefs were insincere because he ordered prayer oils from Keefe after having signed his Complaint in this case. Tr. 18:20-25; 19:1-23. Faver testified that he had not intentionally ordered oils from Keefe on these dates. Tr. 35:17-25; 36:1-2. There was no evidence presented at trial that Faver used, or even received, these items. Moreover, Faver had not ordered oils from Keefe in more than two years as of the trial date. Accordingly, I find no merit to the argument that the two orders from 2016 draw into question the sincerity of his beliefs.

> on the one hand, and abandoning one of the precepts of his religion on the other hand.

Couch v. Jabe, 679 F.3d 197, 200 (4th Cir. 2012) (alterations omitted).

Under the single-vendor policy, Faver must choose between either ordering prayer oils from Keefe, a vendor that sells swine and idols, or praying without oils. Either choice would violate a tenant of Faver's beliefs. Faver faces more than just "substantial pressure" to violate his religious beliefs; he will violate his religious beliefs regardless of which option he chooses. *See DePaola v. Ray*, No. 7:12cv139, 2013 U.S. Dist. LEXIS 117182, at *65-66 (W.D. Va. July 22, 2013) (finding a substantial burden where the prisoner had "no choice" as to whether he would be able to perform obligatory daily prayers in a manner consistent with his sincere religious beliefs). Accordingly, I find that the single-vendor policy substantially burdens Faver's exercise of his religion.

2. Compelling governmental interest

Because Faver has established a substantial burden on the relevant religious exercise, the burden shifts to Clarke to prove by a preponderance of the evidence that the VDOC's single-vendor policy furthers a compelling governmental interest. *Couch*, 679 F.3d at 201. In his closing brief, Clarke primarily argues that the policy serves the interest of operating VDOC facilities safely and efficiently. Def.'s Closing Br. 5-8. In general, "the burden of justifying a policy in terms of

security concerns is an 'unremarkable step.'" *Couch*, 679 F.3d at 201 (quoting *Lovelace*, 472 F.3d at 190). Indeed, RLUIPA must be applied "with particular sensitivity to security concerns" and with "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures." *Id.* (quoting *Cutter*, 544 U.S. at 722). Though a court "should not rubber stamp or mechanically accept the judgments of prison administrators," *id.*, it also must afford "due deference" to explanations from the VDOC's representative "that sufficiently 'take[ ] into account any institutional need to maintain good order, security, and discipline,'" *id*. (quoting *Lovelace*, 472 F.3d at 190). Other judges in this district have held that cost control or operational efficiency can be compelling interests under RLUIPA. *See*, *e.g.*, *Coleman v. Jabe*, No. 7:11cv518, 2014 WL 2040097, at *3 (W.D. Va. May 16, 2014) (Wilson, J.) (citing *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007)).

I find that Clarke, through Vargo's testimony, has shown that the single-vendor policy serves compelling interests in maintaining prison security and efficiency. Vargo specifically identified ways in which the VDOC single-vendor policy achieves these goals. *Cf. Couch*, 679 F.3d at 201-02 (distinguishing between generic assertions that certain policies bolster prison security and specific explanations as to how a particular policy is able to improve security in a facility). The policy creates more uniformity in products inmates can order, which furthers the VDOC's compelling interest in limiting inmate disputes over different types of property.

Vargo gave an example from before the VDOC adopted its single-vendor policy in which differences in the types of shoes inmates could order from outside vendors caused conflict between inmates and encouraged gang affiliation. By narrowing the product choices available to inmates through the single-vendor policy, the VDOC has been able to reduce institutional conflict and create a more secure facility. Vargo did not explain, however, how the shoe example warranted a need for uniformity in prayer oils. No part of her testimony suggested that allowing inmates to possess different types of prayer oil threatened institutional security simply because the oils were not the same.

More relevantly (and convincingly), the single-vendor policy, along with the VDOC's contract with Keefe, enables the VDOC to control the process for delivery of products to VDOC facilities. As such, the VDOC can more efficiently screen for contraband by using a single, systematic approach to screening packages rather than having to screen deliveries arriving from different vendors on different dates and in different packages, resulting in an irregular and more time-consuming process. Additionally, by controlling the process for ordering products, the VDOC can use its own procedures for inmate order requests. Under this system, the inmate placing the order remains anonymous to Keefe, which reduces the risk of an inmate arranging with a vendor to deliver contraband, a scenario that Vargo testified had occurred prior to the single-vendor policy.

Additionally, the single-vendor policy is particularly important as it concerns shipments of oils. Unlike many products that can be effectively screened through the VDOC's warehouse X-ray scanners, oils can contain hidden contraband, such as drugs or flammable substances, that can only be identified through chemical testing. Under the single-vendor policy, the VDOC has entered into an agreement with Keefe that obligates Keefe to procure products, including prayer oils, that comply with the VDOC's standards for purity and flammability. The contractual relationship and significant financial incentive to Keefe provide an assurance to the VDOC that Keefe will offer for sale only those oils that meet the VDOC's specifications. *See Coleman*, 2014 WL 2040097, at *4. The VDOC can oversee and enforce these requirements by requesting documentation from Keefe to confirm the nature of the products it procures. Because it is not practical for the VDOC to perform chemical testing on every shipment of oil sent to each facility, the single-vendor policy is critical to effective monitoring of those shipments. Thus, in affording "due deference to the experience and expertise of" Vargo and the other DOC policy makers, *Couch*, 679 F.3d at 201 (quoting *Cutter*, 544 U.S. at 722), I find that that the single-vendor system furthers the compelling interests of preventing contraband, which promotes prison safety and security, and reducing the time prison personnel must devote to checking commissary shipments, which controls costs. *See Coleman*, 2014 WL 2040097, at *4 (finding that the VDOC's single-vendor policy furthered the compelling interests of safety, security, and cost control).

3. Least restrictive means

Finally, Clarke must establish that the VDOC's single-vendor policy is the least restrictive means of achieving its compelling interest in the security and efficient operation of its facilities. *See Couch*, 679 F.3d at 202. "A 'least restrictive means' is one that does not sweep 'more broadly than necessary to promote the government's interest.' " *Hudson v. Dennehy*, 538 F. Supp. 2d 400, 410 (D. Mass. 2008) (quoting *Casey v. City of Newport*, 308 F.3d 106, 114 (1st Cir. 2002)). This requirement reflects Congress's intent that courts use a "strict scrutiny" standard when evaluating policies challenged under RLUIPA. *Lovelace*, 472 F.3d at 186. In his closing brief, Faver argues that, under strict scrutiny, a defendant must "consider and reject other means before it can conclude that the policy chosen is the least restrictive means." *See Couch*, 679 F.3d 197 at 203 (quoting *Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007)). The Fourth Circuit in *Couch* noted that several circuits had adopted this standard and that the Fourth Circuit had required the government to "acknowledge and give some consideration to less restrictive alternatives" in order to show that the challenged policy is the "least restrictive means" to achieve a compelling interest. 679 F.3d at 203. I find that under either standard, Clarke has carried his burden to show that the single-vendor policy is the least restrictive means.

Faver primarily points to two alternative policy schemes that he argues the VDOC failed to consider under RLUIPA. First, he asserts that the VDOC did

not consider a "centralized exception" to the single-vendor policy, similar to the exception that already exists for publications. Pl.'s Closing Br. 22-23, ECF No. 105. I find this argument unpersuasive. The VDOC's publications exception to the single-vendor policy exists primarily because Keefe does not offer publications. Indeed, Vargo testified that she "believe[d] if [the VDOC] could have Keefe . . . manage [its] publications, [it] would." Tr. 58:2-3. Thus, to maximize prison security, it is clear that the VDOC prefers to narrow the scope of available exceptions to the single-vendor policy, rather than broaden them. Moreover, the VDOC has tried a broader set of exceptions to the single-vendor policy in the past. Vargo testified that before the single-vendor policy went into effect in 2013, the VDOC had permitted institutions, at least in certain instances, to order property from other vendors. This practice produced problems for the VDOC, including difficulties screening items delivered from various sources as well as a lack of uniformity in inmate property, which produced conflict among inmates. Having prayer oils delivered from outside sources was particularly problematic because the VDOC could not screen them for contraband without burdensome testing. The VDOC's experience allowing multiple vendors to provide items for inmate purchase drove the reasons for the VDOC's adoption of the single-vendor policy. Faver's proposed alternative fails to appreciate that the VDOC made this decision, not in a vacuum, but based on years of experience trying to manage the safety, security, and staffing challenges presented by multiple vendors shipping items to prison facilities. Considering

this history, the VDOC reasonably determined that the single-vendor policy was the least-restrictive means to further its compelling interests.

Faver argues that the VDOC's prior practice of allowing case-by-case exceptions to the single-vendor policy is distinct from the "centralized, uniform exception" that he proposes for religious items. Pl.'s Closing Br. 22. This is a distinction without a difference. The VDOC, as explained by Vargo, could reasonably foresee that problems it experienced with its pre-2013 policy scheme would return under a uniform policy permitting inmates to order religious items from other vendors besides Keefe. Indeed, the VDOC could not rely on a single, systematic approach to screening packages from a single vendor, but would need to scan deliveries arriving from different vendors on different dates, and in different packages. Furthermore, because the VDOC would not necessarily control the terms of the ordering process, it could not ensure anonymity between buyer and seller such that inmates could more easily work with outside vendors to try and smuggle contraband into facilities. Finally, the VDOC would not have the same guarantees as to the contents of products—such as religious oils—as it does with Keefe and would need to devote additional staff resources for testing and screening products shipped to its facilities. The single-vendor policy, according to Vargo, has furthered all of these goals. The VDOC has reasonably determined, based on experience, that allowing exceptions would reignite the problems it sought to extinguish. Accordingly, I find that Faver's proposed religious items

exception is not a less restrictive means for achieving VDOC institutional security.

Second, Faver argues that the VDOC failed to consider entering into a contract with an Islamic vendor similar to its contract with Keefe. Pl.'s Br. 20-22. I also find this argument to be without merit. As a threshold matter, Faver presented no evidence to show that a vendor acceptable to his religious beliefs would be amenable to the same terms of the agreement between the VDOC and Keefe.[6] Indeed, the VDOC contract imposes a number of rigorous requirements on the contractor, including possible audits, Keefe Contract § III(A), Joint Ex. 5, ECF No. 97-6, background investigations

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[6] In his closing brief, Faver argues that Clarke "admitted [the VDOC] could enter into a contract with an Islamic vendor containing all the same provisions as the Keefe contract." Pl.'s Closing Br. 26. He cites to the following exchange between his counsel and Vargo:

> Q: The VDOC could also contract with [an Islamic vendor] to provide specifically Islamic religious items; is that correct?
>
> A: Anything is possible, yes.

Tr. 123:9-12. This blanket statement by Vargo is not evidence that she was aware of an Islamic vendor ready to accept a contract with the same terms as the VDOC's contract with Keefe. Indeed, as Faver points out, Vargo later acknowledged that the VDOC had not considered entering into a contract with a vendor to provide Islamic prayer oils. Pl.'s Closing Br. 26 (citing Tr. 126:20-25). Thus, Vargo could hardly testify that she knew of an Islamic vendor willing to accept the same contract terms. Instead, her testimony that "[a]nything is possible," suggests that the VDOC could, at least in theory, enter into a products contract with an Islamic vendor. But that acknowledgement alone does not show that Faver's proposed alternative is anything more than hypothetically possible.

of contractor staff, *id.* § III(R), and compliance with Virginia's Small Business Subcontracting Plan, *id.* § III(G). While Clarke does bear the burden to show that the VDOC has "acknowledge[d] and giv[en] some consideration to less restrictive alternatives," than the single-vendor policy, *Couch*, 679 F.3d at 203, he does not need to "refute every conceivable option to satisfy" this burden, *Maxwell v. Clarke*, No. 7:12cv477, 2013 U.S. Dist. LEXIS 83461, at *21 (W.D. Va. June 13, 2013). Here, Faver has produced no evidence that a contract between the VDOC and an outside Islamic vendor is even possible. *See Legatus v. Sebelius*, 988 F. Supp. 2d 794, 811 (E.D. Mich. 2013) (explaining that the government "must refute the alternative schemes offered by the challenger, but it must do [so] through the evidence presented in the record"). I will not find that Clarke has failed to meet his burden simply because Faver can imagine "some hypothetical alternative that [the VDOC] do[es] not appear to have considered." *Cf. Forter v. Geer*, 868 F. Supp. 2d 1091, 1105 (D. Or. 2012) (citing *Ill. State Bd. Elec. v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979)) (explaining that a court should not deny summary judgment on this ground); *see also Hudson*, 538 F. Supp. 2d at 410 (explaining that prison authorities "must consider and reject other plausible means before determining that the policy they implement is the least restrictive means of furthering a compelling State interest").

Furthermore, as explained above, I find the VDOC has considered the use of multiple outside vendors in the past because it permitted exceptions to the

single-vendor policy before 2013. That practice proved to undermine the VDOC's compelling interests in safety, security, and cost control, leading to adoption of the single-vendor policy. A contract with another outside vendor would again force the VDOC to work with multiple vendors, resurrecting at least some of the problems the VDOC experienced before its single-vendor policy, such as burdensome searches of commissary orders and increased risk of introduction of contraband into the facilities. Accordingly, I find that the VDOC's single-vendor policy is the least restrictive means to further its compelling interests.

V. Conclusion

For the foregoing reasons, the Court concludes that Clark did not violate Faver's rights under RLUIPA and that Faver is not entitled to relief. A separate Order will enter.

The Clerk shall send a copy of this Memorandum Opinion to all remaining parties.

ENTER: September 30, 2019

/s/ Joel C. Hoppe
Joel C. Hoppe
United States Magistrate Judge

APPENDIX C

FILED: March 1, 2022

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 19-7634
(7:16-cv-00287-JCH)

BRAD FAVER

Plaintiff - Appellant

v.

HAROLD CLARKE, Director of VDOC

Defendant - Appellee

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 35. The court denies the petition for rehearing en banc.

For the Court

/s/ Patricia S. Connor, Clerk