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

RESPONSE BRIEF OF APPELLEES

Julian F. Harf
Emily K. Stubblefield
GUYNN WADDELL CARROLL & LOCKABY, P.C.
415 South College Avenue
Salem, VA 24153
540-387-2320
julianh@guynnwaddell.com
emilys@guynnwaddell.com

Counsel for Appellees

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-7497 Caption: David Firewalker-Fields v. Jack Lee, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Jack Lee
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: _____ Date: 10/22/2019

Counsel for: Appellee Jack Lee

CERTIFICATE OF SERVICE

****

I certify that on 10/22/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

David Nighthorse Firewalker-Fields
#1147520
Sussex I State Prison
24414 Musselwhite Drive
Waverly, VA 23891-1111

_____ 10/22/2019
(signature) (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-7497 Caption: David Firewalker-Fields v. Jack Lee, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Middle River Jail Authority
(name of party/amicus)

who is appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: _____ Date: 10/22/2019

Counsel for: Appellee Middle River Jail Authority

CERTIFICATE OF SERVICE

****

I certify that on 10/22/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

David Nighthorse Firewalker-Fields
#1147520
Sussex I State Prison
24414 Musselwhite Drive
Waverly, VA 23891-1111

_____ 10/22/2019
(signature) (date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

STATEMENT OF FACTS

A. Firewalker-Fields' grievances.

Firewalker-Fields was an inmate at the Middle River Regional Jail ("MRRJ"), in Staunton, Virginia, from August 2, 2017 to October 24, 2017. (Faye McCauley Decl. ¶ 2, JA 42.) On August 3, 2017, he issued a grievance and complained that the MRRJ did not offer a Jumuah service on Fridays. (JA 11.) He requested a Jumuah service. He stated that as a Sunni Muslim, he was required to observe the Jumuah service. (*Id.*) Firewalker-Fields complained that Christians had access to a church service and a bible class, but there were no services or classes for Muslims. (*See id.*) John Lilly, Program Director at the MRRJ, replied. Lilly responded that the supposed Christian service was a "program over the TV [that] is a non-denominational program that people can choose whether or not to watch. You are allowed to have your religious material and believe as you choose." (*Id.*)

Firewalker-Fields appealed Lilly's grievance response. He argued that the "DOC permits an inmate serving as Imam over a Islamic prayer service as long as there is a staff member present," which "satisfies the Religious Land Use and Institutionalized Persons Act of 2000 . . ." (JA 12.) An MRRJ administrator replied and stated, "Mr. Firewalker, you may practice your religion in your housing area. Sunday service is non denominational." (*Id.*)

B. Programming at the MRRJ.

On Sunday mornings, the MRRJ provides a religious service on closed circuit televisions located in the "day rooms" attached to each housing unit. The services are taped and donated by a Mennonite group. Because the Mennonites use the Bible as their central text, the services have Christian themes. The services are shown during lockdown hours. Any inmate that wants to watch the services may do so. Inmates that do not want to watch can stay in their housing areas. (John Lilly Decl. ¶ 2, JA 35.)[1]

The MRRJ inmate population is overwhelmingly Christian; however, the MRRJ has inmates from at least 33 different religions. (*Id.* at ¶ 4, JA 36.) The MRRJ accommodates inmates of all faiths in a number of ways. The Jail permits all inmates to pray in their cells and access soft-covered religious texts. The MRRJ also permits each inmate to place a spiritual advisor on his visitation list. Each inmate may visit with a spiritual advisor once per week and may pray with the spiritual advisor. Specific to Muslim inmates, the MRRJ permits them to keep prayer rugs and soft-covered Qurans in their cells. In addition, the Jail offers

[1] The only video capability available at the MRRJ was the closed circuit television system described in the preceding paragraph. There was no way to show a video without playing it on every television at the MRRJ. (Lilly Decl. ¶ 3, JA 35.)

special meal times during Ramadan. Also, the MRRJ diet is pork-free year-round. (*Id.* at ¶ 5, JA 36.)

In 2018, only 6 inmates signed up for Ramadan meals (approximately 0.6% of the inmate population). During that time, the total average daily inmate population was 905 inmates. (*Id.* at ¶ 6, JA 36.)

From 11 a.m. to 1:30 p.m. each day, the MRRJ is on lockdown for lunch and mid-day count. All MRRJ officers are occupied assisting in the count, feeding, cleaning up, or taking their mandatory breaks. The MRRJ did not have sufficient staff to supervise a group Jumuah service midday on Fridays. However, if an inmate places an imam on his visitation list, the inmate may pray with the imam on Fridays starting at 12:30 p.m. (*Id.* at ¶ 7, JA 36.) During his incarceration at the MRRJ, Firewalker-Fields did not place an imam or other spiritual advisor on his visitation list. (*Id.* at ¶ 8, JA 36.)

As declared by MRRJ Program Director John Lilly, "Jail safety, resources, willing volunteers, and inmate demand necessarily factor into the available religious programming at the MRRJ." (Lilly Decl. ¶ 10, JA 37.) To prevent the inherent safety risks of inmate-led groups—for example, the formation of a "gang" mentality or the risk that inmates will take orders from other inmates rather than MRRJ officers—the MRRJ does not permit inmates to lead religious services or other classes. (*Id.* at ¶ 11, JA 37.) The MRRJ prohibits group worship in the

absence of an approved, volunteer faith group leader. (*Id.*) All classes—religious and non-religious—that are provided at the MRRJ are provided by donation or on a voluntary basis. (*Id.* at ¶ 9, JA 36.)

The Jail has more local churches volunteer to provide programming than it can accommodate. (*Id.* at ¶ 12, JA 37.) Many local church groups have been turned away because the MRRJ does not have the time or space to accommodate them. (*Id.*) However, aside from local church groups, the MRRJ has difficulty finding outside volunteers to lead programming at the Jail. (*Id.*)

No imam or other Islamic leader has volunteered to lead any religious activities at the MRRJ, despite the MRRJ's best efforts to reach out to the local Muslim community. (*Id.* at ¶ 12, JA 37.) Faye McCauley, MRRJ Operations Specialist, has attempted to contact the nearest mosque, the Islamic Center of the Shenandoah Valley in Harrisonburg, to ask whether the mosque is willing to participate in any type of outreach with the MRRJ. (McCauley Decl. ¶ 6, JA 30.) Ms. McCauley called on multiple occasions. (*Id.*) Each time she called, nobody answered. There was no voicemail option to leave a message. (*Id.*)

In addition to direct communication from organizations, the local "re-entry" councils serve as the supplemental resource for the MRRJ to garner outside assistance and/or programming from local organizations. (*Id.* at ¶ 4, JA 30.) The MRRJ is a member of two such councils, in Staunton and Harrisonburg. (Lilly

Decl. ¶ 13, JA 37.) The re-entry councils are comprised of local representatives from government, public, non-profit, and faith-based organizations, and focus on providing services and programming to prisoners to support their eventual re-entry into civilian communities. (*Id.*) The Central Shenandoah Re-Entry Council holds meetings every other month, and the Harrisonburg Council holds quarterly meetings. (*Id.*) Ms. McCauley and Mr. Lilly are on the executive committee of the Central Shenandoah Re-Entry Council, in Staunton. (*Id.*) Mr. Lilly attends the majority of meetings for both re-entry councils, while Ms. McCauley attends the Central Shenandoah meetings. (*Id.*; McCauley Decl. ¶ 3, JA 29.)

There are no Muslim groups that currently attend either of the re-entry council meetings. (Lilly Decl. ¶ 15, JA 38.) As of December 10, 2018 (the date they executed sworn declarations), neither John Lilly nor Faye McCauley recalled a Muslim group or clergy member attending a re-entry council meeting in the previous five years. (*Id.*; McCauley Decl. ¶ 5, JA 30.)

With respect to classes, the MRRJ offers various programming including drug/alcohol recovery programs and educational programs, among others. (Lilly Decl. ¶ 16, JA 38.) Volunteers from local churches lead a faith-based class. (*Id.*) Although the class is not intended for any single religion, the Bible is the central text. (*Id.*) Every non-maximum security inmate is eligible to attend all classes at the Jail, including the faith-based class. (*Id.* at ¶ 17, JA 38.)

Classification at the MRRJ is determined by an objective point system based on the inmate's criminal background and other risk factors. (*Id.* at ¶ 19, JA 38.) Due to his criminal history, Firewalker-Fields was a maximum-security inmate while incarcerated at the MRRJ. (*Id.* at ¶ 18; JA 38.) Accordingly, he was not eligible to attend any classes offered at the Jail. (*Id.*)

SUMMARY OF THE ARGUMENT

The district court properly granted summary judgment to the MRRJ on Firewalker-Fields' Free Exercise claim. The MRRJ had no Friday Jumuah service because MRRJ policies prohibited inmate-led activities and required that religious programming be provided by approved, outside volunteers. The MRRJ did not have access to a televised Jumuah service and had no outside volunteers to lead a service, despite its attempt to reach out to the local Muslim community. The district court correctly applied the four factors established in *Turner v. Safley*, 482 U.S. 78 (1987), when it found that the MRRJ policies were reasonably related to the legitimate penological interests of preserving jail safety and resources. Though it was Firewalker-Fields' burden, he never offered the MRRJ any alternatives to the in-person service he requested. The alternatives he offers now, for the first time on appeal, are neither "obvious" nor "easy."

Moreover, the MRRJ accommodated Firewalker-Fields and other Muslim inmates in several ways. The MRRJ permitted Firewalker-Fields to name an imam

on his visitor list and pray with the imam during Jumuah. The Jail also permitted Firewalker-Fields to keep a prayer rug and Quran in his cell. The MRRJ provided a special diet year-round and special meals during Ramadan. Firewalker-Fields had significant alternative means of practicing his religion. Firewalker-Fields failed to meet his burden under *Turner* to demonstrate that the MRRJ policies were unreasonable.

The district court also properly applied *Turner* to Firewalker-Fields' First Amendment Establishment Clause claim. In the jail context, there is inherent tension between the Free Exercise and Establishment clauses because jails are *required* to facilitate opportunities for inmates to exercise their religious beliefs. Inmates cannot practice their religious beliefs without active involvement of prison administration. When inmates challenge jail policies designed to accommodate their Free Exercise rights, logic demands that *Turner* applies. *Turner* recognizes that the manner in which inmates exercise certain constitutional rights—like the religious rights at issue here—must be modified in the jail setting. The MRRJ cannot provide identical worship opportunities to all religious sects, without regard to inmate demand, safety, and resources. The MRRJ adopted reasonable measures to account for these concerns. Applying *Turner*, the district court correctly held that the MRRJ did not violate the Establishment Clause.

Firewalker-Fields urges the Court to apply a test derived from *Cutter v. Wilkinson*, 544 U.S. 709 (2005). No court has ever applied a "*Cutter* test," and the Court should not adopt such a test in this case. In *Cutter*, the Supreme Court decided whether a generally applicable law violated the Establishment Clause. It was a separate, much broader issue, with different facts. The *Turner* test was specifically designed to address the constitutionality of individual jail policies. The more narrowly-tailored *Turner* analysis applies in this case.

Some courts analyzing Establishment Clause cases in the prison setting have adopted tests from *Lee v. Weisman*, 505 U.S. 577, 587 (1992) or *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Assuming, *arguendo*, that the Court adopts one of these tests, the MRRJ's policies are constitutional. Moreover, the *Lee* and *Lemon* tests account for the key question in the *Turner* analysis—whether a prison's policies are reasonable in context.

In short, the district court appropriately evaluated this case under *Turner* and concluded that the MRRJ's policies did not violate the Free Exercise or Establishment clauses. This conclusion holds true under any of the prevailing tests. Accordingly, the Court should not disturb the district court's decision granting summary judgment to the MRRJ.

ARGUMENT

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

Prison policies that allegedly substantially burden an inmate's religious exercise are constitutional if the policy is reasonably related to legitimate penological interests. *Turner v. Safley*, 482 U.S. 78, 89 (1987). The district court properly granted summary judgment on Firewalker-Field's Free Exercise claim because the MRRJ's lack of Jumuah service was reasonably related to its legitimate penological interests.

Courts recognize that prison administrators are best equipped to create policies to promote safety and efficient administration of prisons. *See Turner*, 482 at 84-5 (citing *Procunier*, 416 U.S. at 405-06) (explaining the formula for reviewing prisoners' constitutional claims must "recognize courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform"). Courts must give "substantial deference" to the decisions of prison administrators, "who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003); *see also United States v. Stotts*, 925 F.2d 83, 86 (4th Cir. 1991) ("courts must respect the determination of prison officials"). The deferential nature of *Turner* is deeply entrenched in United States jurisprudence. *See Procunier v. Martinez*, 416 U.S.

396, 404 (1974) (citation omitted) ("Traditionally, the federal judiciary has adopted a broad hands-off approach to the problem of prison administration"), abrogated on other grounds by *Thornburgh v. Abbott*, 490 U.S. 401 (1989). The "herculean task" prison administrators undertake in administering their "complex and intractable duties" is not something courts take lightly. *Id*.; *Turner*, 482 U.S. at 84-5 (explaining *Procunier* establishes the principles necessary to frame prisoners' constitutional claims, such as recognizing the lofty burden prison administrators carry); *Heyer v. U.S. Bureau of Prisons*, No. 19-7027, 2021 U.S. App. LEXIS, 885 at *17-8 (4th Cir. Jan. 13, 2021) ("The Supreme Court has . . . recognized that it is no easy feat to run a prison, and this branch of government lacks expertise in navigating the complicated decisions involving doing so," therefore, "deference is owed to prison administrators decisions").

In *Turner*, the United States Supreme Court identified four factors to assess whether a prison policy is reasonable:

> (1) Whether a valid, rational connection exists between the prison regulation and the government interest put forward to justify it;
>
> (2) Whether there are alternative means of exercising the right that remain open to the prisoner;
>
> (3) What impact accommodation of the constitutional right will have on guards and other inmates and on the allocation of prison resources generally; and

> (4) Whether there are 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.

Id. at 89-90.

This Court should affirm the district court's decision because the district court properly employed the *Turner* analysis and found Firewalker-Fields failed to meet his burden. No reasonable trier of fact could conclude the *Turner* analysis weighs in favor of Firewalker-Fields.

A. MRRJ's Policies Have Valid, Rational Connections To Legitimate Government Interests.

Courts have consistently held that concerns related to safety and resources satisfy the first *Turner* factor. There were no Friday Jumuah services because MRRJ policies prohibited inmate-led activities and required that religious programming be provided by approved, outside volunteers. (Decl. Lilly, J.A 50.) These policies were created to preserve jail safety and resources:

> To prevent the inherent safety risks of inmate-led groups—for example, the formation of a gang mentality or the risk that inmates will take orders from other inmates rather than MRRJ officers—the MRRJ does not permit inmates to lead religious services or other classes. The MRRJ prohibits group worship in the absence of an approved, volunteer faith group leader….[Additionally,] providing a service for Muslim inmates, which represent approximately 0.6% of the inmate population, would spark a detrimental ripple effect. Other similarly sized religious groups at the MRRJ would expect a service of their own. The MRRJ does not have enough space, staff, or willing volunteers to support services for every approved faith group.

(*Id.* at 55, 56-57). Courts have consistently held similar policies reflecting the same concerns satisfy the rational connection factor. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 353 (1987) (explaining prison regulations that led to inmates not being able to participate in Jumuah were valid, in part because prison administrators were concerned about the availability of resources and the potential that an inmate taking on a religious leadership role would "invariably challenge the [prison's] institutional authority"); *Smith v. Kyler*, 295 F. App'x 479, 481 (3d Cir. 2008) (holding no free exercise violation by DOC's policy to provide Chaplains for only the largest major faith groups and to prohibit group worship in the absence of an approved volunteer Faith Group Leader); *Adkins v. Kaspar*, 393 F.3d 559, 565 (5th Cir. 2004) (rejecting plaintiff's assertion that, "regardless of the availability of volunteers, space or time," the defendants should be required to accommodate every religious holiday and requirement of a religion constituting less than one percent of the inmate population); *see also Turner v. Safley*, 482 U.S. 78, 90 (1987) ("When accommodation of an asserted right will have a significant "ripple effect" on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of correctional officials").

Additionally, the prohibition on inmate-led services or classes is applicable to all inmates. *See Turner*, 482 U.S. at 90 (a regulation must be legitimate and neutral). Firewalker-Field's suggestion that the MRRJ enacted these policies

because it believes "Islam . . . fosters a gang mentality" misconstrues the Lilly declaration. (App. Brief 19). The MRRJ does not target Islam or any other religious group. The MRRJ does not allow *any* inmate to lead *any* type of inmate group, because it can lead to formation of a gang mentality and inmates exercising undue influence over other inmates. This particular security concern is recognized in federal courts. *See, e.g.*, *O'Lone*, 482 U.S. at 353; *Kyler*, 295 F. App'x at 481. The rule applies equally to all groups and their activities, religious and secular. (Decl. John Lilly, J.A. 50).

Christian inmates make up an overwhelming majority of the MRRJ population. (Decl. John Lilly, J.A. 48, 50). Inmates who wish to attend a Sunday service must watch the donated Mennonite service, regardless of their preferred Christian denomination. Mennonites, also known as Anabaptists, make up less than 0.3% of the United States Christian population. *Religions*, Pew Research Center, https://www.pewforum.org/religious-landscape-study/. The odds that any Christian inmate at MRRJ is a Mennonite are slim. However, due to resource considerations the donated Mennonite service is aired, notwithstanding the preference of the Christian inmates.

In the jail context, religious exercise cannot exist in a vacuum; the MRRJ must necessarily adopt reasonable measures that account for the inherent safety concerns and financial burdens of the jail. The district court properly applied

Turner in finding the MRRJ's policies, prohibiting inmates from leading services, offering programming only by approved outside volunteers, and providing services to the majority faith-group, are rationally related to these legitimate penological interests.

B. It Is Not the MRRJ's Burden To Determine What Alternatives Exist.

It is well-established that appellate courts will not consider facts outside the record on appeal. *See Colonial Penn Ins. v. Coil*, 887 F.2d 1236, 1239 (4th Cir. 1989) (citations omitted). Any exception to this rule is limited to facts "whose sources accuracy cannot reasonably be questioned." *Id*. (explaining judicial notice is most frequently used for the content of court records). This Court should not take judicial notice of facts that are undeniably in question.

On brief, Firewalker-Fields offers several policy alternatives for the first time that he argues are "obvious." He faults the MRRJ for not coming up with and implementing these alternatives, without any evidence that they can be "easily" implemented at the MRRJ. By implication, Firewalker-Fields argues it was the MRRJ's burden to conjure up these alternatives to permit him to participate in Jumuah. But neither the district court nor the MRRJ had the burden to construct alternatives on Firewalker-Field's behalf. *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (explaining that under *Turner* the inmate carries the burden of proof to disprove the validity of the prison regulation in question); *Gordon v. Leeke*, 574

F.2d 1147, 1151 (4th Cir. 1978) (explaining courts do not have burden of constructing alternatives for *pro se* plaintiffs).

For example, Firewalker-Fields now argues that a televised service would be an adequate alternative if in-person services cannot be accommodated. (App. Brief 28-9.) He previously had specifically requested in-person Jumuah services at MRRJ "instead of on television." (Inmate Grievance Appeal, J.A. 12, 19.) Indeed, the district court noted "that an Islamic prayer service over television would not be sufficient to accommodate [Firewalker-Fields'] faith, [because] he specifically requested to have services on Friday held in the Gym or classrooms instead of on Television." (Summary Judgment Opinion, J.A 59 n. 3.) For this reason, the district court did not consider whether a televised service satisfied the fourth *Turner* factor.

Firewalker-Fields' failure to raise this alternative in previous pleadings precludes this Court from considering it.[2] *See United States v. Evans*, 404 F.3d 227, 236 fn.5 (4th Cir. 2005) (stating a party that "failed to raise [an] argument

[2] Firewalker-Fields blames the lack of discovery process for the reason why the district court "misunderstood" his alleged desire to have a televised Jumuah service. (App. Brief 23.) This argument is futile. Firewalker-Fields had an opportunity to file a timely motion for discovery, but failed to do so. Additionally, Firewalker-Fields is incorrect in asserting that "[i]n most Free Exercise or RLUIPA cases the plaintiff's willingness to consider… alternatives would be explored in…interrogatories and depositions." (App. Brief 30.) As all prisoners are subject to the same procedural rules in the Western District, it is incorrect to suggest Firewalker-Fields is somehow especially disadvantaged.

before the district court…has…waived it on appeal"). In *Turner*, the Court was careful to only consider the alternative proffered by the prisoner. It did not shift the burden to the prison to evaluate the feasibility of alternatives never raised by the plaintiff. *Turner*, 482 U.S. at 93. Ultimately, the regulation in question was upheld in part because the alternative proffered was not feasible. *Id*.

In *O'Lone*, the Court clarified this principle. It expressly rejected the Third Circuit's decision placing the burden on prison officials to manufacture alternatives to accommodate a prisoner's free exercise rights. *O'Lone*, 482 U.S. at 347. The Court explained:

> "[w]e have rejected the notion that prison officials have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. By placing the burden on prison officials to disprove the availability of alternatives…[the Third Circuit] fails the respect and deference that the United States Constitution allows for the judgment of prison administrators."

Id. at 350 (quotation and citation omitted).

Common sense demands this outcome. Religious exercise is a personal and intimate experience. For example, one of the five Pillars of Islam, salat (also spelled salah) requires followers to perform five daily prayers. *Salat: daily prayers*, BBC, https://www.bbc.co.uk/ religion/ religions/islam/practices/salat.shtml. However, only four-in-ten American Muslims actually perform these prayers. Elizabeth P. Sciupac, *U.S. Muslims are religiously observant, but open to multiple*

interpretations of Islam, Pew Research Center, https://www.pew research.org/ fact-tank/2017/08/28/u-s-muslims-are-religiously-observant-but-open-to-multiple-interpretations-of-islam/. In other words, a person may find one religious practice essential while another person of the same faith may not.

It is not appropriate for a prison official to determine how to accommodate an inmate's religious beliefs, because religious practices are not uniformly observed, even among members of the same faith. Moreover, it is illogical and unreasonable to expect prison officials to know what practices are required by each faith. Thus, inmates—not prison officials—are responsible for proposing potential alternatives to meet their religious needs. As such, the district court properly concluded that no obvious, easy alternative was available, because Firewalker-Fields never put forth any reasonable alternatives. (Summary Judgment Opinion, J.A. 68.)

C. Even If Firewalker-Fields Properly Alleged Alternatives To In-Person Jumuah Service, The Alternatives Are Not Easy or Obvious.

A televised service is not an easy alternative. There is no easy way to implement a televised Jumuah service. Firewalker-Fields' argument to the contrary is out of touch with MRRJ's reality. (*See* App. Brief 22) ("[c]onstitutional adjudication should not proceed as if video technology was stuck in the 1970s.") MRRJ must take into account far more than its ability to access an online Jumuah service. For example, it must consider how it will display the

service. While Firewalker-Fields sees no reason why the closed-circuit TV[3] cannot display the service, he fails to appreciate that the MRRJ will then be inundated with requests from all 32 other religions to stream their service on the closed-circuit system. (*See* Decl. John Lilly, J.A. 49) ("MRRJ… recognizes approximately 33 different religions"). The potential of MRRJ having to display 16 hours of religious services per week (assuming each service is 30 minutes) creates obvious problems, including the administrative and potentially financial burdens of finding, approving, and administering these services.

Firewalker-Fields suggests that the Jail could simply buy a new technological device and stream a Jumuah service for him. (App. Brief 22.) Again, Firewalker-Fields fails to appreciate the implications of this decision and the limits of MRRJ's resources. If the MRRJ purchases a laptop or iPad for one inmate to watch a religious service, does this mean all inmates get a device for their service? Moreover, where will the inmate watch this service? Will the Jail allow an inmate to have unsupervised access to a technological device? If not, who will supervise the inmate while he is watching the service? How will the Jail satisfy inmates who are not religious but want access to the same device? Do they

[3] The only video capability available at MRRJ is a closed circuit TV. This means all TVs in the jail must show the exact same programming at all times. (Decl. John Lilly, J.A. 48.)

have to provide a device to all inmates? Bearing these considerations in mind, broadcasting a Jumuah service is hardly an obvious or easy alternative.

Firewalker-Fields improperly relies on *Greenhill v. Clarke* to suggest courts recognize the ease of providing televised religious services to inmates. (App. Brief 21.) In *Greenhill*, an inmate alleged he was not able to participate, directly or by television, in Jumuah.[4] *Greenhill v. Clarke*, 944 F.3d 243, 246 (4th Cir. 2019). The prison offered Jumuah in-person or through closed-circuit broadcasts, and it "conceded that it could physically provide Greenhill with television access for viewing Jum'ah." *Id*. at 247. Despite the prison's *ability* to show the service, it chose to deny Greenhill access, based on Greenhill's elevated security and housing classification. *Id*. The narrow issue was "whether television access limited to religious exercise can be denied solely because television access is considered a privilege." *Id*. at 249, 253.

The MRRJ did not have access to a televised Jumuah service and thus could not physically provide one to Firewalker-Fields. Moreover, the MRRJ did not deny Firewalker-Fields access to Jumuah because it believed the service was a privilege to be earned. The lack of service stemmed from legitimate safety and resource concerns.

[4] In *Greenhill*, plaintiff identified three ways in which he could view Jumuah services, and the Court confined its analysis to the three alternatives offered by Greenhill. *Greenhill v. Clarke*, 944 F.3d 243, 249 (4th Cir. 2019).

Finally, although the MRRJ was not required to explore alternatives, it did so anyway. MRRJ reached out on "multiple occasions" to the Islamic Center of the Shenandoah Valley in hopes of coordinating an outreach program. (Decl. Faye McCauley, J.A. 30.) However, MRRJ's Operations Specialist was never able to make contact with the Islamic Center. (*Id*.) Additionally, MRRJ allows inmates to put any religious leader, such as an imam, on his visitor list. (Decl. John Lilly, J.A. 36.) During these visits, the imam can perform Jumuah with the inmate. Firewalker-Fields never placed an imam on his visitor list. (*Id.*)

D. The District Court Properly Concluded That The Impact Of Accommodating Firewalker-Fields Would Impact Prison Staff and Other Inmates.

The district court determined the third *Turner* factor was more neutral than the first two, but still favored the MRRJ. (Summary Judgment Opinion, J.A. 67-68.) In reaching its conclusion, the district court focused on the MRRJ's security and resource concerns. The district court analyzed the potential security risks if a Jumuah service at MRRJ was in-person and inmate-led.[5] It explained that allowing an in-person, inmate-led Jumuah service could lead to the formation of a gang mentality and inmates exercising undue influence over each other. (*Id.* at 65.) In light of that precise security risk, the MRRJ does not permit inmates to

[5] The district court only analyzed security concerns for this particular type of worship because it determined no alternatives were proffered by Firewalker-Fields. (Summary Judgment Opinion, J.A. 68.)

lead any type of service or group; only approved, outside volunteers have that privilege. (Decl. John Lilly, J.A. 50.) Lilly explains in his sworn declaration that there are inherent safety risks when inmates lead any kind of group class. (*Id*.) The district court appropriately deferred to Lilly's statement. (*See Id*. at 35.)

Firewalker-Fields contends that MRRJ's security concerns are overstated. (App. Brief 25-7.) First, he asserts that MRRJ refused to consider the differences between a "street gang meeting and communal prayer mandated by one of the world's greatest religions." (*Id*. at 25.) The argument misrepresents the purpose of the policy. The policy is applicable to *all* inmates, regardless of religion[6]—and in no way suggests that MRRJ views the practices of Islam in the same light as a street gang. MRRJ, of course, is fully aware that religious worship and street gangs are different, and provides numerous accommodations to Muslim prisoners. However, as discussed, allowing one inmate to lead religious services can create safety risks well known to prison administrators, and widely recognized in the case law to inform jail policy. *Turner* requires deference to prison officials, who are best equipped to make jail policy. "Running a prison is an inordinately difficult undertaking . . . courts must accord deference to the officials who run a prison, overseeing and coordinating its many aspects, including security, discipline, and

[6] This policy is not just for inmate-led religious classes, it applies to all activities and classes – religious or not.

general administration." *Lovelace v. Lee*, 472 F.3d 174, 199 (4th Cir. 2006) (citing *Turner*, 482 U.S. at 84-85; *O'Lone*, 482 U.S. at 349-50).

Firewalker-Fields also suggests that because VDOC and the Federal Bureau of Prisons allow supervised inmate-led worship, MRRJ must allow it. This is a false equivalence without factual support in the record. There is no evidence in the record that MRRJ has the same capabilities or even the capability to implement inmate led meetings. Unlike prisons, jails are "short-term holding facilities." Prison Fellowship, *FAQ: Jail vs. Prison*, https://www.prisonfellowship .org/ resources/training-resources/in-prison/faq-jail-prison/?mwm_id= 2957486 45994&sc=WB1710B10&sc=WB1710B10&gclid= CjwKCAiAu8SABhAxEiwA sodSZG9zKwzeqMx_o7 svC0kB7kaafIxOGvsBtM zwz4NCwOvTlHgZAHhAdRo CBPkQAvD_BwE. Consequently, jails have "less well-developed facilities" because they are not designed to house long-term residents. *See What is the Difference Between Jail and Prison*, https://www.hg.org/legal-articles/what-is-the-difference-between-jail-and-prison-31513. Comparing a prison's resources to a jail's may be akin to comparing apples to oranges.

Firewalker-Fields argues "both this Court and the Supreme Court have recognized that…security concerns about accommodating religious exercise by inmates are frequently overstated, and indeed often counterproductive." However, Firewalker-Fields fails to provide any case supporting this proposition. Instead,

Firewalker-Fields relies on a quote from *Greenhill* discussing the connection between religion and inmate rehabilitation. (App. Brief 27.) Similarly, Firewalker-Fields' reliance on *Cutter v. Wilkinson*, 544 U.S. 709 (2005) is misguided. The fact that the Supreme Court decided that compliance with a statute will not impact the ability of prison staff to ensure safety and security, does not mean that security concerns are "often overstated." (*Id*.) In *Cutter*, the Supreme Court reiterated that "prison security is a compelling state interest, and [] deference is due to institutional officials' expertise in this area." *Cutter*, 544 U.S. at 725 n. 13.

Firewalker-Fields further contends that allowing inmate-led services would not create any burden on the MRRJ's resources, and compares an in-person Jumuah service to the televised Mennonite service. (App. Brief 28-29.) The televised Mennonite service only requires the television. However, an in-person Jumuah service during lockdown hours (11 a.m. to 1:30 p.m.) creates a host of concerns. During this period, all officers are occupied in count, feeding, cleaning up, or taking their mandatory breaks." (Decl. John Lilly, J.A. 49.) The MRRJ did not have the human resources to supervise an in-person service at that time. Additionally, as stated previously, the ripple effect is detrimental and a serious concern. Importantly, Firewalker-Fields did not dispute MRRJ's evidence regarding its security and resource concerns at the district court level. The district

court properly determined that the third *Turner* factor favored the MRRJ in light of the undisputed evidence on the record.

E. The District Court Properly Concluded That Firewalker-Fields Had Alternative Means of Practicing His Religion.

Jails do not have to perfectly accommodate all prisoners' religious requests. So long as prisoners have sufficient alternative means to practice their religion, the second *Turner* factor is satisfied; even if they are unable to worship in their preferred method.

The MRRJ accommodated Firewalker-Fields and other Muslims in numerous ways. The MRRJ permitted Firewalker-Fields to name an imam on his visitor list and to visit and pray with the imam during Jumuah. (Decl. John Lilly, J.A. 49). The MRRJ permitted Firewalker-Fields a prayer rug and soft-covered Quran in his cell. (*Id*.) The MRRJ provided Firewalker-Fields the option of special meals during Ramadan. (*Id*.) The MRRJ provided a pork-free diet year-round. (*Id*.) These accommodations undoubtedly satisfy the second *Turner* factor. *See, e.g.*, *O'Lone*, 482 U.S. 342, 352 (1987) (finding that accommodations for Ramadan and a pork free diet were sufficient prison accommodations where the ability to participate in Jumuah was restricted); *Baranowski v. Hart*, 486 F.3d 112, 121 (5th Cir. 2007) (finding that accommodations such as the ability to worship in an inmate's cell using available religious material and availability to access other

religious materials during the week were sufficient alternatives to Shabbat and other religious services).

The district court weighed all the *Turner* factors and provided the appropriate amount of deference to the determinations of MRRJ administrators. There is no requirement that every Turner factor substantially favor the jail. Rather, *Turner* requires a holistic review of reasonableness. *O'Lone*, 482 U.S. at 350 (explaining several factors are relevant to *Turner*'s reasonableness inquiry). The district court correctly held that Firewalker-Fields could not meet his burden to show the MRRJ's religious policies were unreasonable.

II. THE DISTRICT COURT PROPERLY GRANTED SUMMARY JUDGMENT ON THE ESTABLISHMENT CLAUSE CLAIM.

The Establishment Clause of the First Amendment provides "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. Firewalker-Field's argument that prison officials are not entitled to deference under the Establishment Clause is incorrect, and ignores the context in which these constitutional claims arise. (App. Brief 15.) The district court properly employed *Turner* when deciding whether the MRRJ's policy of broadcasting a Mennonite service violated the Establishment Clause.

In the context of prisoners' Establishment Clause claims, *Turner* is the appropriate test to determine whether the government made a permissible accommodation to prisoners' free exercise rights. The Supreme Court "has long

recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Com.*, 480 U.S. 136, 144-45 (1987). When the government accommodates individuals' free exercise rights, it can implicate Establishment Clause concerns. *See Cutter*, 544 U.S. at 719-20. In the prison context, the way to determine whether an accommodation is permissible is by applying *Turner*. The *Turner* test accomplishes the overall goal apparent in accommodation doctrine jurisprudence – determining whether there is a sufficient secular purpose for a government action. *See Cutter v. Wilkinson*, 544 U.S. 709, 713 (2005); *Locke v. Davey*, 540 U.S. 712, 718 (2004); *Hobbie*, 480 U.S. at 144-45; *Cutler v. United States HHS*, 797 F.3d 1173, 1181 (D.C. Cir. 2015).

The Supreme Court has expressly held "*Turner* provides the test for evaluating prisoners' First Amendment challenges." *Shaw v. Murphy*, 532 U.S. 223, 230 (2001). Importantly, the Supreme Court did not qualify its holding nor prescribe different standards for different constitutional challenges within the First Amendment. *Turner* applies to all First Amendment claims in the prison context. In fact, *Turner* applies to *all* constitutional claims by prisoners involving rights that must "necessarily be compromised for the sake of proper prison administration." *Johnson v. California*, 543 U.S. 499, 510 (2005); *see also Washington v. Harper*,

494 U.S. 210, 224 (1990) (holding *Turner* is not limited to rights under the First Amendment and applies to "all circumstances in which the needs of prison administration implicate constitutional rights."). Thus, the district court's *Turner* application is proper.

A. There Is No One Size Fits All Test for Establishment Clause Analysis

The Establishment Clause of the First Amendment provides "Congress shall make no law respecting an establishment of religion." "While the concept of a formally established church is straightforward, pinning down the meaning of a law respecting an establishment of religion has proved to be a vexing problem." *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2080 (2019). The Supreme Court currently recognizes three Establishment Clause tests: (1) *Lemon* test; (2) *Lee* coercion test; and (3) the endorsement test. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971) (establishing *Lemon* test); *Lee v. Weisman*, 505 U.S. 577 (1992) (establishing *Lee* coercion test); *Lynch v. Donnelly,* 465 U.S. 668, 687-94) (1994) (O'Connor, J., concurring) (establishing endorsement test). In addition, the Supreme Court recognizes two other doctrines—"tradition" and "accommodation"—that do not implicate any specific test but have been relied upon by the Court to decide Establishment Clause cases. *See, e.g.*, *Marsh v. Chambers*, 463 U.S. 783 (1983) (relying on tradition concept to analyze

Establishment Clause claim); *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (relying on accommodation).

Despite the disjointed approach in Establishment Clause jurisprudence, there is one constant. Context is crucial. *See County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 597 (1989) ("[T]he effect of the government's use of religious symbolism depends on its context"), abrogated on other grounds by *Town of Greece v. Galloway*, 572 U.S. 565 (2014). "To focus exclusively on the religious component of any activity would inevitably lead to the activity's invalidation under the Establishment Clause." *Wood v. Arnold*, 915 F.3d 308, 314 (4th Cir. 2019) (citations and internal quotations omitted). Thus, the context is determinative. This principle is particularly applicable with regard to Establishment Clause challenges in prisons.

In *Wood v. Arnold*, a high school student alleged her school violated the Establishment Clause by endorsing Islam in a world history class. *Wood*, 915 F.3d at 313. This Court refused to solely review the teacher's statements that allegedly endorsed Islam in a vacuum.[7] Instead, it looked into the broader context of the world history curriculum, which included topics ranging from the Renaissance to both World Wars. *Id*. at 312-14. It determined there was no Establishment Clause

[7] The teacher stated, *inter alia*, "Most Muslim's faith is stronger than the average Christian." *Wood v. Arnold*, 915 F.3d 308, 313 (4th Cir. 2019).

violation given the context in which the teacher made the statement – during a unit about how the Islamic faith contributed to development of the Muslim empire. *Id*. at 318.

Similarly, context is key in this case. The Court must look beyond the fact that the MRRJ televised a Christian service on Sundays. The Court must consider the broader context of prison life, including: (1) prisons *are required* to accommodate prisoners' religious exercise; (2) the MRRJ recognizes 33 different religions, of varying sizes; and (3) the MRRJ accommodates Muslim prisoners in several ways. As recognized in *Shaw*, the *Turner* analysis is the best vehicle to weigh these considerations. *Shaw*, 532 U.S. at 228-29.

B. The *Turner* Analysis Is the Appropriate Test For A Prisoner's Constitutional Claims.

The MRRJ accommodates prisoners' religious exercise by airing a Sunday service. In the prison context, *Turner* should be applied to determine if the accommodation is proper.

Prisoners' constitutional claims must be analyzed under *Turner* when the right at issue is "inconsistent with proper incarceration." *Johnson v. California*, 543 U.S. 499, 510 (2005) (citing *Overton v. Bazzetta*, 539 U.S. 126, 131 (2003)); *see also Shaw*, 532 U.S. at 229 ("In *Turner* we adopted a unitary, deferential standard for reviewing prisoners' constitutional claims"). Courts apply *Turner* to many constitutional claims, because many rights are inconsistent with proper

incarceration. *See Ward v. Walsh*, 1 F.3d 873, 877 (9th Cir. 1993) (citing *Washington v. Harper*, 494 U.S. 210, 223 (1990)) ("The Supreme Court has held that *Turner* applies to all constitutional claims arising in prison with the exception of Eighth Amendment claims"); *See also Nasir v. Morgan*, 350 F.3d 366, 369-70 (3d Cir. 2003) (applying *Turner* when considering if a prisoner's First Amendment rights were violated by a prohibition on inmate-to-inmate correspondence); *Harris v. Thigpen*, 941 F.2d 1495, 1515-16 (11th Cir. 1991) (applying *Turner* when considering if a prisoner's Fourteenth Amendment privacy rights were violated). Firewalker-Fields' contention that a "Free Exercise [case] produced the Turner test" is incorrect, and improperly narrows *Turner*'s scope. (App. Brief 32); *see Turner*, 482 U.S. at 81-2 (analyzing claim that inmates have a First Amendment right to correspond and a constitutionally protected right to marry). Thus, the general rule is *Turner* applies broadly.

The only exception to this general rule (i.e. when *Turner* does not apply) is when exercising a right has no legitimate bearing on prison administration. *See, e.g.*, *Johnson,* 543 U.S. at 510 ("The right not to be discriminated against based on one's race is not susceptible to the logic of *Turner*. It is not a right that need necessarily be compromised for the sake of prison administration"); *Spain v. Procunier*, 600 F.2d 189, 193-94 (1979) (explaining that because the Eighth Amendment's purpose is to protect persons convicted of crimes, allowing

"mechanical deference" to prison officials is inconsistent with the right and would call into question the integrity of the criminal justice system). For example, racial classifications are subject to strict scrutiny in prison settings. The inapplicability of *Turner* is proper in this context.

> [T]here is simply no way of determining what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics….Therefore, [strict scrutiny applies] to all racial classifications.

Id. at 506. The invidious nature of racial discrimination mandates this result. *See Id*. at 505 ("Racial classifications raise special fears that they are motivated by an invidious purpose"). Moreover this result is consistent with Supreme Court jurisprudence, which has prohibited racial classifications even when all races are equally benefited or burdened. *Id*. at 506 (citation omitted); *see also Brown v. Board of Education*, 347 U.S. 483 (1954).

In contrast, Establishment Clause jurisprudence in the prison context recognizes the necessity of providing appropriate accommodations based on inmate demand and resources – no court has ever concluded that all religions must be equally accommodated while in prison. For example, in *Cruz v. Beto*, the Supreme Court explained that it would be inappropriate if "every religious sect or group within a prison – however few in number – [was provided] identical facilities or personnel." *Cruz v. Beto*, 405 U.S. 319, 322 fn. 2 (1972).

The district court properly concluded *Turner* applies to Firewalker-Fields' Establishment Clause claim because this case involves "a right . . . that need necessarily be compromised for the sake of proper prison administration." (Summary Judgment Opinion, J.A. 69-70.) As the district court aptly recognized:

> the inherent tension between the Establishment and Free Exercise Clauses is exacerbated in the prison context, where inmates often cannot practice their religious beliefs without some active involvement of prison administration. . . . [Consequently, courts] . . . apply the Establishment Clause less strictly.

(*Id*.) (citation omitted).

The Supreme Court has never reviewed a prisoner's Establishment Clause claim. However, if the issue ever arose before the Court, it would likely apply *Turner.* The fact that the Supreme Court has not dealt with the issue is not surprising given that "Establishment Clause cases involv[e] a great array of laws and practices." *Am. Legion*, 139 S. Ct at 2081. For example, some of the recent Supreme Court Establishment Clause cases concerned President Trump issuing an executive order blocking entry to aliens of primarily Muslim nations, Catholic school teachers claiming they were discriminated against in employment, and town board meetings opening with prayer. *Trump v. Hawaii*, 138 S. Ct. 2392 (2018), *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020), and *Town of Greece v. Galloway*, 572 U.S. 565 (2014). The variety of cases reaching the Supreme Court on this issue necessarily require a variety of tests.

Firewalker-Fields claims "federal circuit courts that have considered Establishment Clause claims in the prison context . . . have not applied the *Turner* test," while simultaneously recognizing "[t]he Fifth Circuit's opinion in *Brown*… [applied] the *Turner* standard." (*Id*. at 35-36) (citing *Brown v. Collier*, 929 F.3d 218 (5th Cir. 2019)). Firewalker-Fields' argument is inconsistent and incorrect. Other Circuits have considered *Turner* in this context. *Maye v. Klee*, 915 F.3d 1076, 1085 (6th Cir. 2019) (analyzing prisoner's Establishment Clause claim under both *Turner* and *Lemon*); *Merrick v. Inmate Legal Servs.*, 650 F. App'x 333, 336 (9th Cir. 2016) (finding that the district court did not properly address the Establishment Clause claim, which should be analyzed under *Turner* and not grouped in with plaintiff's RLUIPA claim and parallel state law claim, which have higher standards)[8]; *see also Inouye v. Kemna*, 504 F.3d 705, 716 (9th Cir.) (citing *Stafford v. Harrison*, 766 F. Supp. 1014 (D. Kan. 1991)) (differentiating probationers' and prisoners' Establishment Clause claims, and noting *Turner* deference applied to prisoners' Establishment Clause claims). *Turner* is the appropriate test for all prisoners' constitutional claims, absent the limited exceptions discussed *supra*, which are not present here.

[8] *See Merrick v. Inmate Legal Servs.*, 2016 U.S. Dist. LEXIS 198375, at *5 (D. Ariz. 2016) ("In its Memorandum Disposition…, the [Ninth Circuit] Court of Appeals stated the Plaintiff's Establishment Clause claim should be analyzed under the test set forth in *Turner*").

C. Firewalker-Fields' Reliance On *Cutter* To Create A New Establishment Clause Test Is Baseless and Should Be Ignored.

Firewalker-Fields argues that *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005) is the correct framework to evaluate the alleged Establishment Clause violation in this case. (App. Brief 33.) He advocates that prison accommodations must comply with three factors to avoid violating the Establishment Clause. Firewalker-Fields argues a prison's accommodations must:

> (1) Remove government-created burdens on private religious exercise;
> (2) Appropriately take into account burdens the accommodations impose on nonbeneficiaries; and
> (3) [be] administered neutrally among different faiths.

(*Id.* at 33-34.) Even under Firewalker-Fields' test the MRRJ meets constitutional standards; in this context, the second factor of Firewalker-Fields' test demands the Court apply a *Turner* analysis. Under Firewalker-Fields' interpretation, every prison would be required to provide equal worship opportunities to all religious sects in the inmate population. His position ignores the well-established law that courts must give deference to jail administrators due to varying resource and safety concerns, and inmate demands.

Additionally, Firewalker-Fields cites no precedent applying *Cutter* to any Establishment Clause case. *Cutter* is inapplicable. First, no court has ever applied a "*Cutter* test," and it is doubtful the Supreme Court intended any test to be born

from *Cutter*. The Supreme Court decided *Cutter* in 2005. In sixteen years, no court has suggested *Cutter* creates a test for Establishment Clause cases.

Second, the sole question before the *Cutter* Court was whether Section 3 of RLUIPA violated the Establishment Clause. *Cutter*, 544 U.S. at 713, 717, 724 ("We granted certiorari to resolve the conflict among Courts of Appeals on the question whether RLUIPA's institutionalized-persons provision…is consistent with the Establishment Clause…. In upholding RLUIPA…, we emphasize that respondents have raised a facial challenge to the Act's constitutionality, and have not contended that under the facts of any of the petitioners' specific cases that applying RLUIPA would produce unconstitutional results"). A Court analyzing whether a *law* violates the Establishment Clause necessarily requires an analysis beyond *Turner*'s scope. *Turner*'s only applicability is to a prisoner's constitutional claim. *Turner* controls because effective prison administration necessarily impacts the manner in which inmates exercise their constitutional rights. Thus courts must perform a context-specific inquiry when evaluating a prisoner's constitutional challenge. *See Turner*, 482 U.S. at 89-92.

In contrast, a court evaluating whether a law, such as RLUIPA, violates the Establishment Clause need not address such fact-intensive inquiries regarding specific prison policies. In *Cutter*, the Court decided whether a generally applicable law was constitutional. Determining whether legislation is

constitutional invokes much broader questions than whether a particular jail's accommodations violate the Establishment Clause. The *Turner* test was specifically designed to address the constitutionality of individual jail policies. The more narrowly tailored *Turner* analysis applies in this case.[9]

Cutter simply continues the Court's tradition of recognizing that there is room for legislative acts to accommodate religion without violating the Establishment Clause. *Cutter*, 544 U.S. at 724 (explaining that if RLUIPA was declared unconstitutional, then "all manner of religious accommodations would fall"). Thus, it has no precedential value on this issue. Firewalker-Fields' attempt to derive a test from *Cutter* and apply it to this case is an attempt to fit a square peg in a round hole.

D. Even Under The Other Establishment Clause Tests, The MRRJ's Policy Is Constitutional.

Some federal courts analyzing prisoners' Establishment Clause claims have applied either the *Lee* or *Lemon* test. It is sometimes unclear why a court chose a particular test, and sometimes courts switch between tests without explanation. *Compare Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996) (applying *Lee*) *to Kauffman v. McCaughtry*, 419 F.3d 678, 684 (7th Cir.. 2005) (applying *Lemon*).

[9] It is well established that the more narrowly tailored rule prevails over the generally applicable one. *See, e.g.*, *Lara-Aguilar v. Sessions*, 889 F.3d 134, 139 (4th Cir. 2018).

Nevertheless, in the instant case, the MRRJ policy is constitutional under *Lemon* and *Lee*.

The *Lee* Coercion Test.

If this Court refuses to apply the *Turner* test, it should apply the *Lee* coercion test, which is used to address Establishment Clause challenges by inmates claiming the prison coerced them to participate in a religious activity. In *Lee v. Weisman*, the Supreme Court announced that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise." 505 U.S. 577, 587 (1992).

This test 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. *See Inouye*, 504 F.3d at 713; *Werner v. Orange County Dep't of Probation*, 115 F.3d 1068, 1074 (2d Cir. 1996), vacated on other grounds by 115 F.3d 1068 (1997); *Kerr v. Farrey*, 95 F.3d 472, 479 (7th Cir. 1996); *Ross v. Keelings*, 2 F. Supp. 2d 810, 817-18 (E.D. Va. 1998); *Nusbaum v. Terrangi*, 210 F. Supp. 2d 784 (E.D. Va. 2002); *Desper v. Lee*, 2011 U.S. Dist. LEXIS 121330, at *17-19 (W.D. Va. Oct. 20, 2011), *aff'd*, 467 F. App'x 226 (4th Cir. 2012). Courts applying *Lee* ask three questions: (1) has the state acted; (2) does the action amount to coercion; (3) is the object of the coercion religious. *Inouye*, 504 F.3d at

713 (citing *Kerr*, 95 F.3d at 479). All three prongs must be answered in the affirmative to amount to a constitutional violation.

Here, the operative question is whether Firewalker-Fields can establish the second prong; i.e., whether the MRRJ coerces inmates to participate in the Christian service. A religious act is coercive if the state compels a person to engage in it and imposes a punishment (or denial of benefits) if the person refuses to engage. For example, in *Kerr*[10], prison authorities required inmates with substance abuse problems to enroll in Narcotic Anonymous (NA) meetings. *Id*. at 474. The NA meetings were organized around religious principles. *Id*. (seven out of twelve steps of NA program directly invoked religion). If inmates failed to attend the NA meetings the prison punished them by reclassifying them as higher security risks, and wrote negative notations in their record, which adversely impacted the inmates' chance of parole. *Id*. at 479. The Seventh Circuit concluded the NA meetings were coercive because attendance was mandatory and failure to participate in the program would result in significant penalties.

[10] Firewalker-Fields contends that in *Kerr*, the Seventh Circuit applied *Lemon* after reversing the district court, which applied *Turner*. (App. Brief 36). This is incorrect. In *Kerr*, the district court applied Lemon, and the Appellate Court reversed and applied *Lee*. *Kerr*, 95 F.3d at 479. ("In applying the *Lemon* test to Kerr's claim, the district court did not take into account the substantial Establishment Clause jurisprudence that the Supreme Court has developed since *Lemon*…. In our view, when a plaintiff claims that the state is coercing him or her to subscribe to religion generally [*Lee* applies]").

Here, MRRJ did not coerce Firewalker-Fields. The MRRJ did not require Firewalker-Fields or any other inmate to watch the televised service. Additionally, no punishment or denial of benefits resulted from failing to participate in the service. Unlike *Kerr*, Firewalker-Fields suffered no adverse consequences for failing to watch the service.

Firewalker-Fields' contention that he was punished or denied a benefit by choosing to remain in his cell, as opposed to watching the service, is without merit. As *Kerr* makes clear, punishment must adversely impact the inmate. Here, there is no evidence Firewalker-Fields lost any tangible benefit by choosing to remain in his cell. At worst, he was unable to sit in the day room during the service. There is no evidence that the inmates who watched the service were permitted to do anything besides watch the service.[11] Firewalker-Fields has no evidence that his freedom of movement was any more restricted in his cell than it would be in the day room during the service. Furthermore, in his cell Firewalker-Fields could choose how to spend his time. And again, contrary to Firewalker-Fields' argument, the Establishment Clause does not require jails to accommodate all religions equally, nor could they. *E.g., Desper*, 2011 U.S. LEXIS at *18-19 (citing *Cruz*, 405 U.S. at 325 n. 2).

[11] Upon information and belief, the service lasted 30 minutes, and the inmates who chose to watch the service were not permitted to do anything else in the day room.

A panel of this Circuit affirmed a district court's application of *Lee* and *Turner* to Establishment Clause cases. *Desper v. Lee*, 467 F. App'x 226, 227 (4th Cir. 2012). Desper, an MRRJ inmate and Seventh-Day Adventist, argued MRRJ's policy providing a televised "Amish Mennonite" service on Sunday mornings violated the Establishment Clause. *Desper*, 2011 U.S. Dist. at *3. The district court held the Sunday service was not coercive and thus the MRRJ did not violate the Establishment Clause. *Id*. at *19. Therefore, there was no Establishment Clause violation. Three key findings led the court to its conclusion. First, Desper was not required to watch the program. *Id*. Second, Desper incurred no punishment for not watching the service. *Id*. Finally, and in an implied nod to *Turner*, the court emphasized that the Jail was "not require[d] . . . to provide identical worship opportunities for every religious sect or group" and "need only provide all prisoners with 'reasonable opportunities' to exercise their religious freedom." *Id.* at 18-19. The court found that Desper did not demonstrate he had no reasonable opportunities at the MRRJ to exercise his own religious beliefs. Likewise, here, Firewalker-Fields was not required to watch the Sunday service, incurred no punishment for choosing to remain in his cell, and had many other reasonable opportunities to exercise his Muslim faith.

The Western District of Virginia elucidated, like many others before and after it, that context matters; religious exercise in prison does not exist in a

vacuum. At bottom, determining whether the MRRJ Sunday service violates Firewalker-Fields' rights under the Establishment Clause requires an inquiry into (i) whether the MRRJ provided Firewalker-Fields with "reasonable opportunities" for religious exercise, and (ii) whether it is reasonable for the MRRJ to provide identical worship opportunities for Muslims.

The *Lemon* Test.

If this Court refuses to apply *Lee*, then the *Lemon* test will apply. *Lemon* has been used in the Seventh and Eighth Circuits, and the Western and Eastern Districts of Virginia to analyze a prisoner's Establishment Clause claim. *See Kaufman*, 419 F.3d at 684; *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979 (8th Cir. 2004)[12]; *Reese v. Jacobs*, No. 3:18CV140, 2020 U.S. Dist. LEXIS 45973, at 23-4 (E.D. Va. 2020) (applying *Lemon* and *Turner* to hold MRRJ's policy requiring volunteer-led religious services did not violate the Establishment Clause); *Gray v. Johnson*, 436 F. Supp. 2d 795, 799 n. 4 (W.D. Va. 2006) (explaining that while other Courts apply *Lee* to prisoner's Establishment Clause cases, "the Fourth Circuit has endorsed the *Lemon* test for analyzing Establishment Clause issues").[13]

[12] While *Murphy* expressly states it is applying Lemon, the Eighth Circuit's balancing of security risks implicates the *Turner* factors. *Murphy*, 372 F.3d at 985.
[13] While it is true that the Fourth Circuit has applied *Lemon* in Establishment Clause cases, it has not applied *Lemon* in prisoner cases like this one. As explained above, if deciding between *Lee and Lemon*, *Lee* is the more appropriate test and more widely accepted to evaluate these circumstances. Regardless, both tests invoke an implied *Turner* analysis.

Under *Lemon*, a government activity does not violate the Establishment Clause if (1) it has a secular purpose (2) its principle or primary effect does not advance or inhibit religion; and (3) it does not result in excessive government entanglement with religion. *Lemon*, 403 U.S. at 612. The *Turner* factors are necessarily invoked under *Lemon*.

A government activity fails prong one "only if the action is entirely motivated by a purpose to advance religion." *Gray*, 436 F. Supp. 2d at 800 (citing *Mellen v. Bunting*, 327 F.3d 355, 372 (4th Cir. 2003)). Analysis under *Lemon* prong one is identical to that of *Turner* factor one (i.e. whether there is a valid, rational connection between a prison's action and its justification for the action). *See Kaufman*, 419 F.3d at 684 (analyzing whether the prison justified its action as a security risk); *Murphy*, 372 F.3d at 985 (analyzing whether the prison justified its action due to security risks or resource constraints). Here, the primary purpose of the MRRJ's televised service is to fulfill its requirement to accommodate prisoners free exercise rights. Since accommodating religious exercise was the primary purpose of airing the service, MRRJ's practice satisfies the secular purpose test.

A government activity that fails under *Lee* necessarily fails *Lemon* prong two. *See Ross*, 2 F. Supp. 2d at 817 ("[W]here coercion is present, the program will inevitably fail the *Lemon* test"). As described above, no coercion exists in airing a televised service. Furthermore, the primary effect of the MRRJ's Sunday

service is not to advance or inhibit a particular religion but rather to "promote religious exercise within the limits of institution security needs" in light of the particular concerns present at the MRRJ. *Murphy*, 372 F.3d at 985. The *Lemon* prong two inquiry asks "whether a particular [policy] . . . would cause a reasonable observer to fairly understand it *in its particular setting* as impermissibly advancing or endorsing religion." *Lambeth v. Bd. of Comm'rs*, 407 F.3d 266, 271 (4th Cir. 2005) (emphasis added).

Here, the televised service is just one of many different accommodations MRRJ makes on behalf of religious inmates. As detailed above, the MRRJ specifically accommodates Muslim inmates in a variety of ways. Given the jail context, and in light of the accommodations the MRRJ provides to its small Muslim population, a reasonable observer would find that the MRRJ was not impermissibly endorsing Christianity.[14]

A government activity fails prong three if the activity requires "comprehensive, discriminating and continuing state surveillance." *Gray*, 436 F. Supp. 2d at 801 (internal quotations and citation omitted). It is acceptable to have some overlap between a government activity and religion. *Id*. In *Gray*, the

[14] This is especially true given that the MRRJ intends for the service to be non-denominational. (JA 35.)

Western District of Virginia explained that "merely hosting" an entirely voluntary event does not create an impermissible entanglement. *Id*. at 801-02.

Here, the MRRJ aired a service to accommodate the vast majority of inmates. The government's role in acting as a host for this service does not constitute the kind of comprehensive and discriminatory action that creates an excessive entanglement. Accordingly, the MRRJ did not violate *Lemon* by providing the Sunday service.

The Court should not disturb the district court's decision granting summary judgment to the MRRJ because the MRRJ did not violate the Establishment Clause under any of the existing tests.

CONCLUSION

For the foregoing reasons, Appellees Jack Lee and Middle River Jail Authority, by counsel, respectfully request that the Court affirm the ruling of the district court granting summary judgment in their favor.

JACK LEE and
MIDDLE RIVER JAIL AUTHORITY

By /s/ Julian F. Harf

Julian F. Harf (VSB # 90775)
Emily K. Stubblefield (VSB # 96164)
Guynn, Waddell, Carroll & Lockaby, P.C.
415 S. College Avenue
Salem, Virginia 24153
Phone: 540-387-2320
Fax: 540-389-2350
Email: julianh@guynnwaddell.com
emilys@guynnwaddell.com
Attorney for Appellees Jack Lee and Middle River Jail Authority

CERTIFICATE OF COMPLIANCE

1. This brief of the Appellees has been prepared using Microsoft Work software, Times New Roman font, 14 point proportional type size.

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of authorities; statement with respect to oral argument; any addendum containing statutes, rules, or regulations, and the certificate of service, this brief contains 10,023 words.

Date: February 8, 2021

By: /s/ Julian F. Harf
Of Counsel