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

REPLY BRIEF OF APPELLANT

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INTRODUCTION

A reasonable trier of fact could conclude on this record that Appellee Middle River Regional Jail ("MRRJ") broadcasts a sectarian Christian worship service at all inmates every Sunday and that the circumstances coerce non-Christian inmates to participate. A trier of fact also could conclude that MRRJ's stated justifications for refusing to accommodate the similar religious needs of Muslim inmates are not reasonable, but instead are "an exaggerated response to prison concerns." *Turner v. Safley*, 482 U.S. 78, 90 (1987). MRRJ's brief wrongly blames Appellant David Nighthorse Firewalker-Fields ("Firewalker-Fields") for MRRJ's own failure to consider "easy" and "obvious" alternatives that would allow MRRJ to respect and accommodate the Free Exercise needs of *all* its prisoners. *Id.* MRRJ also asks this Court for a degree of deference that the law does not support even in the Free Exercise context, and that is particularly inappropriate when evaluating claims under the Establishment Clause. The district court's grant of summary judgment should be vacated, and the case remanded for trial.

ARGUMENT

I. THE DISTRICT COURT IMPROPERLY GRANTED SUMMARY JUDGMENT ON FIREWALKER-FIELDS'S FREE EXERCISE CLAIM

The district court improperly granted summary judgment on Firewalker-Fields's Free Exercise claim for the right to practice Jumuah, as demanded by his

faith. MRRJ justifies the district court's decision by arguing for a standard of deference to prison officials that goes beyond anything demanded by *Turner*, and by wrongly blaming Firewalker-Fields for failing to answer a question he was never asked. There is at least a triable issue as to whether MRRJ could accommodate Mr. Firewalker-Fields's Free Exercise needs in some way, including the easy and obvious alternative of streaming or broadcasting Jumuah services.

A. A Reasonable Trier of Fact Could Conclude That MRRJ's Safety And Resource Interests Fail To Justify Its Policy Because "Easy" And "Obvious" Alternatives Exist

MRRJ's insistence that it cannot accommodate Firewalker-Fields's religious obligation to celebrate Jumuah ignores obvious alternatives, including pre-recorded or streamed Jumuah services that are ubiquitously available on the internet. Under *Turner*, the existence of "easy" and "obvious" alternatives suggests that a prison's refusal to accommodate religious exercise "is not reasonable, but is instead an exaggerated response to prison concerns." 482 U.S. at 90.

MRRJ submitted an affidavit asserting that it has no way to display services other than its single CCTV system, which supposedly must broadcast the same signal to all display units at once. App-48. At trial, however, that assertion would be subject to cross-examination. It also would be contrary to the daily common experience of the trier of fact, and likely contradicted by evidence of practices at other facilities and even at MRRJ itself. It is a matter of public record in this Court's

cases that other facilities, including in Virginia, use affordable and readily available display technologies to accommodate inmates' religious needs. *See, e.g., Greenhill v. Clarke*, 944 F.3d 243, 247 (4th Cir. 2019); *Jehovah v. Clarke*, 798 F.3d 169, 179 (4th Cir. 2015). MRRJ's own Inmate Handbook also is freely available on its website and an appropriate subject for judicial notice. It explains that electronic "[t]ablets will be issued to inmates free of charge," and that inmates should use their tablets to access the law library and order items from the commissary. *See* Inmate Handbook at 7, *available at* www.middleriverregionaljail.org (last visited February 21, 2021)*; see also id.* at 6, 10. The Handbook also says that there are tablets in mounted "kiosk[s] . . . in the housing unit" that can be used for the same purposes. *Id.* at 1, 4, 6, 8. Undersigned counsel understands that inmates in Mr. Firewalker-Fields's security classification do not receive personal tablets. But their apparently widespread use within the facility casts considerable doubt on MRRJ's position.

In a *pro se* case where an incarcerated plaintiff was given no discovery,[1] the district court should not have granted summary judgment to MRRJ on the basis of

[1] MRRJ faults Firewalker-Fields for failing to file a motion for discovery prior to the mediation. Appellee's Br. 15 n.2. But the district court's order denying defendants' motion to dismiss ordered the parties to mediation and directed MRRJ to file a motion for summary judgment on an aggressive schedule that did not provide for discovery. App-28. A plaintiff (and particularly an incarcerated *pro se* plaintiff) could reasonably assume that the court did not intend for discovery to occur until after the mediation concluded. Firewalker-Fields sought discovery at that point, but the court denied it without explanation. App-6, 74.

an affidavit that is contrary to readily available facts appropriate for judicial notice, and that the trier of fact would have been entitled to disbelieve purely on the basis of common experience. Firewalker-Fields's complaint and supporting declarations made clear that he was aware of and relying on the existence of more accommodative practices at VDOC facilities, *see* App-12 (noting that VDOC permits supervised inmate-led services), and he specifically requested leave to take depositions of several VDOC officials, *see* Dkt. 69.

MRRJ asserts that if it provides this simple accommodation "MRRJ will then be inundated with requests from all 32 other religions to stream their service on the closed-circuit system." Appellee's Br. 18. But MRRJ points to no evidence to substantiate these fears. MRRJ's unsupported and non-specific belief that inmates of other faiths would make unreasonable demands cannot be enough to justify a refusal to accommodate Muslim services, even under *Turner.* MRRJ must show that "a valid, rational connection exists between the prison regulation and the government interest put forward to justify it." *Turner*, 482 U.S. at 90. Speculation about possible slippery slopes is not sufficient, particularly when other facilities apparently have not experienced the cascade of claims that MRRJ hypothesizes.

MRRJ asserts that any effort to display services to smaller groups would "create[] obvious problems, including the administrative and potentially financial burdens of finding, approving, and administering these services." Appellee's Br. at

18. Again, however, MRRJ offers only speculation and a series of rhetorical questions as an excuse for refusing to engage with the constitutional rights at stake. *See id.* MRRJ essentially assumes that portable televisions and other display technologies are prohibitively expensive, and that allowing inmates any additional access to such technologies poses insurmountable risks that cannot be resolved through basic security measures. A reasonable trier of fact could conclude that these concerns are unexamined and overstated. A trier of fact also could fairly be skeptical of MRRJ's assertion that it would be impossible to display a Jumuah service on one or more of the day-room closed-circuit televisions without displaying it on all of them. Common experience is very much to the contrary.

MRRJ emphasizes that it "reached out on 'multiple occasions' to the Islamic Center of the Shenandoah Valley in hopes of coordinating an outreach program." *Id*. at 20. However, it is unclear why MRRJ must limit itself to the local community, which only has a single mosque, when numerous mosques have conveniently shared their resources online. If MMRJ was willing to consider donations as it claims, *see id*. at 4, then the source of the services should not matter.

MRRJ's insistence that it lacks the capacity to approve and supervise the display of pre-recorded religious services also is hard to reconcile with its repeated statements that Firewalker-Fields could have added an imam to his visitor list and met with him on Fridays during this window. Presumably MRRJ would need to pre-

approve that imam, escort Firewalker-Fields to wherever those meetings take place, and supervise the encounter in *some* fashion.

MRRJ argues that it bears no burden "to construct alternatives on Firewalker-Field's behalf," and that Firewalker-Fields waived any right to consideration of streamed or pre-recorded services as an alternative by failing to specifically request them. Appellee's Br. 14. We agree that MRRJ has no obligation to "set up and shoot down" every conceivable alternative. But televised services were always one of the obvious alternatives in this case, right up until the district court's summary judgment order held, *sua sponte* and incorrectly, that Firewalker-Fields had renounced that possibility. App-59 n.3. In his complaint, Firewalker-Fields asked, *inter alia*, "[f]or Middle River Regional Jail to implement Islamic prayer services on Fridays." App-19. That statement in no way implied that Firewalker-Fields would only accept in-person services. The district court focused on Firewalker-Fields's request "[t]o have religious services held in the gym or classrooms instead of on television," but that preference cannot fairly be understood as a renunciation of any interest in televised services if in-person services are impossible. *Id.*

Firewalker-Fields never testified that televised services would be inconsistent with his religious beliefs. The question was never posed to him, in part because there was no discovery and in part because MRRJ's arguments below explicitly considered the possibility of televised services and rejected it. The principal focus

of Firewalker-Fields's entire case has been that it is unfair to deny Muslim inmates any access to Jumuah services when Christian inmates are provided with weekly *televised* worship services. MRRJ obviously understood that, and never argued below that Firewalker-Fields would only accept in-person services. MRRJ acknowledged in its motion for summary judgment 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 "[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 (emphasis added). Firewalker-Fields therefore had no reason, prior to the district court's summary judgment opinion, to believe that he needed to correct any misunderstanding on this score.

MRRJ argues that it lacks any capacity to determine its inmates' religious beliefs, and cannot be expected to guess at whether Firewalker-Fields would prefer a televised service to nothing. *See* Appellee's Br. 17. In *United States v. Wilgus*, the Tenth Circuit correctly noted that no great act of "judicial imagination" is required to identify that once-a-week services would be preferable to a total denial, even if the plaintiff had not specifically requested that alternative. 638 F.3d 1274, 1289 (10th Cir. 2011). The same principle should control here. At no point did Firewalker-Fields ask MRRJ to divine the tenets of his faith. Firewalker-Fields clearly stated

that he wanted to celebrate Jumuah, and explained his preference about how he wanted to do so. Assuming that he would be uninterested in any less-than-perfect alternative would turn Free Exercise litigation into a game of "gotcha" unworthy of such an important First Amendment freedom.

This Court should be sensitive to the reality that waiver arguments like these are consistently deployed to punish inmates for seeking their actual religious preferences, and to coerce them into proposing less desirable alternatives that will then be portrayed as concessions. The plaintiff in *Holt* apparently requested the right to grow at least a half-inch beard even though his religious beliefs actually called for a longer beard, and the half-inch request swiftly became the sole focus of the litigation. *Holt v. Hobbs*, 574 U.S. 352, 359 (2015). In an Eleventh Circuit case remanded in light of *Holt*, prison officials argued (unsuccessfully) that the inmate's prior compromise proposal that he be allowed to grow at least a quarter-inch beard was an admission that his religion required no more, and mooted his claim. *See Smith v. Owens*, 848 F.3d 975 (11th Cir. 2017). If Firewalker-Fields *had not* expressed his preference for live services, that possibility likely would have been given no consideration at all.

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

MRRJ asserts that any attempt to accommodate Firewalker-Fields's religious faith would pose an unmanageable security risk or burden on prison resources. But a reasonable trier of fact could conclude, even under *Turner*'s deferential standard, that these concerns are unreasonable and overstated.

Firewalker-Fields has pointed out that many prisons successfully provide in-person and broadcasted Jumuah services, and this Court's decisions recognize that reality. MRRJ argues that "[c]omparing a prison's resources to a jail's may be akin to comparing apples to oranges." Appellee's Br. 22. Perhaps, sometimes, that "may be" true. But MRRJ never even attempts to compare its actual resources to those of, for example, a typical VDOC prison, and its Handbook does not paint a picture of an impoverished facility. MRRJ is a 212,000 square foot facility that sometimes houses as many as 900 inmates. *See* https://www.middleriverregionaljail.org/history (last visited February 26, 2021). Nor is there anything in this record, other than MRRJ's *ipse dixit*, to eliminate any triable issue about whether MRRJ could permit supervised inmate-led services, as VDOC and the Bureau of Prisons do.[2]

[2] *See* App-12; 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

MRRJ essentially asks for unlimited deference to its own barely-explained assertions and judgments. But the fourth *Turner* factor calls for courts to consider whether obvious alternatives exist precisely because a prison's failure to implement these alternatives "may suggest that [its policy] is not reasonable, but is instead an exaggerated response to prison concerns." *Turner*, 482 U.S. at 90. This Court has cautioned against providing prison administrators uncritical deference. *See*, *e.g.*, *Jehovah*, 798 F.3d at 179 (holding that a reasonable trier of fact could find that the plaintiff's proposed alternatives were "obvious" and "easy" and thus evidence that the prison's ban was "an exaggerated response") (internal citations omitted); *Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006) (stating that while judges should give "due deference," they must not "rubber stamp or mechanically accept the judgments of prison administrators."). *Turner* is not a rational basis standard, under which the defendant prevails if a court can hypothesize any state of facts that would make the defendant's position rational. A trier of fact is entitled to assess whether MRRJ's position is *reasonable*. In this case, common sense and the practices of other facilities suggest many important questions that MRRJ has not meaningfully answered, beyond arguing that the court must give it deference.

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to lead religious activities but such offenders have no authority over any other offenders.") (last visited Feb. 14, 2021); 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 Feb. 14, 2021).

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

A reasonable trier of fact also may disagree that Firewalker-Fields had sufficient alternative means of practicing his religion. MRRJ emphasizes that it provides Muslims some accommodations, including permitting prayer rugs and Qurans in cells, and providing special meals during Ramadan and a pork-free diet year-round. Appellee's Br. 24. However, none of these accommodations relate to Jumuah. *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 Feb. 16, 2021) (describing Jumuah as "the central act of community prayer" for Muslims).

MRRJ relies on an improper reading of *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), to justify its refusal to accommodate Jumuah services. In *O'Lone*, the prison advanced specific and credible reasons why inmates assigned to outside work details could not be permitted to come back inside during the day. 482 U.S. at 346, 351-52. The Supreme Court also emphasized that the prison allowed inmates to congregate for prayer or discussion at nearly all times except during work hours and granted the "state-provided imam . . . free access to the prison." *Id*. at 352. Thus, the

prisoners in that case were given much more robust opportunities to practice their religion, including communal prayer, than Firewalker-Fields has been offered.

MRRJ insists that Firewalker-Fields could have put an imam on his visitor list to observe Jumuah. Firewalker-Fields did not know any imams in the local area. He is from out of state and lacks any connections to the local Muslim community. MRRJ, with its connections to the Staunton area, could not find a local imam able to conduct Jumuah services, so it is unreasonable to expect Firewalker-Fields to succeed where MRRJ failed.

II. THE DISTRICT COURT ERRED BY GRANTING SUMMARY JUDGMENT AGAINST THE ESTABLISHMENT CLAUSE CLAIM

A. *Cutter v. Wilkinson*, Not *Turner*, Supplies The Appropriate Establishment Clause Analysis

MRRJ correctly points out that the Supreme Court's Establishment Clause jurisprudence is (to put it generously) highly context-specific,[3] but then inexplicably refuses to apply the precedent most closely on point in this context. Appellee's Br. 25-28. The Supreme Court has considered the Establishment Clause implications of religious accommodations in prison exactly one time—in *Cutter v. Wilkinson*, 544 U.S. 709 (2005). In *Cutter*, Ohio argued that granting the religious exemptions

[3] "[J]erry rigged fire trap" is also a fair characterization. Hugh Hewitt, *John Roberts Counterpunches The Counterpunching President*, Washington Post (Nov. 24, 2018), *available at* https://www.washingtonpost.com/opinions/john-roberts-counterpunches-the-counterpunching-president/2018/11/24/a1922e70-eff8-11e8-9236-bb94154151d2_story.html (last visited February 22, 2021).

required by RLUIPA would inevitably lead to Establishment Clause violations because the prison would be endorsing and promoting those exemptions, and other inmates would be coerced by them. 544 U.S. at 713. The Supreme Court rejected that argument, and held that accommodations granted under RLUIPA need not violate the Establishment Clause if three conditions are satisfied. *Id.* at 720. First, the accommodation must alleviate a government-imposed burden on religion. Second, the accommodation may not impermissibly burden other inmates. Third, the overall accommodations program must be administered neutrally as between religions. Together, those conditions ensure that accommodations granted to some prisoners do not become a vehicle for the promotion or coercive imposition of the state's preferred religious beliefs.

MRRJ contends that the more deferential *Turner* test should be applied instead. Appellee's Br. 33. But the *Turner* test would obscure and weaken the Establishment Clause where the state's power over its citizens is greatest. As Firewalker-Fields previously explained, *Turner* does not apply to all constitutional rights in prison. *See Johnson v. California*, 543 U.S. 499, 510 (2005) (declining to apply *Turner* to a racial classification case). MRRJ argues that "*Turner* is the appropriate test for all prisoners' constitutional claims, absent limited exceptions . . . ." Appellee's Br. 33. But all of the cases cited between pages 29 and 31 of MRRJ's brief address constitutional rights that exempt an individual from otherwise

legitimate state action. Such rights often must yield to the unique needs of the prison environment, and *Turner* provides a framework for balancing the competing constitutional interests of inmates and the government. The Establishment Clause, by contrast, is a structural limitation on government power. The deference implicit in *Turner* balancing is inappropriate in an Establishment Clause context, because prison officials have no legitimate interest in establishing a religion. Put another way, MRRJ correctly points out that *Turner* is the test for constitutional rights that are *inconsistent* with incarceration. Appellee's Br. 29-30. But the Establishment Clause is wholly consistent with incarceration, because prison administrators have no legitimate penological interest in establishing a favored state religion.

Firewalker-Fields previously explained that no federal Circuit has applied *Turner* to an Establishment Clause claim, before or after *Cutter*. Appellant's Br. 35-36. MRRJ points (at 33) to three decisions as supposed counter-examples, but none of them stand for what MRRJ claims.

In *Maye v. Klee*, 915 F.3d 1076, 1085 (6th Cir. 2019), an inmate was denied the opportunity to celebrate Eid al-Fitr—one of two annual feasts central to the Islamic faith—because he was a member of the Nation of Islam and not Al-Islam. The Sixth Circuit declined to decide whether *Turner* or prevailing Establishment Clause jurisprudence applied, concluding that "the Establishment Clause violation in this case is clear under either standard." *Id.* The *Maye* Court did not analyze any

of *Turner's* four factors and rooted its finding of an Establishment Clause violation in the prison's brazen disparate treatment. *Id.*

The Ninth Circuit panel in *Merrick v. Inmate Legal Servs.*, 650 F. App'x 333 (9th Cir. 2016), remanded an inmate's Establishment Clause claim because the district court dismissed the claim without considering it separately from the inmate's Free Exercise claim, and employed a "*compare*" citation in a way that implied that *Turner* would supply the Establishment Clause standard. *See* 650 F. App'x at 336. The district court was somewhat perplexed by that citation on remand. *See Merrick v. Inmate Legal Servs.*, 2016 WL 11663487 at *2 (D. Ariz. June 22, 2016). And the Ninth Circuit's memorandum disposition is unpublished and non-precedential.

In *Inouye v. Kemna*, 504 F.3d 705, 716 (9th Cir. 2007), the Ninth Circuit discussed whether qualified immunity attached to parole officers who forced parolees to attend religion-based treatment programs. The district court had held that *Stafford v. Harrison*, 766 F.Supp 1014 (D. Kan. 1991), rendered the governing law not "clearly established" for qualified immunity purposes because it applied *Lemon v. Kurtzman*, 403 U.S. 602 (1971),[4] and *Turner* to an Establishment Clause claim.

[4] The parties appear to agree that the *Lemon* test has no useful role to play here. *See* Appellee's Br. 41 ("*Lee* is the more appropriate test and more widely accepted to evaluate these circumstances"). "Like some ghoul in a late night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring). In *American Legion v. American Humanist Assn.*, 139 S. Ct. 2067

The Ninth Circuit reversed, holding that *Stafford* was factually inapposite because it involved religion-based treatment programs for prisoners rather than parolees. The Ninth Circuit had no need to address whether the *Stafford* opinion was correct to apply *Turner* on its facts, and did not. The Ninth Circuit did, however, express doubt as to *Stafford*'*s* reasoning on the ground that it was "decided before *Lee* [*v. Weisman*, 505 U.S. 577 (1992)] reemphasized the dangers of coercion in the Establishment context." *Id.*

MRRJ draws on unpublished opinions, dicta, and trivial citations to *Turner* in the general vicinity of an Establishment Clause issue. But MRRJ fails to identify a single Circuit court opinion—other than Judge Owen's opinion in *Brown v. Collier*, 929 F.3d 218 (5th Cir. 2019), which failed to garner a majority—that actually applies *Turner* to a prisoner Establishment Clause challenge. This omission is understandable given the practical unanimity among federal courts in rejecting the *Turner* test for Establishment Clause challenges, which even MRRJ acknowledges. *See* Appellee's Br. 36 (noting that *Lee v. Weisman* "has been applied to prisoners' Establishment Clause claims in the Second, Seventh, and Ninth Circuits, as well as the Eastern and Western Districts of Virginia."); *id.* at 41 ("*Lemon* has been used in

(2019), seven Justices recently rejected the unadulterated application of *Lemon* when evaluating government monuments, symbols, and practices.

the Seventh and Eighth Circuits, and the Western and Eastern Districts of Virginia to analyze a prisoner's Establishment Clause claim.").

Cutter is the Supreme Court's best and most recent synthesis of the Establishment Clause issues posed by religious accommodations in the prison context. The three-part test the Court articulated in *Cutter* should govern this case.

B. Under The *Cutter* Factors, Firewalker-Fields Has Advanced A Triable Establishment Clause Claim

Applying the *Cutter* factors, Firewalker-Fields has stated a triable claim under the Establishment Clause.

1. MRRJ's Policies Reflect An Improper Preference For Christianity

MRRJ barely addresses Firewalker-Fields's demonstration that MRRJ treats Christian inmates in a preferential manner, and that the Inmate Handbook announces a denominational preference on its face. Appellant's Br. 42-45. MRRJ offers the curious argument that its Christian inmates are not receiving their preferred religious programming either, since few of them are actually Mennonites. Appellee's Br. 13. Obviously this argument is at war with itself, since MRRJ wants to justify broadcasting the Mennonite service and no others on the ground that Christians *generally* are the dominant faith group. *Compare id*. at 12 (arguing that MRRJ accommodates Christians because they make up the largest faith group) *with id*. at 13 (arguing that broadcasting only Mennonite services does not favor Christians

because "[t]he odds that any Christian inmate at MRRJ is a Mennonite are slim."). If MRRJ is not willing to defend those Mennonite-provided broadcasts as ecumenical Christian services, then its practices are even more sectarian and non-neutral than we believed.

MRRJ wrongly characterizes Firewalker-Fields's position as requiring every prison to "provide equal worship opportunities to all religious sects in the inmate population." Appellee's Br. 34. Firewalker-Fields agrees that the size of a faith population within a prison is a relevant consideration. But that does not mean it is consistent with neutrality to simply ignore the needs of all but the dominant faith group, to institutionalize rules under which only Christian inmates can participate in public group worship, or to subject non-Christian inmates to Christian services when they are not offered comparable opportunities.

MRRJ argues that its religious favoritism towards Christian inmates is necessary to accommodate their Free Exercise rights. *See* Appellee's Br. 29. It is far from clear that MRRJ has no way to fairly accommodate the needs of its Christian inmates other than broadcasting a worship service at everyone via CCTV. The tablets given to non-maximum security inmates would provide another option, and in years past MRRJ apparently required the Christian inmates to wear headphones in order to hear these services. *See Desper v. Lee,* 2011 U.S. Dist. LEXIS 121330 at *5 (W.D. Va. Oct. 20, 2011), *aff'd,* 467 F.App'x 226 (4th Cir. 2012). Regardless, in

Cutter the Court did not stop with the observation that RLUIPA reflects a salutary effort to accommodate Free Exercise interests; it held that the Establishment Clause would nonetheless be violated unless three conditions were met, including neutrality. *Lee* confirms that "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause." 505 U.S. at 577. Indeed, MRRJ's argument would collapse the Free Exercise and Establishment Clause issues into a single inquiry, governed by *Turner*, and render the Establishment Clause irrelevant in the prison context.

Finally, MRRJ stresses that Firewalker-Fields was a maximum security inmate during his stay at MRRJ and thus was not eligible to attend any *classes* offered at the Jail. Appellee's Br. 6. That observation does not improve MRRJ's position. Maximum-security inmates are on lockdown all but three hours a day. The only programming—religious or otherwise—that they may access is the Sunday church service, which is broadcast to all inmates regardless of their religious beliefs. By excluding them from all other institutional programming, MRRJ ensures that its maximum security inmates are fed a steady diet of *only* state-sponsored Christian church services. It is hard to imagine a less neutral policy than that.

2. MRRJ's Practices Are Improperly Coercive

Firewalker-Fields's opening brief explained that broadcasting Christian services into the only common spaces available to inmates during lockdown hours

imposes improper and coercive burdens on non-Christian inmates, because they are given no way to distance themselves from that worship other than confining themselves to their cells.

MRRJ suggests that Firewalker-Fields suffered no harm by being effectively confined to his cell, arguing that his freedom of movement is no more restricted in his cell than in the day room. Appellee's Br. 39. That position is frankly baffling. There were only two places that Firewalker-Fields could be during those services: in the day room, or in his cell. Telling a maximum security inmate that he must stay in his cell, and avoid the only common space he has access to, is obviously a significant restriction on his already-very-limited liberty of movement.

MRRJ suggests that the burden prong of *Cutter* incorporates a *Turner* analysis. Appellee's Br. 34. That is incorrect. Under the second prong of *Cutter* the court is charged with determining whether an accommodation imposes undue burdens on non-adherents. 544 U.S. at 720-23. The aim is to determine whether the government has "'unyielding[ly] weigh[ted]' the interests of [one group of prisoners] 'over all other interests.'" *Id.* at 722 (quoting *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985)). There is no place for *Turner* deference in that inquiry.

MRRJ acknowledges that schools and prisons are analogous, because both environments have a captive audience and are otherwise highly coercive. Appellee's

Br. 28. As Firewalker-Fields previously explained, the contextual factors that caused the Supreme Court to find coercion at the high school graduation in *Lee* are, if anything, more severe in the prison context–where inmates have more restricted liberty and fewer realistic ways to distance themselves from a worship service they disagree with. Appellant's Br. 41-42. Prison is very different from most other contexts where the government interacts with its citizens; it is an inherently coercive relationship where the government restricts inmates' liberty and provides for all of their needs. MRRJ reviews and authorizes religious content before playing it on the CCTV system, which makes MRRJ intimately involved in propagating the religious instruction. And any disruption of those services by a dissenting inmate will be met not with mere social pressure and disapprobation, but with outright punishment by the state.

MRRJ points to *Desper*, where a panel of this Court affirmed for the reasons stated a district court decision holding that MRRJ did not violate the Establishment Clause by broadcasting religious services. *Desper v. Lee*, 467 F. App'x 226, 227 (4th Cir. 2012). Obviously *Desper* is an unpublished opinion and not binding precedent. It also was decided on factual assumptions that are distinguishable from this case in several important ways. The district court in that case understood the religious programming to be one of several options available to inmates. *See Desper,* 2011 U.S. Dist. LEXIS 121330 at *18. The inmates at MRRJ at the time of *Desper*

apparently had to voluntarily opt in to listening to the service by donning headphones provided by MRRJ, and therefore could remain in the day rooms without listening to the worship service. *Id.* at *5. By contrast, MRRJ told Firewalker-Fields that if he did not want to listen to the Christian service he should stay in his cell. App-10. Desper failed to show any adverse consequence of not participating in the religious broadcast. *Id.* at *19. Firewalker-Fields did show adverse consequence in that he was excluded from the common area which he otherwise would have been able to access. Desper failed to exhaust any request for comparable Seventh-Day Adventist programming on his Saturday sabbath. *See id.* at *1 n.2. Firewalker-Fields has pressed and preserved a claim that MRRJ provide him with comparable worship opportunities. And on the record of *Desper* it was apparently undisputed that the Sunday services were non-denominational. *Id.* at n.1. It appears that important things have changed in the decade since *Desper*, and that Firewalker-Fields has presented a more comprehensive challenge.

Of course the nature and context of these Sunday services are not entirely clear in the record of this case either. But that is not a justification for summary judgment, absent any discovery, in a case brought by a *pro se* litigant and raising facially serious concerns. The district court should proceed to a trial in which these issues may be examined in greater depth.

CONCLUSION

The district court's grant of summary judgment should be vacated, and the case remanded for trial on both the Free Exercise and Establishment Clause claims.

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 5,218 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: March 1, 2021

/s/ J. Scott Ballenger
J. Scott Ballenger