CASE NO. 20-7382

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

DEAULLANDY GORAN COLEMAN,
Plaintiff - Appellant,

v.

SERGEANT JONES; MAJOR JOHNSON,
Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA AT ALEXANDRIA

REPLY BRIEF OF APPELLANT

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INTRODUCTION

Appellant's opening brief explained, in detail, why the important issues in this case *cannot* be reduced to the simplistic question of whether Muslim inmates have some freestanding constitutional "right to eat meat"—just as *Jehovah v. Clarke*, 798 F.3d 169, 179 (4th Cir. 2015), could not be reduced to whether inmates have a freestanding right to employment or good time credits. Mr. Coleman did assert a religious need to eat meat, and the district court erred in concluding that he waived that claim. But even if we accept the premise that he has no right to eat meat, and that defendants could serve a vegetarian diet to all prisoners, defendants still cannot:

- Make distinctions that are motivated by discrimination between faiths or animus toward any faith;
- Force inmates to choose between otherwise available and desirable government benefits (like eating meat) and the demands of their faith, without meaningful penological justification;
- Deny a requested accommodation by quarreling with whether the inmate's personal beliefs are actually mandated by the doctrines or requirements of his faith; or
- Administer policies that are not neutral between different faiths, or that coerce inmates to change their faith.

The opening brief explained that all of those rights are clearly established and that Mr. Coleman has a triable case that defendants violated all of them. Mr. Coleman was offered a Hobson's choice: eat the meat-based diet served to the

general population and violate your religion, or eat an inferior and undesirable vegetarian diet. When Coleman proposed a straightforward and cost-free alternative—the jail's meat-based Kosher meals, or readily available cross-certified Kosher/Halal meals that included meat—he was rebuffed without any meaningful penological justification. Defendants told Coleman that only Jewish inmates can have those meals, and that they cannot serve anything other than the single jail-selected vegetarian diet to any inmate who identifies as Muslim. JA 103–06. The district court correctly recognized that a reasonable jury could find that defendants had no legitimate penological interest in enforcing such a policy, and that a reasonable jury could find intentional discrimination on this record. JA 299.

Against that backdrop, the court erred in holding that Appellees were shielded by qualified immunity. No reasonable officer could fail to understand that intentional discrimination is forbidden, that substantial burdens on sincere religious beliefs require penological justifications, and that a state may not favor one religion over others.

Defendants' brief offers no meaningful response, beyond the assertion that inmates have no right to eat meat. And even on that question, defendants rely on inapposite and dated case law that fails to grapple with the important issues presented by this case. The district court's grant of summary judgment should be reversed, and the case remanded for trial.

ARGUMENT

I. THERE CAN BE NO QUALIFIED IMMUNITY FOR COLEMAN'S INTENTIONAL DISCRIMINATION CLAIMS

The district court recognized that a reasonable jury could find intentional discrimination on this record. JA 299. Coleman's opening brief explained that the district court's holding on that issue was correct, that intentional discrimination would establish a violation of the Equal Protection, Free Exercise, and Establishment Clauses under clearly settled law, and that there can be no qualified immunity for an intentional discrimination claim. Opening Br. § I.

Defendants have virtually no response. They argue that inmates do not have a right to eat meat, or at least that the law is unsettled on that issue. But there certainly is a clearly established right to be free from intentional religious discrimination in the provision of government benefits, even if those benefits are entirely discretionary.

Defendants assert that "[n]o intentional discrimination has been shown, merely different treatment," and that "[b]oth Jewish and Islamic inmates are afforded meals that comply with their faith." Appellees' Br. at 13. But the district court concluded that a reasonable jury could find "that such differential treatment was based on intentional discrimination" under the full circumstances of this case, and defendants offer no substantive argument that the district court erred. JA 299. Defendants stubbornly refused Coleman's reasonable request for meals that they

would have given to him if he converted to Judaism, on the basis of a purported "policy" that does not appear to exist, without any real penological justification and without considering easy and obvious alternatives. Opening Br. § I(A). They also expressed hostility to Mr. Coleman and to the idea that any inmate could have religious beliefs that differ from the jail's general preconceptions about Islamic law. *Id.* At the summary judgment stage all reasonable factual inferences, including the facts necessary to determine if there was a clearly established right, must be made in Coleman's favor. *See Tolan v. Cotton*, 572 U.S. 650, 657 (2014).

Defendants imply that they could not have had an intent to discriminate against Coleman because they were relatively low-level employees. But defendants do not identify any supervisor in the Sheriff's Office who commanded them to adopt or enforce this supposed "policy" of one-religion-one-meal. A reasonable jury could find that they took this decision on themselves, and may even have *violated* the jail's actual written policies and past practices. Opening Br. at 10, 51. Defendants admit that their "responsibility is to run a jail and provide reasonable accommodations for religious beliefs." Appellees' Br. at 4. Their reasons for these decisions present issues of witness credibility that require a trial.

Defendants argue that "[w]hether qualified immunity applies is not a question of the official's subjective state of mind" but instead of "whether a reasonable person in the official's position would have known their actions violate

clearly established statutory or constitutional rights." *Id.* at 11 (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818–19 (1982)). But when the constitutional violation is a forbidden state of mind, those inquiries collapse together. As Coleman's opening brief explained (at 27–28), this Court has held many times that there can be no qualified immunity against a constitutional claim that depends on a forbidden state of mind, because in such cases the "official's state of mind is a reference point by which she can reasonably assess conformity to the law." *Thompson v. Virginia*, 878 F.3d 89, 106 (4th Cir. 2017); *see also Brooks v. Johnson*, 924 F.3d 104, 118-19 (4th Cir. 2019); *Lovelace v. Lee*, 472 F.3d 174, 198 (4th Cir. 2006). *Dean v. Jones* held earlier this year that where "liability turns not on the particular factual circumstances under which the officer acted . . . but on whether the officer acts with a culpable state of mind," qualified immunity is never appropriate. 984 F.3d 295, 310 (4th Cir. 2021). If a reasonable jury could find intentional discrimination, then granting summary judgment on the basis of qualified immunity was error and the case should be remanded for trial.

II. COLEMAN'S FREE EXERCISE CLAIM CANNOT BE REDUCED TO WHETHER THERE IS A "RIGHT TO EAT MEAT"

As in the district court, defendants insist that the Free Exercise issues in this case boil down entirely to whether a Muslim inmate "has a constitutional right to a meal with meat." Appellees' Br. at 4. That is a gross oversimplification of the relevant principles and of the case law. The clearly established law is that

substantial burdens on sincerely held religious beliefs demand a penological justification, and consideration of "obvious, easy alternatives," under the test established by *Turner v. Safley*, 482 U.S. 78, 90 (1987). The cases that have considered challenges to vegetarian diets by Muslim prisoners have applied that clearly established standard, with varying results depending on the facts and circumstances of each case. No reasonable officer could believe that such challenges always and necessarily fail because there is no freestanding "right to eat meat."

A. A Substantial Burden On Religious Belief Does Not Require A Clearly Established Right

Defendants commit a fundamental analytical error by asserting that "[b]ecause there is no right, there can be no substantial burden on it." Appellees' Br. at 12-13. Free Exercise analysis *begins* by asking whether the plaintiff has a sincerely held religious belief and whether the challenged practice or policy substantially burdens the plaintiff's ability to practice his religion. *See, e.g.*, *Greenhill v. Clarke*, 944 F.3d 243, 253 (4th Cir. 2019) (citations omitted). If so, the practice or policy must satisfy the appropriate standard of justification. In prison, that standard is the penological interest test outlined in *Turner*. (Outside of prison the standard is *Employment Division v. Smith*, 494 U.S. 872, 879 (1990), and its progeny.) The downstream result of that entire analysis is a conclusion about whether the claimant has a Free Exercise right to a changed policy, or to an

exception from that policy. Defendants are attempting to turn that jurisprudence upside down and to deny the possibility that religious exercise can be substantially burdened at all unless the claimant *already* has a freestanding and clearly established right to the accommodation he seeks.

Defendants' proposed inversion of the doctrine would eliminate Free Exercise scrutiny entirely in a very important category of cases. It is clearly settled law that a loss of government benefits can be a "substantial burden" on religious belief even if the claimant has no freestanding right to those benefits. In *Sherbert v. Verner*, for example, the claimant obviously had no constitutional right to unemployment benefits. 374 U.S. 398 (1963). Nonetheless the Supreme Court held that she could not be denied those discretionary benefits on the ground that she was unwilling to work on Saturdays. *Id.* at 409-10; *see also Jehovah*, 798 F.3d at 179 (finding that the loss of opportunity to accrue good time credits due to a lack of jobs that accommodated Jehovah's Sabbath observance was a substantial burden).

A practice or policy substantially burdens a person's religious exercise when it "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs," *Carter v. Fleming*, 879 F.3d 132, 139 (4th Cir. 2018) (quoting *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 718 (1981)), including when it "forces a person to choose between following the precepts of his religion and forfeiting governmental benefits, on the one hand, and abandoning one

of the precepts of his religion on the other hand." *Couch v. Jabe*, 679 F.3d 197, 200 (quoting *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006)) (alterations adopted); *see, e.g.*, *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450-51 (1988) (substantial burden exists where a regulation has a "tendency to coerce individuals into acting contrary to their religious beliefs").

This Court applied that principle in *Jehovah v. Clarke*, where a prisoner argued that his exercise of religion was substantially burdened by the fact that the available prison jobs required him to work on his Sabbath. The district court dismissed on the ground that prisoners have no constitutional right to work while incarcerated, but this Court reversed and held that the district court had misunderstood "the correct focus of the RLUIPA and First Amendment inquiries." 798 F.3d at 179. "The constitutional right in jeopardy is Jehovah's right to free exercise of his religious beliefs; the unavailability of prison jobs accommodating his Sabbath schedule is the alleged burden on that right." *Id.* Even though there is no right to a prison job, forcing Jehovah to choose between his religious beliefs and an otherwise available benefit was coercive, and a substantial burden on those beliefs.

Mr. Coleman has presented a triable claim that his religious beliefs require him to consume meat, and the district court erred in suggesting that he waived that claim. *See* Opening Br. at 33–34. He also presented evidence that he suffered

significant health consequences from the vegetarian diet, which interfered with his ability to pray. *Id.* The district court acknowledged a triable issue on that point. JA 291–97. But even if we set all of that aside and grant defendants' premise that there is no general right to eat meat, forcing Mr. Coleman to choose between eating meat and following the commands of his religion is coercive and a substantial burden on his religious beliefs that demands justification. The most dramatic illustration of that point is that defendants would have given Mr. Coleman exactly what he wanted if he renounced his faith and converted to Judaism.

Defendants' contrary argument essentially confuses the substantial burden analysis with the test for qualified immunity, and fails to respond at all to Coleman's arguments and the district court's findings.

B. It Is Clearly Established Law That Inmates Are Entitled To Religious Dietary Accommodations Absent An Appropriate Penological Justification

Defendants' blinkered focus on whether there is a "constitutional right to a meal with meat" also obscures the substance of the clearly established Free Exercise rights at stake here. Defendants assert that "the Fourth Circuit has not addressed this particular question" (by which they mean the notional "right to eat meat") and proceed to rely on cases (mostly out-of-circuit and/or unpublished) that reject particular claims for dietary accommodations. But the relevant principle here is that inmates have a right to religious accommodations unless the denial of that

accommodation is justified by penological interests under *Turner.* Whether a particular plaintiff does or does not have a "right to eat meat" in a particular case depends on the application of that clearly established standard to particular facts.

This Court's decisions in *Wall v. Wade,* 741 F.3d 492 (4th Cir. 2014), and *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006), both articulate the clearly established law at the proper level of concreteness and particularity. *Wall* concerned religious dietary accommodations in prison, and this Court held that defendants' focus on the lack of specific on-point precedent "overlooks the broader right at issue: that inmates are entitled to religious dietary accommodations absent a legitimate reason to the contrary." 741 F.3d at 502. This Court explained that "we need not to have previously passed judgment on the appropriateness of particular sincerity tests in order to demand that prison officials act reasonably in administering that right," and that "[a]n expectation of reasonableness in this context is not a high bar, and does not punish officials for 'bad guesses in gray areas.'" *Id.* at 503 (quoting *Maciariello v. Sumner*, 973 F.2d 295, 298 (4th Cir. 1992)). Similarly, in *Lovelace* this Court held that "[a] prison official violates this clearly established right if he intentionally and without sufficient justification denies an inmate his religiously mandated diet." 472 F.3d at 199.

Defendants admitted that providing religious accommodations fell within their duties at the jail. Appellees' Br. at 4. They knew from *Ward* and *Lovelace* and

many other cases that forcing an inmate to become an involuntary vegetarian in order to practice his religion demands a meaningful penological justification. They knew, or later learned, that the jail had provided Kosher meal accommodations to Muslim inmates in the past, and that doing so for Mr. Coleman would entail no direct financial cost or administrative burden. JA 112, 114, 132, 227–28. The closest they came to articulating a real justification was an argument that for purposes of simplicity or convenience all members of the same religion should have to eat the same meal. That position is itself contrary to clearly established law, which makes clear that officials *may not* assume that all members of a faith have the same beliefs and refuse to consider sincere but idiosyncratic personal differences. *See, e.g., Thomas,* 450 U.S. at 714. Regardless, the district court correctly recognized that defendants could have accommodated Mr. Coleman without compromising their desire for uniformity, simply by serving the same dual-certified Kosher/Halal meals to Muslim and Jewish inmates alike. JA 298.

Turner is a relatively deferential standard, but it clearly requires consideration of "obvious, easy alternatives" that would accommodate an inmate's religious needs without significant harm to penological interests. 482 U.S. at 90. The district court pointedly concluded that defendants' actions were so patently unjustified that a reasonable trier of fact could infer intentional discrimination. JA 299. No reasonable official could think clearly established law permitted them to

disregard Mr. Coleman's needs for no real reason. The defendants' apathy toward their duty to reasonably accommodate Coleman's religious beliefs therefore violated the clearly established right this Court articulated in *Wall*.

The fact that this Court has never decided a case factually identical to this one is irrelevant. This Court has repeatedly explained that clearly established law, for qualified immunity purposes, "includes not only already specifically adjudicated rights, but those manifestly included within more general applications of the core constitutional principle invoked." *Pritchett v. Alford,* 973 F.2d 307, 314 (4th Cir. 1992). Although courts should "avoid ambushing government officials with liability for good-faith mistakes made at the unsettled peripheries of the law," this Court has held that it "need not—and should not—assume that government officials are incapable of drawing logical inferences, reasoning by analogy, or exercising common sense. In some cases, government officials can be expected to know that if X is illegal, then Y is also illegal, despite factual differences between the two." *Williams v. Strickland*, 917 F.3d 763, 770 (4th Cir. 2019). A right may be clearly established if "a general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002) (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)); *see also Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (a right may be clearly established if it is "manifestly

apparent from broader applications of the constitutional premise in question").

This Court has rejected overly narrow characterizations of clearly established law in numerous cases and contexts. In addition to the cases cited in Coleman's Opening Brief (at 37-39), *Pritchett* involved a § 1983 suit claiming that officers violated the right to procedural due process under the Fourteenth Amendment by summarily removing a towing business from a wrecker-referral list administered by the South Carolina Highway Patrol. 973 F.3d at 309. This Court rejected the defendant's argument that the right was not clearly established because "no court at the time had specifically recognized a property right in being on this or comparable state-prescribed wrecker-service lists." *Id.* at 317. Instead, this Court determined that there was a clearly established right not to be deprived of government benefits without due process of law, and denied qualified immunity. *Id.* at 317-18. Similarly, in *Tobey v. Jones*, this Court held that defendants violated clearly established free speech rights when they arrested the plaintiff for a silent protest in a TSA screening area. 706 F.3d 379, 383 (4th Cir. 2013). Defendants protested that there was no case directly addressing what restrictions on speech in an airport screening area are reasonable. *Id.* at 392. This Court rejected their argument that a general reasonableness standard failed to "provide sufficient guidance as to the contours of constitutional rights." *Id.* That is the same conclusion this Court reached, in a context much like this one, in *Wall. See* 741

F.3d at 503 (holding that "[a]n expectation of reasonableness in this context is not a high bar, and does not punish officials for 'bad guesses in gray areas'" (citation omitted)).[1]

C. Defendants Rely On Inapposite And Unpersuasive Precedent

Rather than engage with this Court's controlling precedents, defendants discuss a variety of carefully selected out-of-circuit and district court cases (almost

[1] *See also, e.g.*, *Smith v. Ray*, 781 F.3d 95, 101–102 (4th Cir. 2015) (recharacterizing the right from officers using specific takedown techniques in particular moments to the right to not be subjected to unreasonable force given the totality of the circumstances); *Ray v. Roane*, 948 F.3d 222, 229–30 (4th Cir. 2020) (rejecting arguments that factual differences in the size and threat of a dog failed to prove a clearly established right—the general right was to not have one's pet killed by police when it did not pose a threat); *Occupy Columbia v. Haley*, 783 F.3d 107, 121, 125 (4th Cir. 2013) (rejecting appellant's argument that the district court determined the right at too high a level of generality and denying qualified immunity because the First Amendment right to protest absent time, place, and manner restrictions was clearly established); *Gould v. Davis*, 165 F.3d 265, 269–270 (4th Cir. 1998) (defining the clearly established right as the right to be free from unreasonable searches and defining reasonableness based on clearly established exigent circumstances); *Wilson v. Kittoe*, 337 F.3d 392, 403 (4th Cir. 2003) (holding that the defendant police officer violated a clearly established Fourth Amendment right when he arrested a neighbor for obstructing an investigation when the neighbor refused to obey orders to leave, even without a similar case on point); *Bailey v. Kennedy*, 349 F.3d 731, 745 (4th Cir. 2003) (holding that officers violated clearly established law when they took a man into custody for a psychological evaluation when there was no evidence that he posed a danger to himself); *Henry v. Purnell*, 652 F.3d 524, 532 (4th Cir. 2011) (holding that shooting fleeing misdemeanant violated clearly established right, even if officer subjectively believed he was firing a taser); *Rogers v. Stem*, 590 F. App'x 201, 207 (4th Cir. 2014) (holding that right to be free from arrest without probable cause was clearly established even when the state statute at issue had not been judicially interpreted by Virginia courts).

all of them unpublished) and assert that "[n]o court that has considered the issue of halal meat has held that a Muslim, when provided with a nutritionally sufficient meal that does not violate Muslim law, has a constitutional right to a meal with meat." Appellees' Br. at 4. Defendants' discussion of the case law is incomplete and unpersuasive.

To begin with, Coleman's opening brief cited the Ninth Circuit's decision in *Shakur v. Schriro*, which remanded a claim very much like this one for consideration of whether "the gastrointestinal distress caused by the vegetarian diet" and inherent pressure on the plaintiff to "chang[e] his religious designation to Jewish simply to obtain the desired kosher meat meals" made out a violation of the Free Exercise Clause. 514 F.3d 878, 885, 889 (9th Cir. 2008). Coleman also cited *Jones v. Carter*, in which the Seventh Circuit could "find no principled reason for endorsing [defendant's] practice of withholding a readily available food," namely Kosher meals that were offered to Jewish inmates, from the Muslim plaintiff. 915 F.3d 1147, 1150-52 (7th Cir. 2019). Defendants conspicuously have no response.

Defendants persist in characterizing *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008), as holding "that there is no right to non-vegetarian meals." Appellees' Br. at 7. As Coleman explained at length previously, Patel was not even seeking non-vegetarian meals; his claim was that he should not be required to pay for the *vegetarian* meals he wanted from the prison commissary.

See Opening Br. at 39-41. Coleman also previously explained that the Third Circuit's decision in *Williams v. Morton* rested on significant budgetary and security concerns—concerns that are absent on the record of this case. *See* 343 F.3d 212, 217, 220-21 (3d Cir. 2003)

Defendants point to *Pratt v. Corrections Corp. of America*, an unpublished opinion in which a Muslim prisoner was offered "special vegetarian meals" in place of a non-Halal diet. 267 F. App'x 482, 482 (8th Cir. 2005). But *Pratt* contains no reasoning other than the same misreading of *Patel* that defendants persist in. *Id.* at 483. *Pratt* holds, unpersuasively, that forced vegetarianism can never be a "substantial burden," but it identifies no legitimate penological interests and does not discuss whether alternatives (like a Kosher diet) were available.

Defendants point to *Kahane v. Carlson*, in which the Second Circuit held that an orthodox Jewish prisoner must be provided with "a diet sufficient to sustain the prisoner in good health without violating the Jewish dietary laws" but that the district court had unnecessarily intruded on the "reasonable discretion" of prison authorities by particularly specifying "hot kosher TV dinners." 527 F.2d 492, 496 (2d Cir. 1975). The opinion does not consider or reject any argument that Rabbi Kahane had a religious need to eat hot TV dinners specifically, or that the alternatives would be unpalatable or nutritionally inadequate. *Kahane* also was decided more than a decade before *Turner* made clear that prison officials must

consider "obvious, easy alternatives." 482 U.S. at 90. Defendants cite an unpublished district court opinion that cited *Kahane* in rejecting a claim by Muslim inmates seeking Halal meat three to five times a week. *Abdul-Malik v. Goord*, No. 96 CIV.1021, 1997 WL 83402 (S.D.N.Y. Feb. 27, 1997). But the diet under review was not exclusively vegetarian, and the prison system was attempting to expand its once-a-week Halal meat service but could not because of supply shortages. *See id.* at *3-4.

The Fifth Circuit's decision in *Kahey v. Jones* applied the *Turner* test and focused on the costs and operational disruption associated with "devot[ing] special storage facilities, utensils and preparation effort" to accommodate Kahey's request for food prepared with dishes and utensils that never touched pork. 836 F.2d 948, 950-51 (5th Cir. 1988). The Ninth Circuit distinguished *Kahey* in *Shakur*, noting that "[i]n contrast to the inmate in *Kahey*, Shakur is not requesting any individualized processing or containers; he simply requests the same kosher TV-style dinner already served to many Jewish inmates." 514 F.3d at 891 n.9. Coleman similarly has just requested to eat a diet that defendants serve to plenty of other inmates and that they could make available to him at no meaningful cost.

Defendants cite the Sixth Circuit's unpublished decision in *Abdullah v. Fard*, No. 97-3935, 1999 WL 98529 (6th Cir. Jan. 28, 1999). But the Sixth Circuit applied the *Turner* test and relied on evidence that providing Halal meat options

"would strain the system's resources." *Id.* at *1. The Sixth Circuit specifically found that "the record does not indicate any alternative that would accommodate the alleged need for *Halal* meat at a minimal cost." *Id.*

Defendants cite several unpublished decisions from district courts in this Circuit. But none of those cases considered a record, like this one, in which it is undisputed that the plaintiff's request could have been accommodated without significant cost or administrative inconvenience, using meals already made available to Jewish inmates. For example, *King v. Hooks* does appear to say that a lacto-ovo vegetarian diet is sufficient. No. 5:17-CT-3043, 2021 WL 1435294, at *8 (E.D.N.C. Mar. 29, 2021). But there is no suggestion in the decision that there was any meat-based Halal-compliant alternative (Kosher or otherwise) available in the facility that the claimant requested and was denied.

In *Turner-Bey v. Maynard*, a prisoner argued that differences between meals for Jewish and Muslim inmates violated his constitutional rights. No. CIV.A 10-2816, 2012 WL 4327282, at *2-4 (D. Md. Sept. 18, 2012). But the court credited the prison's evidence that the plaintiff was simply mistaken. Jewish prisoners *were not* "provided meat from ritually-slaughtered animals" but were similarly fed a lacto-ovo vegetarian diet, and "providing any meat-based religious diets for any group would be cost-prohibitive and involve food preparation techniques that cannot be met in most . . . facilities." *Id.* at *7, *8-9. The court held that the *even-*

handed denial of religiously slaughtered meat to both Jewish and Muslim prisoners was "directly related to prison security (to prevent tension caused by the perception that different groups are treated differently)." *Id*. at *8. The district court also specifically found that there was no evidence of intentional discrimination. *Id.* at *10.

In *Watts v. Byars*, a Muslim prisoner similarly complained that prison officials served him a vegetarian meal instead of a specifically Halal-compliant meal. Civ. A. No. 6:12-1867, 2013 WL 4736693 (D.S.C. Sept. 3, 2013). Again, the district court credited testimony that the prison was "unable to afford a diet option for *any* religious group that requires ritually slaughtered animals due to the costs and practical limitations on prison storage, cooking, and serving capacities," and that attempting to do so would "create the perception of favoritism among inmates." *Id.* at *2 (emphasis added).

None of these cases are inconsistent with the clearly established law of this Circuit, illustrated by cases like *Wall* and *Lovelace*, that accommodations can be denied only on the basis of real penological interests and after consideration of available alternatives. None of them would support a belief that it is acceptable to force Muslim inmates, but not Jewish inmates, to become vegetarians when the Muslim inmates could be accommodated with no meaningful cost or administrative inconvenience—and when the differential treatment could be

eliminated simply by serving all Jewish and Muslim inmates the same, dual-certified meal. Indeed, these cases specifically highlight that dietary accommodations can be denied when they would impose prohibitive costs or foster a perception of favoritism. Here, these rationales weigh in Mr. Coleman's favor: granting his request would be cost-free and would ameliorate appearances of bias.

III. APPELLEES HAVE NO MEANINGFUL RESPONSE TO MR. COLEMAN'S ESTABLISHMENT CLAUSE CLAIM

The Establishment Clause "mandates governmental neutrality between religion[s]." *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 860 (2005) (citations omitted). Coleman's opening brief explained that defendants created both the substance and perception of favoritism by providing ritually slaughtered meat to Jewish inmates while denying the same meat to Muslim inmates who requested it—particularly when it is undisputed on this record that equal treatment could have been accomplished without significant cost or administrative inconvenience. Even in the prison context, the Supreme Court has unanimously recognized that accommodations must be administered neutrally among religions. *Cutter v. Wilkinson*, 544 U.S. 709, 720-24 (2005).

Remarkably and tellingly, Appellees' brief has no response to any of that. It does not attempt to justify the preferential treatment of one faith, nor does it address Coleman's right to be treated neutrally with respect to his religion. It does not attempt to distinguish any of the decisions holding that extending a benefit to

one religion and denying it to another violates the Constitution, even in prison contexts. It even acknowledges that Appellees have shown "different treatment" toward Jewish and Muslim inmates. Appellees' Br. at 21. As Coleman's opening brief argued, it is impossible to see the care that defendants have taken to ensure that Jewish prisoners have access to a religiously compliant *and meat-based* diet as anything other than favorable treatment, when compared with defendants' complete indifference to Mr. Coleman's reasonable and identical requests. As discussed above, a finding of intentional discrimination certainly would make out a violation of the Establishment Clause here. Even without a finding of intentional discrimination, on this record Mr. Coleman has a triable case that the Establishment Clause was violated by the objective disparity in treatment, coupled with the absence of any coherent justification for that disparity.

IV. APPELLEES HAVE NO RESPONSE TO COLEMAN'S DEMONSTRATION THAT THE STATE CONSTITUTIONAL CLAIMS ARE NOT SUBJECT TO FEDERAL QUALIFIED IMMUNITY LAW

Mr. Coleman's opening brief also explained that the district court erred in assuming that the Virginia courts would import federal qualified immunity jurisprudence wholesale into state law. Although the law of official immunity for claims of religious discrimination is not wholly settled in Virginia, the better reading of the case law is that defendants would not have official immunity under state law for the conduct alleged here. Coleman therefore has triable claims under

Virginia law even if his federal claims are barred by 42 U.S.C. § 1983 qualified immunity principles. Defendants, tellingly, have no response.

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 5,238 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word, in fourteen-point Times New Roman font.

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 printout.

Dated: November 23, 2021

Signed,

/s/ J. Scott Ballenger
J. Scott Ballenger