CASE NO. 19-7497

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

DAVID NIGHTHORSE FIREWALKER-FIELDS,
Plaintiff - Appellant,

v.

JACK LEE, Superintendent;
MIDDLE RIVER JAIL AUTHORITY,
Defendants - Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
AT ROANOKE

OPENING BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Virginia had jurisdiction over this 42 U.S.C. § 1983 suit pursuant to 28 U.S.C. § 1331. The district court granted summary judgment to defendants on all remaining claims on September 30, 2019. Plaintiff-Appellant filed a timely notice of appeal on October 11, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

This constitutional civil rights action challenges policies of the Middle River Regional Jail in Staunton, Virginia. The issues are:

(1) Whether the district court erred in granting summary judgment on the Free Exercise claim, when a reasonable trier of fact could find that defendants' security and resource justifications for refusing to accommodate the religious needs of Muslim inmates were exaggerated and ignored obvious alternatives; and

(2) Whether the district court erred in granting summary judgment on the Establishment Clause claim, when the record shows a triable issue that defendants' practice of broadcasting sectarian Christian worship services in the "day rooms" during lockdown hours on Sundays imposes inappropriate burdens on non-Christian inmates and fails to treat different faiths in a neutral manner.

STATEMENT OF THE CASE

As this Court has recognized, "[t]he First Amendment's protection of the right to exercise religious beliefs extends to all citizens, including inmates." *Jehovah v. Clarke*, 798 F.3d 169, 176 (4th Cir. 2015) (citation omitted). Plaintiff-Appellant David Nighthorse Firewalker-Fields ("Firewalker-Fields"), a practicing Muslim, is bound by the commands of his faith to participate in a communal prayer called Jumuah every Friday. The Middle River Regional Jail ("MRRJ") refused to accommodate that simple need on the grounds that no outside group had provided a volunteer or donated a pre-recorded service, and that no staff could be spared while the facility was on lockdown from 11AM to 1:30PM every day. Yet every Sunday, during exactly the same time window, MRRJ broadcasts a sectarian Christian service, donated by a local Mennonite group, to the televisions in the "day rooms" attached to every housing unit—forcing Firewalker-Fields to listen to Christian proselytization or retreat to his cell.

Firewalker-Fields filed this suit contending that these policies violate his rights under both the Free Exercise and Establishment Clauses of the First Amendment. The district court granted summary judgment against both claims under the test established by *Turner v. Safley*, which held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." 482 U.S. 78, 89 (1987).

This Court should reverse that holding and order a trial at which the facts can be further developed. The *Turner* test is relatively deferential in Free Exercise cases, but it requires more than minimal rationality. *Turner* calls for an assessment of *reasonableness*, including whether there are "obvious, easy alternatives" which may suggest that the challenged policies are "not reasonable, but [are instead] an exaggerated response to prison concerns." *Id.* at 89-92. In the modern era it is not reasonable for MRRJ to insist that it cannot provide its Muslim inmates with access to a Jumuah service, at least by pre-recorded video, until someone from the local community wanders in with an appropriate donation. Jumuah services are widely available for free on the internet, and are broadcast in Virginia Department of Corrections ("VDOC") facilities throughout the state.

The district court also erred by applying the *Turner* test to Firewalker-Fields's Establishment Clause claims at all. The court relied on language from a Fifth Circuit decision that failed to garner a majority even in that case, and that is inconsistent with the dominant case law nationwide. Under the correct analysis, supplied by *Cutter v. Wilkinson*, 544 U.S. 709 (2005), MRRJ's policies and practices violate the Establishment Clause because the Christian service it broadcasts at all inmates imposes impermissible burdens on non-Christians and fails to treat all faiths with the neutrality the Constitution demands.

Statement of the Facts

Because Firewalker-Fields proceeded *pro se* and the district court granted summary judgment to defendants, the following liberally summarizes the record evidence in the light most favorable to Firewalker-Fields and is drawn from his verified complaint as amended by later filings,[1] and from the declarations and other evidence submitted in connection with summary judgment.

Firewalker-Fields is a practicing Sunni Muslim who was incarcerated at the Middle River Regional Jail ("MRRJ")[2] in Staunton, Virginia. Jumuah is a gathering of Muslims for group prayer beginning after noon on Fridays, and it constitutes one of the central practices of Islam. App-9. Firewalker-Fields, and 1.8 billion Muslims worldwide, hold the sincere religious belief that Friday was chosen by God as a dedicated day of worship.

MRRJ is on daily lockdown from 11:30-1:30 every afternoon, including Fridays. App-49. Firewalker-Fields requested an exemption to be able to observe

[1] Because Firewalker-Fields was proceeding *pro se*, the district court liberally construed a later memorandum containing factual assertions as a motion to amend and supplement the complaint, and granted that motion. *See* App-22 n.1.

[2] Middle River Regional Jail is a municipal prison jointly developed and operated by five counties (Staunton, Waynesboro, Harrisonburg, Augusta, and Rockingham) in western Virginia. MRRJ also contracts with VDOC, the state corrections department.

Jumuah with his fellow Muslim inmates. App-11-12. MRRJ denied his request because of two MRRJ policies, one prohibiting inmate-led activities and the other requiring that all religious programming must be provided by outside volunteers. App-59-60.

In practice, MRRJ does not offer any Muslim religious worship services or classes. MRRJ called only one mosque, the Islamic Center of Shenandoah Valley in Harrisonburg, to gauge their interest in participating in outreach with MRRJ, but never made contact. App-43. MRRJ also was unable to solicit Muslim programming from two local "re-entry" councils, neither of which has any Muslim representation. App-51.

By contrast, MRRJ offers Christian faith classes and broadcasts Christian services donated by a local Mennonite group over the closed-circuit televisions in the "day rooms" each Sunday morning during lockdown hours. App-8, 48. MRRJ Program Director Lilly testified that "the Mennonites use the Bible as their central text" and therefore "the services have Christian themes." App-48. During lockdown all inmates are confined to their housing areas, consisting of their individual cells and the community "day rooms." *Id.* Lilly testified that inmates who do not want to watch the Mennonite services "can stay in their housing areas." *Id*. All of the CCTV monitors are set to one central system and show the same programming at all times.

Id. Firewalker-Fields's verified complaint explains that this arrangement "force[s] people in the Jail to be Christian because if one watches all have to watch." App-8.

Director Lilly testified that in his view "[e]ven if an imam volunteered to lead Muslim services or classes at the MRRJ, it would not be in the best interests of the Jail to offer such programming at this time," because the "overwhelming majority" of inmates are Christian and accommodating the small Muslim population "would spark a detrimental 'ripple' effect" in which other small religious groups "would expect a service of their own" and experience decreased morale when those services were not provided. App-51-52.

MRRJ does provide some other accommodations for Muslim inmates. They may pray and have various religious items, including the Quran and Muslim prayer rugs, in their cells. App-49. The prison also provides Muslim prisoners with pork-free meals and the option for Ramadan-compliant mealtimes. *Id*.

This Court's cases recognize that at least some VDOC facilities allow Muslim inmates to lead supervised congregational prayers and broadcast Jumuah service every Friday. *See Greenhill v. Clarke*, 944 F.3d 243, 247 (4th Cir. 2019).

Procedural History

On August 3, 2017, Firewalker-Fields filed an administrative grievance, requesting the right to participate in Jumuah and to be afforded similar religious

opportunities afforded to Christian inmates, and complaining that MRRJ "shows 'church' over the T.V." App-11. On August 15, Lilly responded to the grievance by stating that the CCTV programming was "non-denominational" and available only for inmates who "choose" to attend, and that inmates are allowed to have "religious material and believe as you choose." *Id*.

Firewalker-Fields appealed Lilly's response on August 17. App-12. He requested that MRRJ provide accommodations similar to those provided in VDOC facilities, by permitting inmate-led group prayer under the supervision of prison personnel. *Id*. On August 21, MRRJ repeated its response from August 15 to the initial grievance. *Id*.

On August 24, 2017, Firewalker-Fields filed a *pro se* complaint in the United States District Court for the Western District of Virginia pursuant to 28 U.S.C. § 1983 against Warden Jack Lee and the Middle River Regional Jail. App-7, 13. The complaint alleged that defendants violated his constitutional and statutory rights during his confinement by holding Christian faith classes and broadcasting Christian services that inmates are effectively forced to watch, while refusing to permit comparable Islamic classes and services and denying him the ability to practice Jumuah on Fridays. App-7-9, 13-19. Firewalker-Fields subsequently requested and

was granted a transfer to Sussex I State Prison, where he is currently serving his sentence.

The district court initially construed Firewalker-Fields's complaint as alleging claims under the Free Exercise Clause, the Equal Protection Clause, and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"). App-25-26. On September 24, 2018, the district court held that Firewalker-Fields's transfer mooted his RLUIPA claim, along with all constitutional claims for declaratory and injunctive relief, and granted defendants' motion to dismiss those claims. App-24-25. However, the court held that Firewalker-Fields had stated a potentially viable Free Exercise claim, noting his allegations that "Muslim inmates are not allowed to congregate to practice their faith, either physically or via television programming, on Fridays while confined in segregation and are told that they can only observe 'non- denominational' Christian programs on Sundays," and holding that the failure to offer "any accommodation" to Firewalker-Fields's sincere religious need to participate in group prayer on Fridays stated a claim for relief. App-25. The court also held that Firewalker-Fields had stated a claim under the Equal Protection Clause, noting his allegations "that the Christian inmates were allowed to participate in congregational prayer each Sunday and attend religious classes but that Muslim inmates were not," and acknowledging that "[n]on-denominational Christian church

services and classes are not pan-religious substitutes for non-Christians' religious exercise." App-27.

The district court ordered the parties to go to mediation and ordered the defendants to file a motion for summary judgment within 75 days. App-28. The court's order did not mention the possibility of discovery, and the Rules do not permit discovery in *pro se* prisoner suits without specific leave of court. *See* Fed. R. Civ. Pro. 26(a)(1)(B)(iv). After the mediation ordered by the court failed to produce a resolution, Firewalker-Fields filed a motion requesting discovery to take depositions, which MRRJ challenged as untimely. App-6 (Docket entries 69 and 72). The district court denied that motion without explanation at the end of its summary judgment order. App-74.

The district court granted defendants' motion for summary judgment on the remaining constitutional claims for damages. App-74.

The Free Exercise Claim

The court held that Firewalker-Fields's inability to participate in Jumuah and religious classes resulted from the combination of two policies: (1) MRRJ's "prohibition on inmate-led services," and (2) "its policy of offering programming only by approved outside volunteers—coupled with the lack of volunteers willing to lead an Islamic service or to otherwise donate Islamic materials (like the video

donated by the Mennonites).” App-65. In a footnote, the district court stated that “[b]ased on Plaintiffs’ requests for relief, it appears that an Islamic prayer service over television would not be sufficient to accommodate his faith” because Firewalker-Fields requested that services on Fridays be “‘held in the Gym or classrooms instead of on Television.’” App-59 n.3 (citing App-19). The court then analyzed Firewalker-Fields’s Free Exercise claim under the four factors outlined in *Turner*, as follows. App-65-69. The indented quotations below are the district court’s recitation of the *Turner* factors, drawn at App-63 from *Lovelace v. Lee*, 472 F.3d 174, 200 (4th Cir. 2006) (quoting *Turner*, 482 U.S. at 89-92), followed by the court’s application of each factor.

> (1) whether there is a “valid, rational connection” between the prison regulation or action and the interest asserted by the government, or whether this interest is “so remote as to render the policy arbitrary or irrational”;

The district court held that MRRJ’s policy of prohibiting inmate-led services and classes has a valid and rational connection to its interests in preventing the development of a “gang mentality” and in preventing “inmates from exercising undue influence over other inmates,” and that its policy of “relying entirely on donations for the provision of services is consistent with an interest in conserving prison resources.” App-65. The court also held that “[t]o the extent that Plaintiff’s complaint is that MRRJ provides a service for Christian inmates—allowing such

inmates to leave their housing areas during lock-in hours to attend—that policy, too, bears a rational relation to preserving prison resources and prison security" because "the overwhelming majority of inmates at the MRRJ are Christians" and prisons are not required "to provide the same services to smaller inmate populations as they provides [sic] for much larger groups under their care and supervision." App-66. The court expressed a concern about the potential "ripple effect" of other smaller religious groups requesting similar accommodations, App-66-67, but declined to address MRRJ's argument that for those reasons it should not be required to offer Muslim services or programming even if there were appropriate volunteers or free materials to facilitate them. App-65 n.8.

> (2) whether "alternative means of exercising the right … remain open to prison inmates," an inquiry that asks broadly whether inmates were deprived of all forms of religious exercise or whether they were able to participate in other observances of their faith;

The district court held that "although the Friday group prayer is important or even required in Firewalker-Fields's faith, the prison offered numerous other ways in which Firewalker-Fields could have observed his faith," including "nam[ing] an imam on his visitor list," keeping a prayer rug and a soft-cover Quran in his cell, and receiving a pork-free diet year-round and special meal times during Ramadan. App-67.

> (3) what impact the desired accommodation would have on security staff, inmates, and the allocation of prison resources;

The district court held that the third *Turner* factor "is more neutral than the first two, but still lightly favors Defendants" because of the security concerns discussed under the first factor, and because "locating and paying persons to run services or classes … would have a substantial impact on the resources and require additional staff to ensure security." App-67-68. The court also faulted Firewalker-Fields for failing to present more than a "scintilla of evidence to support his allegations that there is any benefit" to the Christian inmates "to going into these day rooms during lock-down hours over staying in one's housing area." App-68 n.10.

> (4) whether there exist any "obvious, easy alternatives" to the challenged regulation or action, which may suggest that it is "not reasonable, but is [instead] an exaggerated response to prison concerns."

The district court's entire analysis of the fourth *Turner* factor consisted of "[a]s to the fourth *Turner* factor—whether there is an obvious, easy alternative to the policies—one is not readily apparent and Firewalker-Fields has not suggested one." App-68.

The Establishment Clause Claim

Firewalker-Fields's opposition to summary judgment argued that defendants' practices at MRRJ also violate the Establishment Clause, and that the deferential

"*Turner / O'Lone* reasonable relationship standard does not govern Establishment Clause cases." App-55-56. The district court construed the complaint as stating an Establishment Clause claim, App-69, and—citing a recent Fifth Circuit case—held that "'logic demands'" that the *Turner* standard must be applied to Establishment Clause claims as well because of the inherent tension between Free Exercise and Establishment concerns in the prison setting. App-70 (quoting *Brown v. Collier*, 929 F.3d 218, 244 (5th Cir. 2019)). "Thus, because the Court concluded that the prison's policy of playing volunteer-provided Christian-themed materials during lock-down hours is reasonably related to a legitimate penological interest, Plaintiff's claim fails whether grounded in the Free Exercise Clause or the Establishment Clause." *Id.*

Firewalker-Fields filed a timely notice of appeal. App-76. This Court directed the appointment of counsel and asked that counsel address the Establishment Clause issue and any other matter.

SUMMARY OF ARGUMENT

Middle River Regional Jail broadcasts sectarian Christian worship services at the entire inmate population in the "day rooms" every Sunday during lockdown hours, and tells non-Christian inmates who do not wish to listen to those services that they are welcome to stay in their cells. At the same time, MRRJ refuses to consider allowing its Muslim inmates to celebrate the Friday prayers that are a

central tenet of their faith. Firewalker-Fields has put forward a triable claim that these policies violate his rights under both the Free Exercise and Establishment Clauses of the First Amendment. The district court's grant of summary judgment to defendants applied inappropriately deferential standards, and should be vacated.

In Free Exercise cases the *Turner* framework requires substantially more than just a valid, rational connection to a legitimate penological objective. The ultimate question is whether the challenged decision is *reasonable*, considering *inter alia* whether there are "obvious, easy alternatives" that might suggest it was, instead, "an exaggerated response to prison concerns." *Turner*, 482 U.S. at 89-92. MRRJ's position that it need not consider accommodating Firewalker-Fields's religious need to participate in Jumuah unless a local imam volunteers to lead that service ignores numerous obvious, easy alternatives implemented at other prisons in Virginia—including allowing supervised inmate-led prayer, or displaying a recorded Jumuah service obtained from the internet or from one of the VDOC facilities that broadcast them. A reasonable trier of fact also could find that MRRJ's concerns about security and resource constraints during lockdown hours are exaggerated, particularly when MRRJ accommodates Church services for its much larger Christian population during the same time period.

The district court should not have applied the *Turner* framework to the Establishment Clause claims at all. The Establishment Clause is a structural

limitation on government power, and the realities of prison life do not demand that prison officials receive any special leeway or deference when it comes to Establishment Clause concerns. Certainly MRRJ has an interest in accommodating the Free Exercise interests of its Christian prisoners. But that interest is bounded by the standards outlined in *Cutter*, where the Supreme Court held that accommodations granted under RLUIPA will not violate the Establishment Clause so long as those accommodations respond to a disability imposed by incarceration, do not impose burdens on other inmates, and are administered neutrally between different faiths. The balance (or, rather, imbalance) struck by MRRJ does not satisfy those standards. By broadcasting Christian services to all the day rooms during lockdown hours, MRRJ effectively forces non-Christian inmates to participate in Christian worship or retreat to their cells. And MRRJ has made clear that it is unwilling to facilitate, or even tolerate, comparable worship opportunities for its non-Christian inmates.

ARGUMENT

This Court reviews a district court's grant of summary judgment de novo, "applying the same legal standards as the district court, and viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *Hupp v. Cook*, 931 F.3d 307, 317 (4th Cir. 2019) (*quoting Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 208 (4th Cir. 2017)). Summary judgment is

appropriate only when the moving party demonstrates there is "no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Hupp*, 931 F.3d at 317 (quoting FED. R. CIV. P. 56(a)) (emphasis added). The district court erred in granting summary judgment to defendants on Firewalker-Fields's Free Exercise and Establishment Clause claims.

I. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON THE FREE EXERCISE CLAIM

The district court improperly granted summary judgment on Firewalker-Fields's Free Exercise claim regarding his ability to celebrate Jumuah, the traditional Friday prayers for Muslims. The Quran commands Muslims to participate in Jumuah. *See Surah Al-Jumu'ah* 62:9 ("Believers, when the call for Prayer is made on Friday, hasten to the remembrance of Allah and give up all trading. That is better for you, if you only knew."); *see also Jum'ah*, Encyclopaedia Britannica, https://www.britannica.com/topic/Jumah (last visited Dec. 8, 2020) ("The obligation for communal worship on Friday is enjoined upon Muslims in the Qurʾān (62:9)."). Firewalker-Fields similarly believes that the Islamic faith requires adherents to practice Jumuah services. App-9. MRRJ nonetheless denied Firewalker-Fields any opportunity to participate in Jumuah—ostensibly because it does not permit inmate-led activities for security reasons; because no local Islamic organization has donated Jumuah programming; and because Firewalker-Fields has not put a local imam on his visitation list.

While this Court has stated that lower courts should give appropriate deference to prison administrators' given rationales, courts should still not "rubber stamp or mechanically accept the judgments of prison administrators" *Lovelace*, 472 F.3d at 190. The prison "must address specifically" why the regulation is necessary to achieve its stated objectives. *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019).

In *Jehovah v. Clarke*, for example, this Court considered a Free Exercise challenge brought by a prisoner who asserted a religious need to consume wine as part of Christian communion services. Of course the prison's general concerns about inmate access to alcohol were *rational*, but this Court recognized that there were strong arguments that the facility could accommodate the inmate's rights without substantially harming its security interests. Instead of rigidly banning all prisoners in segregation from consuming wine, the prison could have considered making an individual exception for the plaintiff, applying the same security measures used for medication, or only banning prisoners with alcohol infractions or a history of alcoholism from consuming wine for communion purposes. *Id.* at 178-79. Ultimately this Court concluded that "[a] reasonable jury could find that at least one of these alternatives is so 'obvious' and 'easy' as to suggest that the ban is 'an exaggerated response,'" and reversed the district court's grant of summary judgment. *Jehovah*, 798 F.3d at 179.

The Court should follow the same course in this case. The district court improperly granted summary judgment despite the existence of genuine disputes of material facts regarding the prison's rationales and possible alternative accommodations. Even assuming that MRRJ has articulated justifications that are rationally related to legitimate objectives, a reasonable trier of fact could conclude that MRRJ's rigidity and failure to consider obvious and readily available alternatives is not reasonable under these circumstances.

A. "Easy" And "Obvious" Alternative Ways To Accommodate Firewalker-Fields Strongly Suggest That MRRJ's Position Is An Exaggerated, Unreasonable, And Even Irrational Response To Prison Conditions And Constraints.

The most obvious defect in MRRJ's justifications, and in the district court's summary judgment opinion, lies in their failure to consider obvious alternative ways to permit Firewalker-Fields to participate in Jumuah. MRRJ claims that allowing inmates to lead worship services would be unsafe, and that it cannot be expected to spend any money facilitating the free exercise of religion by its inmates. App-65. It points to the fact that a local Mennonite congregation recorded and donated its Sunday church services, and asserts that since no one has offered to donate comparable resources to facilitate Muslim participation in Jumuah there is nothing it can do for Firewalker-Fields. *Id.* These justifications ignore alternatives that, in 2020, a reasonable jury certainly could consider "easy" and "obvious" under *Turner*'s fourth prong. Indeed, in this case some of those alternatives are so obvious

that MRRJ's position lacks even a rational connection to legitimate penological objectives under *Turner*'s first prong.

As discussed below (*infra* at 25), MRRJ's view that Islam somehow fosters a "gang mentality" is inappropriate, and its security concerns with permitting supervised inmate-led prayer are exaggerated and inconsistent with modern penological practices. But even if supervised inmate-led prayer is not an option, the easy and obvious alternative—illustrated by the Christian services that MRRJ displays every Sunday—would be to display pre-recorded Jumuah services to Muslim inmates.

A quick internet search reveals countless free recordings of Jumuah services available online.[3] Mosques around the country and world livestream their weekly Jumuah prayer.[4] And this Court's cases recognize that prisons within the VDOC system broadcast Jumuah services on their CCTV systems. *See Greenhill*, 944 F.3d at 247 (explaining that Red Onion State Prison broadcasts weekly Jumuah services through a closed-circuit television system and provides in-person Jumuah

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[3] *See, e.g.,* East London Mosque & London Muslim Centre, *Jumu'ah Khutbah | English | Never Lose Hope in the Mercy of Allah | 18 August 2017*, YouTube (Aug. 18, 2017), https://www.youtube.com/watch?v=T5q7gPC7KZ8 (last visited Dec. 8, 2020).

[4] *See, e.g.*, *Jumuah Stream*, MASJID MUHAMMAD, https://thenationsmosque.org/Jumuah-stream/ (last visited Dec. 8, 2020); *Lectures Live*, Atlanta Maskid of Al-Islam, https://www.atlantamasjid.com/Jumuah-live (last visited Oct. 18, 2020); *Live Streams-ICA*, Islamic Center of America, http://www.icofa.com/live-stream/ (last visited Dec. 8, 2020).

services). The ready availability of recorded Jumuah services, at no or nominal cost, should be an appropriate subject of judicial notice. MRRJ has proactively sought out religious programming in the past from its local "re-entry" councils, demonstrating that its donative policy does not require that religious programming arrive on the prison's front porch unsolicited. App-30, 60. If (as its formal policies suggest) MRRJ would have been willing to display a Jumuah recording if one had been donated by a local mosque, then surely downloading or livestreaming a free Jumuah service from the internet, or requesting such materials from VDOC facilities, would be an "obvious" and "easy" alternative.

In its search for a volunteer imam, MRRJ did nothing more than attempt a few phone calls to the local mosque and reach out to re-entry councils with no Muslim representatives. App-30. Surely in 2020 there also are obvious alternatives to giving up when someone does not answer the phone. The Islamic Association of the Shenandoah Valley in Harrisonburg has both a phone and an email contact, for example. *See* https://iasv.org (last visited Dec. 8, 2020).

MRRJ cannot, therefore, actually justify its refusal to provide Jumuah programming by reference to resource concerns or a policy against spending money or soliciting content. MRRJ's true policy appears to be that they will accept free religious programming *only if it is spontaneously donated by a local entity*. A limitation of that nature does not just ignore easy and obvious alternatives; it serves

no comprehensible interest at all. And the credibility of these resource concerns is further undermined by MRRJ's backup (and perhaps true) position—that it would refuse to offer Jumuah services even if the necessary resources were donated, because it sees no need to accommodate its small Muslim population and worries that doing so will lead to comparable demands from other religious groups. App-38-39, 65 n.8.

In *Greenhill v. Clarke*, the plaintiff challenged the VDOC's refusal to provide him with some means of celebrating Jumuah as a consequence of his refusal to participate in the prison's Step-Down Program for rehabilitating inmates and encouraging good behavior. *Greenhill*, 944 F.3d at 250-54. This Court vacated and reversed the District Court's grant of summary judgment. While this Court focused its analysis on how the prison and the district court wrongly treated the plaintiff's access to religious services as a privilege instead of as a right, *id.* at 253, it also wondered why the plaintiff could not "be provided access to a television specifically for Jumuah services." *Id.* at 251. A reasonable trier of fact would want an answer to that question here, as well.

MRRJ asserts that its closed-circuit television system only permits it to display one program at a time, to the entire prison facility. It is not clear why that would justify a refusal to broadcast Jumuah prayers on Friday when MRRJ is willing to use the same system for a Christian worship service on Sunday.

Regardless, constitutional adjudication should not proceed as if video technology was stuck in the 1970s. This Court can take judicial notice of the reality that it is now trivially simple to reproduce and display pre-recorded video content on all manner of devices. Simply accepting MRRJ's assertion that there is no way for it to deliver video programming to a small number of inmates, on summary judgment and without meaningful explanation, carries deference beyond the breaking point.

The district court concluded that Firewalker-Fields would not be interested in viewing a pre-recorded Jumuah service, given a request in one of his pleadings that religious services be "'held in the Gym or classrooms instead of on Television.'" App-59 n.3 (citing App-19). That was not an appropriate basis for summary judgment. Of course Firewalker-Fields's first-preference is a Jumuah service conducted live and in-person with other inmates. But that preference does not support a finding that he would not, at a minimum, desire a pre-recorded service like the ones provided to Christian inmates on Sundays. Firewalker-Fields has complained throughout these proceedings that MRRJ provides religious opportunities to Christian inmates without offering comparable opportunities to Muslims. App-8, 11, 14. An appropriately liberal reading of his *pro se* pleadings should not construe his request for live services as an implied waiver of the obvious second-best remedy that would actually parallel what the Christian inmates receive. *See Smith v. Smith*, 589 F.3d 736, 738 (4th Cir. 2009) ("[l]iberal

construction of the pleadings is particularly appropriate where, as here, there is a *pro se* complaint raising civil rights issues"); *Greenhill*, 944 F.3d at 247 ("Although he would prefer to attend in-person services, Greenhill concedes that watching video broadcasts of Jum'ah would satisfy the requirements of his religious belief.").

That is particularly true when this question was never genuinely posed to Firewalker-Fields on the record. In most Free Exercise or RLUIPA cases the plaintiff's willingness to consider (or not consider) potentially appropriate alternatives would be explored in contention interrogatories and depositions. Because there was no discovery in this case, for reasons that were not Firewalker-Fields's fault,[5] he was never asked the questions that would genuinely support a conclusion that he waived what would otherwise be an obvious and triable issue. Nor can any waiver be inferred from the conduct of the briefing. MRRJ's memorandum in support of its motion for summary judgment acknowledged that Firewalker-Fields "complained that Christians had access to a church service and a bible class, but there were no services or classes for Muslims," and argued that

[5] As noted previously, the Federal Rules do not permit discovery by *pro se* inmates without specific leave of court, and the district court's order denying defendants' motion to dismiss in this case ordered the parties to mediation and set an aggressive summary judgment schedule. App-28. It was entirely reasonable for Firewalker-Fields to assume that the court did not contemplate discovery until after the mediation it had ordered, particularly when defendants took no steps to pursue discovery themselves.

"[n]o imam or other Islamic leader has volunteered to provide Muslim programming—in the form of live services, video, classes, or otherwise—despite MRRJ's efforts to facilitate outreach." App-41.1-41.2. Defendants never argued that Firewalker-Fields had waived or renounced any desire for videotaped services comparable to what the Christian inmates were receiving, so Firewalker-Fields was never alerted to any need to correct such a misunderstanding. App-41.1. "A district court may resolve a motion for summary judgment on grounds not raised by a party, but it must first provide notice and a reasonable time to respond." *Jehovah*, 798 F.3d at 177. The district court provided no such opportunity in this case. And Firewalker-Fields represents to appellate counsel that if he had been asked he would have expressed a desire for videotaped services as an alternative to no services.

Here, as in *Jehovah v. Clarke*, there clearly are alternatives that MRRJ could have pursued to facilitate Firewalker-Fields's participation in Jumuah, even accepting MRRJ's overstated security concerns about supervised inmate-led prayer. "A reasonable jury could find that at least one of these alternatives is so 'obvious' and 'easy' as to suggest that the ban is 'an exaggerated response.'" *Jehovah*, 798 F.3d at 179. Indeed, a reasonable jury could conclude that MRRJ's stated justifications make no sense and fail even the first *Turner* prong.

B. A Reasonable Trier Of Fact Could Conclude That Permitting Firewalker-Fields To Participate In Jumuah Would Minimally Impact Security Staff, Inmates, And The Allocation Of Prison Resources.

The district court also erred in concluding that no dispute of material fact existed regarding the impact of accommodating Jumuah services on prison officials, other inmates, and resources under the third *Turner* prong.

MRRJ asserts that it cannot permit any inmate-led programming because of concerns that it may foster a "gang mentality." Of course this concern would be irrelevant if MRRJ accommodated Firewalker-Fields and its other Muslim inmates by displaying recorded Jumuah services led by persons outside the prison, as MRRJ does for its Christian inmates. MRRJ's unwillingness to consider the important differences between a street gang meeting and communal prayer mandated by one of the world's great religions also reflects an unfortunate failure to appreciate the constitutional importance of religious liberty. *See Greenhill*, 944 F.3d at 250-52 (explaining that religious freedom is a right, not a privilege); *cf. Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1731-32 (2018) (holding that disrespect for claimant's religious views by the Colorado Civil Rights Commission violated the Free Exercise Clause).

The mere assertion of security concerns also cannot be used as a shield to silence all constitutional challenges from prisoners. This Court can take judicial notice of the fact that VDOC policy allows for staff-supervised but inmate-led

services,[6] as does the Federal Bureau of Prisons.[7] Appropriate deference to penological judgment has to have some limits, particularly when other expert prison administrators—including in the VDOC facilities that regularly exchange prisoners with MRRJ—do not see a security need for such a blanket prohibition. In *Jehovah*, for example, this Court stressed the need for prison officials to consider making exceptions to their blanket policy against alcohol consumption in order to permit the plaintiff to consume a small amount of wine with communion. 798 F.3d at 178-79. This Court also has recognized that when prisons apply their policies rigidly, restrictions can lose "whatever 'valid, rational connection' to the government's stated interest that might have existed at the time it was adopted." *Wall v. Wade*, 741 F.3d 492, 500 (4th Cir. 2014).

In addition, both this Court and the Supreme Court have recognized that the practical lesson of twenty years of experience with the Religious Freedom Restoration Act (RFRA) and RLUIPA has been that security concerns about accommodating religious exercise by inmates are frequently overstated, and indeed

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[6] *See* Va. Dep't of Corrs., Offender Management and Programs: Operating Procedure 841.3 11-12 (2020), available at https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-841-3.pdf ("Offenders may be authorized by the facility Chaplain or other facility staff to lead religious activities but such offenders have no authority over any other offenders.") (last visited Dec. 8, 2020).

[7] Fed. Bureau of Prisons, Program Statement: Religious Beliefs and Practices 5 (2004), available at https://www.bop.gov/policy/progstat/5360_009.pdf (last visited Dec. 8, 2020)

often counterproductive. In *Greenhill*, this Court quoted a group of former corrections officials appearing as amici curiae, who wrote that "[r]easonably accommodating individual religious practice can have a demonstrably positive effect on prisoner adjustment and rehabilitation and, as a result, on the prison security environment as a whole," and that "restrictions that unreasonably impede individual religious practice under the banner of prison security and rehabilitation are likely to have the opposite effect." 944 F.3d at 254. This Court admonished VDOC that it "might find that providing robust support for inmates' genuine religious exercise would actually enhance prison security and inmate rehabilitation." *Id.* In *Cutter*, the Supreme Court similarly doubted that compliance with RLUIPA would harm prison security, pointing to a representation by the United States that it had successfully complied with similar requirements in the federal Bureau of Prisons under RFRA for more than a decade "without compromising prison security, public safety, or the constitutional rights of other prisoners. 544 U.S. at 725-26 (citation omitted). Of course, RFRA and RLUIPA impose more stringent *legal* standards than the Free Exercise Clause in this setting, but there is no reason why the application of the *Turner* standard should ignore the *factual* lessons of the past twenty years.

Prisons successfully asserting security justifications in other cases also faced much more concrete dangers. In *O'Lone v. Estate of Shabazz*, prison inmates

classified as gang minimum (intermediate) security challenged prison policies preventing them from celebrating Jumuah services held in the main building. 482 U.S. 342, 344-45 (1987). The prison adopted a policy requiring that gang minimum inmates work jobs outside of the main building to address overcrowding concerns. *Id.* at 345. It also eliminated an accommodation allowing Muslim gang minimum inmates to return to the main building for Jumuah services because of "significant problems" that resulted. *Id.* at 346. Because only one guard supervised each inmate work detail, the entire detail had to return to the main gate, "a high security risk area," when one prisoner came back for services. *Id.* Also, inmates had to be logged in and searched, delaying traffic. *Id.* The Supreme Court held that the prison demonstrated that its regulations were related to legitimate concerns over institutional order and safety caused by overcrowding and congestion in high risk areas. *Id.* at 350-51. In addition, the prison had a legitimate interest in fostering prisoners' rehabilitation by simulating realistic working conditions. *Id.* at 351. Here, by contrast, MRRJ made only generalized assertions about security and costs. A reasonable jury could disagree with MRRJ's argument that its policies were reasonably related to these concerns.

MRRJ also asserts that it cannot accommodate worship by Muslim inmates on Fridays at noon because MRRJ is on lockdown from 11 a.m. to 1:30 p.m., and all prison officers "are occupied assisting in count, feeding, cleaning up, or taking

their mandatory breaks." App-49. But the obvious question, unanswered by the present record, is why MRRJ can assign personnel (if any are necessary) to manage Christian worship during exactly the same time window on Sundays, but cannot spare anyone to coordinate what they insist would necessarily be a far smaller observance of Jumuah on Fridays.

MRRJ also expressed a concern that its Muslim population is small, and that accommodating Jumuah services on Friday could produce an unmanageable "ripple effect" of comparable demands from other small religious groups. The district court reasoned that the First and Fourteenth Amendments do not require that "every religious sect or group within a prison—however few in number—must have identical facilities or personnel." App-66 (quoting *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972)). But Firewalker-Fields has not asked that MRRJ treat Islam exactly the same way it treats Christianity—by, for example, broadcasting a Jumuah service to the entire prison on Fridays. His first preference is a small prayer service with the other Muslim inmates. Barring that, he would appreciate an opportunity to view a recorded service in his cell or some other appropriate place, as contemplated in *Greenhill*. *See* 944 F.3d at 251 (suggesting that the inmate could be provided a television to view Jumuah services). Considering the modesty of that request and the vast technological advances since the Supreme Court's 1972 decision in *Cruz v. Beto*, a reasonable trier of fact could find these cost concerns

unreasonable and exaggerated. Indeed, the overwhelmingly Christian identity of the inmate population and the small number of Muslim inmates at MRRJ suggest that both the security dangers and the financial costs of accommodating participation in Jumuah are likely to be small.

The district court's reliance on the footnote in *Cruz v. Beto* also distorts that case's message. The Supreme Court reversed the dismissal of the complaint in *Cruz*, explaining that if the prison denied the plaintiff "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts," then it violated the Free Exercise Clause. *Cruz*, 405 U.S. at 322. In the same footnote the district court cited, the Court explained that "reasonable opportunities must be afforded to *all* prisoners to exercise the religious freedom guaranteed by the First and Fourteenth Amendment without fear of penalty." *Id.* at n.2 (emphasis added). In context the Supreme Court clearly was not saying that prisons may ignore the Free Exercise rights of small religious populations due to slippery slope concerns.

C. A Reasonable Trier Of Fact Could Conclude That Firewalker-Fields Lacks Sufficient Alternative Means of Practicing His Religion.

Finally, the district court also erred in holding that there is no material dispute of fact concerning whether Firewalker-Fields has sufficient alternative means of practicing his religion. In *O'Lone*, the Supreme Court looked at whether

the inmates "retain[ed] the ability to participate in other Muslim religious ceremonies" and if they were "deprived of all forms of religious exercise." 482 U.S. at 352. In holding that the second factor weighed in favor of the prison, the Court noted that the prison allowed inmates to congregate for prayer or discussion at nearly all times except for during work hours, granted the "state-provided imam . . . free access to the prison," provided non-pork meals, and offered special accommodations for Ramadan. *Id.* The district court described *O'Lone* as "finding that accommodations for Ramadan and a pork-free diet were sufficient prison accommodations where the ability to participate in Jumuah was restricted." App-67. But the Supreme Court also emphasized in *O'Lone* that the prison provided significant opportunities for congregate prayer, including allowing inmates to meet at nearly all times outside work hours for religious purposes and allowing the state-provided imam "free access to the prison." 482 U.S. at 352.

MRRJ does not offer remotely comparable alternatives. Instead of providing an imam, the prison allows inmates to list faith leaders on their visitation lists. App-49. For prisoners (like Firewalker-Fields) with no connections to Staunton's Muslim community and no access to the internet, that alternative is meaningless. Furthermore, MRRJ identified only one mosque in the local area. App-43. If the imam volunteered to meet with Firewalker-Fields at the prison, then he would be unable to lead the Jumuah service for his own congregants.

MRRJ responds that it permits inmates to keep prayer rugs and Qurans in their cells. App-49. Again, however, the Supreme Court's reference to those accommodations in *O'Lone* was in the context of a prison environment that also provided significant opportunities for congregate prayer. While a video service can satisfy the communal prayer requirements for Jumuah, purely solitary prayer does not. *See Greenhill*, 944 F.3d at 247; App-26 (Plaintiff "feels compelled by his religious beliefs to participate in group prayer service and group religious classes with other Muslims each Friday."); *see also Jum'ah: The Friday Prayer,* The Pluralism Project, https://pluralism.org/jum%E2%80%99ah-the-friday-prayer (last visited Dec. 8, 2020) (noting "the central act of community prayer" for Muslims). Thus, the district court improperly concluded at the summary judgment stage that MRRJ provided true alternatives for Muslim inmates who feel compelled to fulfill their religious duty to participate in Jumuah communal prayers.

II. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT ON THE ESTABLISHMENT CLAUSE CLAIM UNDER THE DEFERENTIAL *TURNER* STANDARD

The district court also erred by applying the four-factor *Turner* test to Firewalker-Fields's claims under the Establishment Clause. The Establishment Clause is a structural guarantee that raises very different concerns than the Free Exercise context that produced the *Turner* test. The correct Establishment Clause analysis in the prison context is explained in *Cutter v. Wilkinson*. Under the

standards the Supreme Court outlined in *Cutter*, Firewalker-Fields has presented a triable Establishment Clause claim.

A. Establishment Clause Claims In The Prison Context Are Governed By The Considerations Outlined In *Cutter v. Wilkinson*, Not The *Turner / O'Lone* Standard

The Supreme Court has never applied the *Turner* test to an Establishment Clause claim. When confronted recently with an Establishment Clause challenge to RLUIPA, the Court never mentioned *Turner.* Instead, the Court in *Cutter* articulated three conditions that prisons must meet to ensure that religious accommodations to some prisoners do not violate the Establishment Clause rights of others. *Cutter* provides the proper framework for evaluating MRRJ's practices in this case.

In *Cutter*, Ohio argued that RLUIPA was facially unconstitutional because it impermissibly favored religion over irreligion, created coercive incentives for inmates to "get religion" in order to obtain accommodations denied to secular inmates, and imposed impermissible burdens on both staff and other inmates. *See* Br. for Respondents in No. 03-9877, 2005 WL 363713, at *11-*19. In a unanimous opinion, the Supreme Court rejected those arguments and held that it would be possible for prisons to implement RLUIPA accommodations without violating the Establishment Clause. The Court held that accommodations granted under RLUIPA will not violate the Establishment Clause so long as they (1) remove government-created burdens on private religious exercise, (2) appropriately take into account

burdens the accommodations impose on nonbeneficiaries, and (3) are administered neutrally among different faiths. 544 U.S. at 724. The Court's opinion indicates that all three conditions are essential to avoiding Establishment Clause violations the Court had recognized in prior cases. *See id.* at 720 (citing *Estate of Thornton v. Caldor, Inc*., 472 U.S. 703 (1985), and *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687 (1994)).

Of course the first condition will usually be satisfied in prison cases, since most religious accommodations in the prison setting ameliorate a government-created burden resulting from incarceration.

The second condition outlined in *Cutter*—that the Establishment Clause requires religious exemptions to take into account burdens imposed on nonbeneficiaries—reflects concerns about both sectarian favoritism and coercion of non-believers. The *Cutter* Court referenced its prior decision in *Caldor*, which had invalidated a Connecticut law that forbade employers from firing an employee for refusing to work on their Sabbath. *Caldor* held that because the law "unyielding[ly] weigh[ted]" the interests of Sabbatarians "over all other interests," and "takes no account of the convenience or interests of the employer or those of other employees who do not observe a Sabbath," its primary effect was to advance a particular religious practice to the detriment of non-participants. *Caldor*, 472 U.S. at 709-10.

The third condition is the familiar doctrine that the Establishment Clause requires government neutrality in matters of religion. As the Supreme Court has explained, "[t]he 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). The *Cutter* Court emphasized that RLUIPA could be applied in a manner that "confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment." 544 U.S. at 724.

The Supreme Court's unanimous opinion in *Cutter* mentioned *Turner* only once, in a footnote discussing the application of the *Turner* test to a secular inmate raising freedom of expression and association claims. *See* 544 U.S. at 723 n. 11. If the Court had believed that *Turner* applies to Establishment Clause claims in the prison context it surely would have said so, since the deference embedded in *Turner* would have made it easier to reject Ohio's claim that accommodations required by RLUIPA will violate the Establishment Clause.

The federal circuit courts that have considered Establishment Clause claims in the prison context, before and after *Cutter*, have not applied the *Turner* test. *See Maye v. Klee*, 915 F.3d 1076, 1085 (6th Cir. 2019) (declining to decide whether to apply *Turner* or analyze under strict scrutiny because the violation was clear under either standard); *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 426 (8th Cir. 2007) (explaining that the

Eighth Circuit has "consistently analyzed Establishment claims without mentioning the *Turner* standard, even when applying that standard to Free Exercise claims in the same case"); *Kerr v. Farrey*, 95 F.3d 472, 480 (7th Cir. 1996) (applying *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and reversing after district court applied *Turner* and found no Establishment Clause violation). The Fifth Circuit's opinion in *Brown* is the only published circuit court opinion purporting to apply the *Turner* standard, yet Judge Owen's discussion of the Establishment Clause failed to garner majority support and is therefore not Fifth Circuit precedent. *See* 929 F.3d at 254 (King, J., concurring in part and concurring in the judgment) ("I do not join part VI because I would conclude that the Texas Department of Criminal Justice's housing policy violates the Establishment Clause"); *id.* at 59 (Dennis, J., dissenting) (explaining that because he believed the policy violated RLUIPA, he "would not reach the Establishment Clause" issue). If this Court were to endorse the district court's analysis, it therefore would be the first Circuit to extend *Turner* to Establishment Clause claims.

The dominant case law rejects the district court's approach for very good reasons. Although complementary, the Religion Clauses have different objectives**.** The Supreme Court has emphasized that *Turner* applies "only to rights that are inconsistent with proper incarceration," and "need necessarily be compromised for the sake of proper prison administration." *Johnson v. California*, 543 U.S. 499, 510

(2005) (internal citations and quotations omitted) (refusing to apply the *Turner* standard to a racial classification case). Because the constitutional definition of religion is broad and largely left to the individual, almost any prison practice or policy is potentially subject to Free Exercise challenge—including practices and policies essential to sound prison administration. *See United States v. Ballard*, 322 U.S. 78, 87 (1944). The Supreme Court has recognized that some deference to prison officials' judgment is therefore required.

By contrast, the Establishment Clause is a "specific prohibition on forms of state intervention in religious affairs," *Lee v. Weisman*, 505 U.S. 577, 591 (1992), which is concerned with state action coercing religious exercise or advancing, endorsing, or supporting religion. The Establishment Clause is a structural restraint on governmental power, not an individual right the exercise of which may be inconsistent with incarceration. The Supreme Court has never reviewed Establishment Clause claims pursuant to any form of "reasonableness" test outside the unique context of foreign affairs. *See Trump v. Hawaii*, 138 S.Ct. 2392, 2419 (2018); *id.* at 2441 (Sotomayor, J., dissenting). And while many other constitutional rights must "necessarily be compromised for the sake of proper prison administration," *Johnson*, 543 U.S. at 510, it is much more difficult to imagine circumstances in which prison officials have any legitimate penological need to do things that, outside prison, would violate the Establishment Clause. The unique

deference to penological judgment embedded in the *Turner / O'Lone* standard therefore is both unnecessary and inappropriate. *See, e.g., Williams v. Lara*, 52 S.W.3d 171, 187–88 (Tex. 2001) (in the Establishment Clause "context, the unique circumstances of imprisonment are of lesser relevance, and the risk that a court will improperly second-guess a prison official's judgment concerning prison administration or security is less of a concern"). Nor is there any no sound reason to allow prison officials to impose their own interpretations of the proper relationship between religion and state on inmates. In the prison setting—where the power of the state over its citizens is at its apex—the deferential *Turner* standard does not provide an appropriate constraint on government authorities seeking to advance religion.

The only legitimate reason for a prison to get anywhere near a violation of the Establishment Clause is a desire by prison officials to accommodate the Free Exercise rights of some prisoners. In an institutional setting, accommodations granted to one group of prisoners may look like an improper Establishment to others. The Supreme Court specifically addressed that problem in *Cutter*, and set out three conditions that religious accommodations in the prison context must satisfy in order to steer clear of Establishment Clause concerns. Those conditions, and not the deferential *Turner* test, govern this case.

B. Firewalker-Fields Has Put Forward A Triable Claim Under The Establishment Clause Framework Established In *Cutter*

MRRJ violates two of these basic tenets of Establishment Clause jurisprudence by playing sectarian Christian services in the day rooms on Sundays, while denying Muslim inmates the ability to participate in Jumuah on Fridays. It imposes burdens on non-Christian inmates, coercing them to be exposed to Christian proselytization, and it singles out Christian inmates for special treatment that is unavailable to inmates of other faiths without adequate justification. At a minimum, the record indicates important unanswered questions that should have precluded summary judgment.

1. MRRJ imposes burdens on nonbeneficiaries by playing Christian CCTV programming in the "day rooms" during lockdown hours on Sundays

The Mennonite-donated Christian programming that MRRJ plays over the CCTV system in the "day rooms" during lockdown hours each Sunday imposes impermissible burdens on non-beneficiaries. This system broadcasts the religious services simultaneously to every television in MRRJ. App-35. Those TVs are located in the "day rooms" attached to each housing unit, and are played during lockdown hours. *Id*. Each prisoner is confined during lockdown hours to their housing unit, which includes their individual cells and the "day room" common space. *Id*. By broadcasting Christian services, MRRJ effectively reserves the "day rooms" for the exclusive use of the Christian inmates. MRRJ's position is that if a

prisoner does not want to participate in the religious programming they can return to—meaning, *confine* themselves to—their cells. App-12, 35.

As a practical matter, dedicating the day rooms to Christian worship forces the non-Christian inmates to a highly coercive choice: either remain in their cells and forfeit a precious opportunity to be out of that highly confined space, or subject themselves to Christian proselytization and endure the implication that they support and affirm the Mennonite message being broadcast in the day room. As Firewalker-Fields explained in his verified complaint, this arrangement effectively "force[s] people in the Jail to be Christian because if one watches all have to watch." App-8. The district court held that there was insufficient evidence in the record to conclude whether there is any benefit to being in the "day rooms" during lockdown hours. App-68 n.10. But involuntary confinement is the central defining reality of prison life. Obviously there is at least a triable issue concerning whether inmates would prefer to have the *choice* to be out of their individual cells in a shared social space.

If non-Christian inmates are unwilling to confine themselves to their own cells, they are in effect coerced to participate in a Christian worship service. The Supreme Court has repeatedly recognized that the Establishment Clause prohibits states from coercing citizens to participate in religion. "Neither a state nor the Federal Government can . . . force nor influence a person to go to or to remain away

from church against his will or force him to profess a belief or disbelief in any religion." *Everson v. Bd. Of Educ.*, 330 U.S. 1, 15-16 (1947).

In *Lee v. Weisman*, 505 U.S. 577 (1992), for example, the Court held that school prayer at a high school graduation ceremony constituted undue government coercion of religion even though students were not required to attend the graduation ceremony. The Supreme Court was concerned that the inherent social pressure on a person of high school age to, "at least, maintain respectful silence" could put "a reasonable dissenter" in the position of "believ[ing] that the group exercise signified her own participation or approval of it" and "would place objectors in the dilemma of participating, with all that implies, or protesting." 505 U.S. at 593. The social pressure brought to bear on a dissenting high school student pales in comparison to the consequences that Firewalker-Fields would likely face if he disrupted a prison-sponsored Christian worship service to make his dissent and non-participation clear. A prison system is the most coercive possible setting, and prisoners (even adult prisoners) should be entitled to at least as much protection from state coercion to participate in religion as graduating high school students.

Nor is it a sufficient answer to say that Firewalker-Fields could remain silent in the day room and trust that his silence would not be mistaken for assent or participation in the Christian service. No one would expect Christian inmates to sit quietly and politely through a Muslim service they considered blasphemous, or be

surprised if they felt a need to distance themselves from the content of such a service. Notably, Lilly never contended that Firewalker-Fields could remain in the day room while distancing himself in some manner from the Mennonite message; his advice was, simply, that if Firewalker-Fields did not want to listen to the Christian service he should return to his cell. App-35.

At a minimum, common sense and the record of this case indicate that the proper resolution of these coercion questions would depend on factual context that the district court, in dismissing the need for a trial, deemed irrelevant. How large are the day rooms? How loud is the Mennonite service? Are inmates afforded some realistic way to distance themselves from endorsement of the service while remaining in the day room? Firewalker-Fields testified that the circumstances put him to a coercive choice. Program Director Lilly's declaration provides no facts to support a conclusion that those concerns are misplaced for any reason. At a minimum, a trial is warranted to understand the full factual context.

2. MRRJ'S Policy Prefers Christians To Muslims In Violation Of The Establishment Clause

Since the Founding, this Nation's conception of religious liberty has always required, at a minimum, the equal treatment of all faiths without discrimination or preference. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments* ¶ 4 (1785) (criticizing a denominational preference for Christianity because it "violate[d] that equality that ought to be the basis of every law."). This

directive of neutrality and equality has remained a consistent and guiding feature of Establishment Clause jurisprudence. *See Everson*, 330 U.S. at 15; *Kiryas Joel*, 512 U.S. at 690; *Larson*, 456 U.S. at 244 ("The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another."). Although there is "'room for play in the joints' between the Free Exercise and Establishment Clauses, allowing the government to accommodate religion beyond free exercise requirements without offending the Establishment Clause," the *Cutter* Court stressed that permissive accommodations in the prison setting still must be "administered neutrally among different faiths" and may not bestow "privileged status on any particular religious sect." 544 U.S. at 709, 713 (quoting *Locke v. Davey*, 540 U.S. 712, 718 (2004)).

MRRJ's practice of broadcasting Mennonite services, while denying Muslim inmates the ability to participate in Jumuah, violates this neutrality principle and confers privileged status on Christian inmates. The Sunday Christian church services are the only group worship service that MRRJ makes available to the inmate population. MRRJ asserts that these "church services" are "non-denominational," but it is also undisputed that "the services have Christian themes." App-35. The Mennonites are a denomination of Christianity, worship Jesus Christ as their savior, and "use the Bible as their central text." *Id.* And the church services are played on Sunday, the weekly holy day for Christians.

MRRJ also provides this worship programming for Christian inmates during lockdown hours, when the entire inmate population is confined to their housing units, while excluding other faiths from accessing analogous programming during this time. App-36. MRRJ's willingness to accommodate a very substantial Christian worship assembly in the day rooms every Sunday during lockdown, paired with its insistence that practical and security concerns make it impossible to entertain the possibility of non-Christian services during the same period, appears to violate basic neutrality principles and to send an unmistakable message favoring Christianity.

The Middle River Regional Jail Inmate Handbook ("Handbook"), which is referenced in a filing the district court treated as a supplement to the complaint (App-14, 57 n.2) and publicly available on MRRJ's web site,[8] confirms this favored treatment of Christianity. Under the heading "Religious Services," the Handbook states that "[c]hurch services will be broadcast over the television on each pod every Sunday at posted times." Handbook at 6. The Handbook's reference to "church," universally recognized to connotate a Christian place of worship, stands out markedly from the other regulations, which do not reference any specific religion. The Handbook also does not contemplate other, comparable religious programming. "[C]hurch services" will be played on the Christian Sabbath, but there is no provision for Jewish inmates who observe Shabbat from Friday evening to Saturday evening,

[8] Available at www.middleriverregionaljail.org (last visited Dec. 8, 2020).

and Muslim inmates like Mr. Firewalker-Fields who are required to practice Jumuah every Friday afternoon. And while the Handbook provides procedures to request religious diets, outside spiritual advisors, and prayer rugs, *see* Handbook at 6, it offers no analogous mechanism to request non-Christian worship services akin to the Sunday church service. The Handbook therefore suggests a denominational preference on its face.

3. MRRJ Has Offered No Sufficient Justification For Its Preferential Treatment Of Christian Inmates Or The Burdens It Imposes On Non-Christian Inmates

MRRJ justifies this coercion and differential treatment of Christian and non-Christian inmates by pointing to a supposed technological limitation that any programming displayed in the facility has to be displayed everywhere, to its policy that all programming must be volunteer-led or donated, and to the fact that a large majority of inmates identify as Christian. As explained above in connection with the Free Exercise issues, none of these justifications are persuasive on the current record even under the deferential *Turner* standard.

Under the Establishment Clause, where *Turner* deference is not appropriate, MRRJ has offered no defensible justification for putting Muslim inmates in a position where they must confine themselves to their own cells or be exposed to Christian proselytizing, or for privileging Christian worship in such a formal and public way while treating the demands of Firewalker-Fields's faith as dispensable.

It also is far from clear that a state may plead a willingness to accept sectarian donations, but an unwillingness to spend even a small amount of money itself, as an excuse for conspicuously non-neutral treatment of different faiths in an Establishment Clause context. In cases involving donated monuments, for example, the Supreme Court carefully considers whether a reasonable observer would understand the display as an endorsement of one religion; it does not cease its analysis with the fact that someone chose to donate that monument, and no one donated a different one. *See, e.g., Van Orden v. Perry*, 545 U.S. 677 (2005); *American Legion v. American Humanist Assn.*, 139 S. Ct. 2067 (2019). And in the RFRA and RLUIPA contexts, the Supreme Court and Congress have made clear that the government may be required to spend money to achieve appropriate accommodations. *See, e.g., Burwell v. Hobby Lobby*, 573 U.S. 682, 729-30 (2014); 42 U.S.C. § 2000cc–3(c) ("[T]his chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.")

CONCLUSION

The district court's grant of summary judgment should be reversed, and the case remanded for trial.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

1. This brief has been prepared in a proportionally spaced typeface using Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents; table of citations; certificate of compliance and the certificate of service, this Opening Brief of Appellant contains 10,461 words.

3. I understand that a material misrepresentation can result in the court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic copy of the word or line printout.

Dated: December 9, 2020

/s/ J. Scott Ballenger
J. Scott Ballenger