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

OPENING BRIEF OF APPELLANT

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JURISDICTIONAL STATEMENT

This is a 42 U.S.C. § 1983 case filed by an inmate in the Virginia correctional system, alleging violations of equal protection and religious freedoms under the federal and Virginia constitutions. The District Court had jurisdiction under 28 U.S.C. § 1331. On August 26, 2020, the U.S. District Court for the Eastern District of Virginia granted summary judgment to defendants Sandra Johnson and Josie Johns, finally resolving all issues in the litigation. JA 10–11. Appellant filed a timely notice of appeal on September 14, 2020. JA 11. This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

Defendants refused to allow appellant, a devout Muslim, to elect the Kosher diet that is available to Jewish inmates and that appellant sincerely believes would satisfy the requirements of his Islamic faith. Instead, defendants insisted that appellant either violate his religion by eating the general prison diet, or eat an all-vegetarian diet designed to satisfy a broad range of unrelated religions that restrict or prohibit the consumption of meat. The district court held that the record presents a triable case that defendants violated the Equal Protection, Free Exercise, and Establishment Clauses of the U.S. Constitution, as well as their Virginia counterparts. The court nonetheless held that defendants are entitled to qualified immunity as a matter of law. The issues on appeal are:

(1) Whether a finding that defendants acted out of religious animus or intentional discrimination would preclude qualified immunity.

(2) Whether defendants are entitled to qualified immunity on appellant's Free Exercise claim, when they offer no real penological justification for their actions and there were easy and obvious ways to accommodate his needs.

(3) Whether defendants are entitled to qualified immunity on appellant's Establishment Clause claim, when they persisted in implementing differential treatment for Jewish and Muslim inmates with no penological justification.

(4) Whether defendants are entitled to official immunity under Virginia law for appellant's claims arising under the Virginia constitution.

STATEMENT OF THE CASE

This case is about the defendants' arbitrary refusal to allow a Muslim inmate to elect an alternative diet that is consistent with his faith and already offered to Jewish inmates, and their insistence that he must instead either eat food that is forbidden by Islam or become a vegetarian, at significant cost to his health and religious practice.

Appellant Deaullandy Goran Coleman, Jr. ("Coleman") is a devout Muslim whose sincere religious beliefs require him to eat a Halal diet, but permit him to consume Kosher meat in exigent circumstances like incarceration. The meal plan offered to all prisoners at the Henrico County Jail includes meat. The Kosher diet

offered to Jewish inmates includes meat. But because he is Muslim, defendants insisted that his only choices were the general meal plan (which is not Halal compliant) or a "Common Fare" diet that is strictly vegetarian. Coleman does not wish to be a vegetarian, and he sincerely believes that the Kosher diet is consistent with Islamic law in these circumstances. That belief is supported by Islamic scholars, and the federal Bureau of Prisons has reached the same conclusion after careful study. *See, e.g., Patel v. United States Bureau of Prisons*, 515 F.3d 807, 814 (8th Cir. 2008). Coleman also suffered significant health consequences and weight loss on the vegetarian "Common Fare" diet, which interfered with his ability to pray.

Defendants have offered no meaningful penological justification for forcing Coleman to choose between the demands of his faith and giving up meat. All of the meals cost exactly the same, and giving Coleman the Kosher diet would just be a matter of changing the numbers on the order form. Defendants also could have treated Jewish and Muslim inmates equally by ordering dual-certified Kosher/Halal meals, from the same source and at the same price. The district court held that their behavior was so arbitrary and unjustified that a reasonable trier of fact could conclude that it was the product of animus or intentional discrimination against Muslim inmates, violating both the Establishment Clause and the Equal Protection Clause. The district court also held that the record establishes a triable claim that

defendants violated Coleman's free exercise rights, even under the deferential standard of *Turner v. Safley*, 482 U.S. 78 (1987).

Nonetheless the district court granted summary judgment to defendants on qualified immunity grounds, reasoning that prior cases "have consistently found that inmates are entitled to meals that are consistent with their religious beliefs … but also that there is no right to non-vegetarian meals." JA 300–01. The district court's qualified immunity holding is incorrect and should be reversed, for four reasons.

First, the district court correctly recognized that on this record a reasonable trier of fact could infer intentional discrimination. It is clearly settled that decisions motivated by religious animus or intentional discrimination violate the Establishment, Free Exercise, and Equal Protection Clauses alike. No reasonable officer could fail to know that. And this Court has held repeatedly that there can be no qualified immunity for violations that depend on a forbidden state of mind.

Second, it has been clearly established law for decades that the Free Exercise Clause requires a meaningful penological justification for denying an inmate's request for a religious accommodation, and that such requests cannot be denied when there are "obvious, easy alternatives" that could accommodate the needs of both the prisoner and the institution. *Turner*, 482 U.S. at 90. Any reasonable state official would understand that religious accommodations cannot be denied

arbitrarily or through rote invocation of policy, when accommodating the prisoner would be easy and threaten no meaningful penological interest. The cases the district court cited for the proposition that inmates have no constitutional right to eat meat dealt with very different circumstances, and certainly do not support any proposition that prison officials can force inmates to choose between eating meat and the demands of their faiths for no real reason.

Third, it also has been clearly established for decades that the Establishment Clause forbids state action that is substantively non-neutral between different faiths, and that departures from neutrality require justification.

Finally, the district court assumed that the Virginia courts would import 42 U.S.C. § 1983 qualified immunity principles, wholesale and unchanged, into state constitutional law. There is no basis for that assumption. To the contrary, the available case law indicates that the Virginia Supreme Court would not recognize any official immunity defense in these circumstances.

Statement of the Facts

Because Coleman proceeded *pro se* and the district court granted summary judgment to defendants, the following liberally summarizes the record evidence in the light most favorable to Coleman and is drawn from allegations in his complaint that were admitted by defendants and from the declarations and other evidence submitted in connection with summary judgment.

Coleman is a devout Muslim who was in the custody of Henrico County Regional Jail from October 22, 2017 through October 20, 2019. Coleman observes his beliefs every meal by following Halal dietary restrictions. JA 238. In his declaration, Islamic Studies Professor Faghfoory explained that in Islamic tradition eating is "not merely a function of survival" but a "sacred act" and "a form of prayer and worship." JA 256. "[T]he failure to observe an aspect of dietary law is seen as an act that invites Satan and places a Muslim in a state of disobedience to Allah," which renders him "unable to perform his or her religious duties." *Id*.

Henrico County contracts with Summit Food Service, LLC to furnish meals at the Henrico County Jail. JA 109–11. Pursuant to this contract, the Jail offers a "regular diet" available to all inmates, and two types of diets for religious inmates: the Kosher diet and the Common Fare diet. JA 45, 48–49. The "regular diet" and the Kosher diet both include meat. JA 47, 50, 136, 144. The Common Fare meals contain no meat at all. JA 206–08. The food service contract for the Common Fare option explains that it "may be acceptable to inmates whose religious faith prohibits or restricts meat consumption (e.g., Muslim, Buddhist, Hare Krishna, Hindu, etc.)." JA 205. The jail reserves the Kosher meal for Jewish inmates, but Sergeant Jones confirmed that some of the Kosher meals bear labels identifying them as Halal compliant. JA 60–61.

Other than providing a vegetarian menu, Summit takes no additional steps to ensure that the Common Fare meals are Halal. JA 53, 205. In his deposition, Justin Barthel, Director of Dietary Services for Summit Food Service, explained that Summit ensures Halal compliance of the Common Fare diet solely by removing the meat. JA 226. He testified that "[t]here is no [sic] Halal certified foods on [sic] the Common Fare diet." *Id*. Sergeant Jones also agreed that a vegetarian meal given to a Muslim inmate is called "Halal" but the same meal given to a Buddhist or Rastafarian inmate is just a "vegetarian" meal. JA 53. Upon client request, however, Summit can provide both Halal-certified meals with meat and meals that are both Halal and Kosher certified. JA 227–28. Barthel confirmed that Summit has provided Kosher meals with meat to Muslim inmates for other customers, by providing dual-certified Halal/Kosher meals. JA 227–28. And Sergeant Jones knew such meals were available. JA 60–61.

To provide an inmate with Kosher meals, defendants need only increase the head count for Kosher meals by one in the diet statistics regularly provided to Summit. JA 32, 87, 99–101. Kosher meals are delivered frozen and prepackaged, and are not prepared onsite at the Jail. JA 32, 86. Regular inmate and religious meals were all set at the same price under the food service contract with Summit, which imposed a 3% cap on price increases each year. JA 112, 114, 132.

Coleman "sincerely believes that Kosher meat would be consistent with Islamic Halal requirements and would provide him with an alternative protein source." JA 14, 242. The record establishes that Coleman's belief that he could eat Kosher-certified meat in these circumstances is a perfectly mainstream and unexceptional understanding of Islamic law. Islamic dietary restrictions mirror Jewish dietary laws in most respects. Both religions forbid the consumption of pork and pork products, blood, and animals that were improperly slaughtered. Professor Faghfoory accounted for this overlap by explaining that "[t]he Qu'ran teaches Muslims that God gave Moses the scripture." JA 256. And both Professor Faghfoory and defendants' expert Joe Regenstein agreed that "Jewish dietary laws are in some ways more restrictive than Islamic dietary laws." JA 37, 257. Professor Faghfoory confirmed that when Muslims are faced with a lack of access to Halal-certified meat, such as in prison, "the consensus among Islamic scholars and jurists is that Kosher meat is permissible for consumption so long as the individual utters the divine name of Allah before eating." JA 256–57.

When he arrived at the Jail, Coleman was given the default meal distributed to the general population, which is not Halal-compliant. Seeking food consistent with his religious beliefs, Coleman filed a request with Sergeant Jones on March 8, 2018. JA 281. Six weeks later, after multiple requests and paperwork filings, Coleman was approved for "Common Fare" meals on April 18, 2018. JA 231, 281.

The Common Fare diet initially left Coleman suffering from hunger. Coleman met with Sergeant Jones on April 23, 2018 to request the Kosher diet. JA 15, 26, 233. Coleman explained to Jones that he was not getting enough to eat on the Common Fare diet due to the lack of meat and that the Kosher meal would satisfy his religious obligations. JA 54, 233. Coleman again requested the Kosher diet on May 16, 2018. JA 233, 281. The request was forwarded to Major Johnson for review, and she sent the request to the religious services coordinator, Lt. Jacqueline Green, for additional research. JA 92, 94–95, 234, 259.

On May 23, 2018, Jones denied Coleman's request for a Kosher diet simply because Coleman is not Jewish. JA 54, 56, 59, 66–68, 281. Jones told Coleman that "if she gave him the Kosher diet, she would have to give the Kosher diet to all other Muslim inmates who requested it." JA 15, 26, 63–65. As she explained, "I just like to go by policy. That's it. I'm strictly a policy person. If that's what I was taught and -- that's my belief." JA 65. When asked in her deposition why it would be a problem to give the Kosher meals to some or all Muslim inmates, Major Johnson simply said "[b]ecause of the policy and because of our practice." JA 105. "If you're saying you're muslim then you get halal. If you're saying you're Jewish, you'll get Kosher." JA 103. Major Johnson testified that she would not deviate from that view even if she learned that the Kosher diet was completely consistent with Halal requirements. JA 104.

However, Henrico County Jail maintains no written policy about which religions can receive which diet. *See* JA 42, 43, 72, 77–79, 80, 108, 223. The Henrico County Sheriff's Office, which operates the Jail, has an official anti-discrimination policy that forbids "discrimination regarding administrative decisions or programs access based on an inmate's . . . religion." JA 42. A separate Jail policy "assures equal status and protection for all religions." JA 43, 74–76, 102. And the Jail's Inmate Handbook recognizes an inmate's right to practice his religion and promises that "[e]very reasonable effort will be made to facilitate the free practice of religion, subject to reasonable constraints necessary to ensure the safety of staff, religious workers, the inmate population or the Jail's security and good order." JA 108.

In early June 2018, Jones denied yet another request from Coleman for the Kosher diet, again simply because the Jail "[doesn't] serve Muslim Kosher meals." JA 69–70, 254.

The vegetarian Common Fare diet left Mr. Coleman undernourished, bony, and feeling weak and unbalanced. JA 241. He experienced significant bowel pain and discomfort, and lost 15 to 25 pounds during his incarceration at the Jail. JA 233, 241, 246–52. "Muslims, including Mr. Coleman, generally believe that the absence of meat in one's diet will cause certain physical and psychological damage such as the weakening or loss of hearing and vision, and the loss of control over

one's temper," and are admonished to "[e]at meat at least 10–12 times a month." JA 240–41. Mr. Coleman believes that "[t]he permanent deprivation of a meat-based source of protein prevented [him] from adhering to tenets of Islam that require men to sustain and nourish themselves with meat to aspire to bodily and spiritual health," and that the Common Fare diet also "fell short of [his] nutritional needs and interfered with his ability to pray" and "prevented him from worshipping and submitting his will to Allah." JA 241–42, 256.

Statement of Procedural History

On July 26, 2018 Coleman filed a *pro se* complaint in the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1983, alleging that Major Sandra Johnson, Sergeant Josie Jones, and Chaplain Gerald Schwartzlow[1] denied him access to a diet consistent with his religious beliefs. JA 1–2. On February 5, 2019, defendants moved for summary judgment. JA 4. On September 24, 2019, counsel entered an appearance on Coleman's behalf and filed a motion to deny the defendants' summary judgment motion without prejudice the same day. JA 4–5. The district court granted that motion. JA 5.

On November 19, 2019, Coleman filed a Second Amended Complaint claiming that defendants violated his constitutional and statutory rights by denying him access to Halal-compliant meals with meat, by forcing him to eat a vegetarian

[1] The Chaplain has since been dropped from this lawsuit.

diet in order to satisfy the requirements of his faith, by denying him access to the Kosher meal that was available to Jewish inmates, by disfavoring the Islamic faith, and by discriminating against him on the basis of his religion. JA 5, 17–20. Coleman alleged violations of the Religion Clauses of the First Amendment, the Equal Protection Clause, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), and the Virginia Constitution's religious freedom and due process clauses. JA 17–20. On May 22, 2020, defendants renewed their motion for summary judgment, and Coleman subsequently filed an opposition. JA 8.

On August 26, 2020, the district court held that Coleman's transfer to a new facility mooted his RLUIPA claim, along with any constitutional claims for declaratory and injunctive relief. JA 10, 290–91.

Turning to Coleman's Free Exercise Clause claim for damages, the district court held that Coleman established at least a triable issue that he sincerely "believes that a Kosher meal can satisfy the strictures of eating Halal according to his faith." JA 293. The district court also held that Coleman had established a triable claim that defendants' actions imposed a substantial burden on the exercise of his religious beliefs. The court noted that "courts have generally been reluctant to find a substantial burden exists where inmates are provided religiously-compliant food that contains adequate nutritional content." JA 294 (citing, *e.g., Patel v. United States Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008)). The court

also acknowledged, however, that "forcing an inmate to choose between 'following the precepts of h[is] religion and forfeiting [governmental] benefits' … constitutes a substantial burden." JA 295 (*quoting Couch v. Jabe,* 679 F.3d 197, 200–01 (4th Cir. 2012)). In the end, it concluded that there was a "significant dispute of fact as to whether Plaintiff's physical health issues and his inability to pray were caused by Henrico's failure to allow him to eat the Kosher meal, and whether those negative effects constitute a substantial burden." JA 295.

The district court stated that "Plaintiff also mentions that meat may be required for Muslims," but concluded that Coleman "does not seem to rest his argument on that basis, nor does he state that his sincerely-held religious beliefs include the need to eat meat." JA 293 n.8. The district court cited the argument of Coleman's counsel in their summary judgment opposition that "some Islamic scholars are of the view that Muslims are obligated to eat meat," and noted that counsel did not clearly argue "that Plaintiff believed he was obligated to eat meat." *Id.* The court apparently focused on counsel's citation to Professor Faghfoory's declaration, while overlooking the citation to Exhibit N to Coleman's opposition to summary judgment, at 1–2, 6 (in the appendix at JA 235–36, 240), which is a verified interrogatory response discussing Coleman's beliefs.

The district court also recognized that "[t]he *Turner* factors weigh heavily in Plaintiff's favor." JA 296. "Beyond Defendants' justification that more choice

would render the system unsustainable, … they provide no justification for why Summit could not provide dual-certified meals to both Muslim and Jewish inmates," which "would cost the same" and would "be made available to a somewhat larger group of inmates who would still have to identify as Muslim or Jewish to receive the meals," resolving defendants' "slippery slope" concerns. JA 296–97. The court held that a reasonable jury could "easily" find that defendants' actions were "not reasonably related to any legitimate penological objective." JA 297.

The district court also held that the record supports a triable Establishment Clause claim based on the reasonable inference that defendants "impermissibly favor[ed] Judaism over other religions," because "the Kosher diet was the 'lone specially tailored religious diet containing meat,'" and because defendants "largely failed to provide any reasonable explanation" for the difference in treatment. JA 297–98. The court held that the record supports a triable Equal Protection Clause claim for the same reasons, noting that a reasonable jury could find that "Muslim inmates were treated differently than similarly situated Jewish inmates at Henrico, and that such differential treatment was based on intentional discrimination that was not related to any penological interest." JA 299.

The court held that defendants nonetheless were entitled to qualified immunity. JA 300–01. Although it recognized that defendants "could have easily

remedied these potential constitutional violations," the district court "[could not] find that Defendants would understand that their behavior violated Plaintiff's constitutional rights." JA 300. The district court reasoned that "[c]ourts have consistently found that … there is no right to non-vegetarian meals," and that defendants apparently thought "they were plainly satisfying Plaintiff's religious beliefs that he must only eat Halal, and were satisfying Jewish inmates' beliefs that they must eat Kosher." JA 300–01. "Though an easy fix was available, the Court cannot say that, at this point, the rights at issue were sufficiently clear that Defendants would understand that they are violating those rights." JA 301. "However, going forward, where the administrative burden is low, or non-existent, Defendants should carefully consider whether burdening Plaintiff's religious beliefs, or providing inconsistent meals to persons of different faiths, is substantially related to any penological interest." JA 301.

The district court's analysis of Coleman's state constitutional claims consisted of a single paragraph concluding that because Virginia interprets its religious freedom and equal protection mandates as substantively following federal constitutional law, Virginia also "would apply qualified immunity analysis in the same way" as required by federal § 1983 precedents. JA 301–02.

SUMMARY OF THE ARGUMENT

The central command of the Religion Clauses is neutrality. The government must take care to treat all faiths equally, and to ensure that its policies do not pressure citizens to adopt, or abandon, religious beliefs. The Henrico County Jail's dietary policies force Muslim inmates to give up meat and to eat an entirely vegetarian diet if they want to comply with the requirements of their faith. Jewish inmates, whose religious dietary needs are very similar, are not put to such a coercive choice. Defendants would not allow Mr. Coleman to eat the special diet provided to Jewish inmates, even if that diet also satisfies his sincere understanding of Islamic law. Defendants refuse even to order the dual-certified meals that would allow the Jail to treat Jewish and Muslim inmates equally, at no additional cost or administrative inconvenience. And this was not an unconsidered oversight. Defendants have persisted in this position despite multiple grievance proceedings and, now, years of litigation.

The district court correctly recognized that on this record defendants' actions were so arbitrary and lacking penological justification that a reasonable jury could infer intentional discrimination. Decisions made on the basis of animus or intentional discrimination violate the Free Exercise, Establishment, and Equal Protection Clauses under clearly established precedent. And there can never be

qualified immunity for a constitutional violation that depends on a discriminatory state of mind.

As the district court recognized, Coleman also has a triable Free Exercise claim based on the *Turner* factors because defendants have come forward with no coherent penological justification and there clearly are "easy, obvious alternatives" that would have permitted them to accommodate Coleman without significant cost or administrative difficulty. *Turner v. Safley*, 482 U.S. 78, 90 (1987). Qualified immunity is inappropriate because it has been clear since *Turner* itself that prisons need a real penological justification for burdening an inmate's religious exercise, and cannot simply ignore easy and obvious alternatives.

Coleman also has a triable Establishment Clause claim based on the objective inequality in the treatment of Muslim and Jewish inmates. Particularly when coupled with the absence of any evident secular justification, that difference implies a violation of neutrality and a state endorsement of one religion over others. And qualified immunity is inappropriate because under clearly settled law no reasonable officer could believe that the Establishment Clause permits a prison to treat one faith more favorably than others, without a neutral justification.

The district court also erred in dismissing Coleman's Virginia state constitutional claims on the assumption that the Virginia courts would invent and apply a "qualified immunity" doctrine identical to the one that federal courts have

developed under § 1983. Virginia law recognizes a robust but distinct doctrine of "sovereign" or "official" immunity. That doctrine would not protect these defendants, both because the Virginia Bill of Rights waives the sovereign immunity of their employer under these circumstances and because their acts did not involve significant governmental control and discretion.

The constitutional principles at issue here are both simple and well-established: do not burden religious practice absent good reasons for doing so; do not favor one religion over another; and do not treat similarly situated individuals differently on the basis of their religion. Defendants violated those principles. The case should be remanded for trial.

ARGUMENT

I. COLEMAN HAS TRIABLE CLAIMS FOR INTENTIONAL DISCRIMINATION THAT CANNOT BE BARRED BY QUALIFIED IMMUNITY

The district court erred by granting the defendants summary judgment on the basis of qualified immunity, after correctly recognizing that a reasonable jury could infer intentional discrimination. No reasonable officer could fail to understand that intentional discrimination is forbidden by clearly established law.

A. Coleman Has A Triable Claim Of Intentional Discrimination

The district court held that a reasonable jury, drawing all appropriate inferences in Coleman's favor, could find that defendants intentionally

discriminated against Coleman due to his Islamic faith. The record amply supports that conclusion.

First, the Jail's diet options suggest preferential treatment for Jewish inmates on their face. Despite Summit's ability to provide many other options, defendants offer only two daily menus for religious diets: Kosher and Common Fare. The Kosher diet is facially superior to the Common Fare diet, because it allows Jewish inmates to comply with the demands of their religion without giving up meat. The Kosher menu also includes comprehensive instructions for preparation and service, including what types of materials are acceptable for dishes and utensils, special storage for pans used to cook Kosher meals, and directions on how to wash different types of food. JA 200–01. And Summit pledges that "[t]hese foods will be watched over by a Rabbi during processing to ensure Jewish standards are met," or procured from other companies "specializing in Kosher foods." JA 200.

The Common Fare diet is entirely vegetarian. Summit certifies that it "may be acceptable to inmates whose religious faith prohibits or restricts meat consumption," but counsels that customers should consult with their corporate dietitian to ensure that the diet is religiously appropriate. JA 205. Of course, Islam "restricts meat consumption" in a sense, but it does so in ways similar to Judaism and certainly does not require its adherents to become vegetarians. Indeed, Professor Faghfoory testified that some scholars believe the "practices and

teachings of the Prophet Muhammad direct Muslims to eat meat at least 10–12 times per month," JA 256, and Coleman confirmed that he shares those beliefs, JA 240–42. The Common Fare diet also does not mandate compliance with Islamic dietary requirements for preparation and service, as the Kosher meals do. *Compare* JA 200 *with* JA 205.

Whereas the Jail provides its Jewish inmates with an attractive diet tailored precisely to what their religious commitments permit, it offers its Muslim inmates a least-common-denominator diet designed to only approximately satisfy the requirements of a wide range of unrelated religions, with no care for Islam's more specific prohibitions or for the unnecessary and overbroad burdens associated with forcing Muslims to eat like Buddhists or Jains when they do not actually share the religious commitments underlying those highly restrictive diets.

Second, the ease with which defendants could have accommodated Mr. Coleman and remedied this obvious inequality of treatment, coupled with their stubborn and almost completely unjustified refusal to do so, fairly supports an inference of animus or intentional discrimination. The record shows that it would have been trivially easy for the defendants to grant Coleman's request for a Kosher diet. Defendants needed only to increase the head count for Kosher meals by one in the diet statistics regularly provided to Summit. JA 32, 87, 99–101. Providing Coleman with a Kosher meal would not impose any additional burden on jail staff

because Kosher meals are delivered frozen and prepackaged. JA 32, 86. And all of the meals were set at the same price under the Jail's contract with Summit. JA 112, 114, 132. Therefore, giving Coleman, or even all Muslim inmates, Kosher meals would not have cost the jail a penny more, at least in the near term.

Defendants protest that they do not want to let inmates choose a meal other than the one designated for their religion. That is little more than an *ipse dixit* justification, and it impermissibly denies the possibility of variations within religious groups. But even if "one diet per religion" *was* an acceptable goal, the district court correctly recognized that it would not justify defendants' conduct here because Summit can provide dual-certified Halal/Kosher meals with meat. JA 227. Indeed, Sergeant Jones recalled seeing Kosher meals served at Henrico County Jail that were labeled as both Kosher and Halal certified. JA 60–61. Using dual-certified meals for all Jewish and Muslim inmates would allow the Muslim inmates to eat meat, eliminate the glaring differential treatment, and satisfy defendants' aversion to giving inmates any choices. Defendants have offered no coherent justification for refusing to pursue these easy and available alternatives.

Third, the timeline surrounding Coleman's requests for a religiously compliant diet also would permit an inference of animus or discrimination. Coleman first requested a Halal diet from Sergeant Jones in the first week of March 2018. JA 15, 26, 229. Sergeant Jones essentially ignored that request for a

month, until Coleman reached out to her partner, Sergeant Brandon. JA 15. After six weeks and numerous forms and inmate grievances, Mr. Coleman was finally approved for the Common Fare diet on April 18, 2018. JA 15, 26, 231–32. But Coleman was forced to either starve or violate his religion for over a month and half. Defendants also repeatedly ignored Coleman's complaints that he was not getting enough to eat on the Common Fare diet and suffering significant distress and health consequences due to the lack of meat, and they disregarded his explanations that Muslims are permitted to eat Kosher meals. JA 54, 56–57, 239.

Coleman requested the Kosher diet four more times between May 16, 2018 and early June 2018. JA 69–70, 233, 254. All of those requests were denied based on a purported policy of not serving Kosher meals to Muslims (JA 16, 27, 54, 59, 69–70, 97–98, 103, 254), and concerns over having to give Kosher meals to any Muslim who requested them (JA 15–16, 26, 63–64). But in fact, there is no evidence of any written policy or guidelines prescribing which religions receive which diet, or prohibiting personnel from providing Kosher meals to non-Jewish inmates. JA 42–43, 108, 223. The Jail also orders a diet containing meat for all Muslim inmates during the month-long fast of Ramadan, so there is no reason it could not do so year-round. JA 148, 208. And the Jail's *actual* written policies encourage staff to accommodate inmates' religious beliefs wherever and whenever

possible. JA 42–43, 108. A reasonable jury could infer that defendants' behavior is difficult to explain except by reference to discriminatory animus.

Fourth, Sergeant Jones made comments in her deposition that suggest hostility toward religious accommodation claims generally, and Mr. Coleman specifically. She called Coleman "arrogant," and testified that she had told her partner, Sergeant Brandon, that he should not grant Coleman's request for a Kosher meal if Coleman requested one from him. JA 68, 71, 86. She stated her belief that the jail dietitian gets to determine what each individual's religion requires them to eat, and questioned why an inmate should be allowed to explain what his religious beliefs required rather than just accepting what the prison has assigned to that specific religion. JA 59, 85. She also stated that she does not allow inmates to come in and tell her what they want when it comes to meals. JA 59. She questioned whether Coleman even "know[s] what his religion is," and speculated that the Kosher meals would not satisfy a correct interpretation of Islam. JA 62, 82.

The Supreme Court has made clear that discriminatory intent or animus on the basis of religion can be inferred from even "subtle departures from neutrality." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993). The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own

high duty to the Constitution and to the rights it secures." *Id*. at 547. In *Lukumi*, the Court discerned discriminatory animus from a pattern of regulation that treated Santeria less favorably than other religions or comparable secular practices. *Id.* In *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, the Supreme Court recently held that statements made by members of Colorado's Civil Rights Commission indicated hostility toward the petitioner's religious beliefs. 138 S. Ct. 1719, 1731 (2018). There is nothing "subtle" about the departure from neutrality evident here, which—just as in *Lukumi*—draw arbitrary distinctions that burden Muslims for no apparent penological reason. The district court was correct to hold that a reasonable jury could infer animus or discriminatory purpose.

B. Intentional Discrimination Or Religious Hostility Violates The Equal Protection, Establishment, And Free Exercise Clauses Under Clearly Established Law, And Precludes Qualified Immunity

Action taken on the basis of anti-Muslim animus or intentional religious discrimination would violate the Equal Protection, Establishment, and Free Exercise Clauses under precedent so clearly established that no reasonable officer could fail to understand the law. And since the constitutional violation depends on a forbidden state of mind, any officers possessing that state of mind know that they are violating the Constitution. There can be no qualified immunity for an intentional discrimination claim.

The Equal Protection Clause is violated if a plaintiff "demonstrate[s] that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination" on some prohibited basis, such as religion. *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). Intentional discrimination means "that the decisionmaker … selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. V. Feeney*, 442 U.S. 256, 279 (1979). In the prison context, differences in treatment often can be justified under the *Turner* factors as necessary to penological goals. But it is nearly impossible to imagine any acceptable penological justification for adopting a dietary policy "because of, not merely in spite of," the fact that it treats Jews well or Muslims badly. Government action motivated by animus or discriminatory intent toward particular persons is irrational by definition. *See Romer v. Evans*, 517 U.S. 620, 632–33 (1996).

Similarly, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). "[C]ivil power must be exercised in a manner neutral to religion," and when accommodating the needs of religious groups the government may not "single[] out a particular religious sect for special treatment." *Bd. of Educ. Of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 704, 706

(1994). Even in prison, the Supreme Court made clear in *Cutter v. Wilkinson* that accommodations programs may not "confer[] privileged status on any particular religious sect" or "single[] out [a] bona fide faith for disadvantageous treatment." *Cutter v. Wilkinson*, 544 U.S. 709, 724 (2005).

An intentional preference for, or hostility to, particular faiths clearly violates the Free Exercise Clause as well. Government action that is subjectively motivated by "hostility toward … religious beliefs" violates the Free Exercise Clause even when the same action taken for neutral reasons would have been permissible. *Masterpiece Cakeshop,* 138 S. Ct. at 1729. States have a "duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Id.* at 1731; *see also, e.g.*, *Lukumi*, 508 U.S. at 547. Just this summer, the Supreme Court stressed that "[g]overnment fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). Again, the prison context does not change these fundamental principles. The *Turner* test demands that the penological justification advanced for a policy "must be a legitimate and neutral one." *Turner*, 482 U.S. at 90. "[U]nder *Turner*, neutrality must be ensured, or its absence sufficiently explained in light of a legitimate penological interest," to "ensure[] that the prison's application of its policy is actually based on the justifications it purports, and not something more

nefarious." *Mayfield v. Tex. Dept. of Criminal Justice*, 529 F.3d 599, 609 (5th Cir. 2008).

None of these principles is controversial or unsettled. No state official could possibly believe that it is acceptable to intentionally discriminate on the basis of religious preference or animus. And it is not possible for a defendant to commit this sort of violation without understanding that he or she has violated the Constitution. This Court has held many times 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 does not attach. *Dean v. Jones*, 984 F.3d 295, 310 (4th Cir. 2021). For claims with an intent element, "an official's state of mind is a reference point by which she can reasonably assess conformity to the law because the case law is intent-specific." *Thompson v. Commonwealth of Va.*, 878 F.3d 89, 106 (4th Cir. 2017); *see also Brooks v. Johnson*, 924 F.3d 104, 118–19 (4th Cir. 2019) (same); *Ortiz v. Jordan*, 562 U.S. 180, 189–91 (2011) (finding a clearly established right that a prison guard cannot put an inmate in solitary confinement with retaliatory intent). Therefore, when "the facts support an inference that [defendants] acted intentionally in depriving [an inmate] of his free exercise rights, [the defendant] is not entitled to summary judgment on qualified immunity grounds." *Lovelace v. Lee*, 472 F.3d 174, 198 (4th Cir. 2006) (holding that a triable issue about intentional and

unjustified deprivations of Ramadan meals precluded summary judgment on the issue of qualified immunity).

II. EVEN WITHOUT INTENTIONAL DISCRIMINATION, COLEMAN HAS A TRIABLE CASE UNDER THE FREE EXERCISE CLAUSE FOR WHICH THERE SHOULD BE NO QUALIFIED IMMUNITY

Even leaving aside the potential presence of intentional discrimination, Coleman has a triable Free Exercise claim on which the defendants are not entitled to qualified immunity.

The Free Exercise Clause requires prison officials to reasonably accommodate an inmate's exercise of sincerely held religious beliefs. Under long-settled law, prison officials violate these rights when: (1) an inmate has a sincerely held religious belief, (2) a prison practice or policy substantially burdens the inmate's ability to practice his religion, and (3) the prison is unable to show a reasonable relationship between the substantial burden and a legitimate penological interest. *Greenhill v. Clarke*, 944 F.3d 243, 253 (4th Cir. 2019) (citations omitted). The district court correctly held that Coleman has a triable case—indeed, a very strong case—under those principles. But it held that defendants are entitled to qualified immunity because "[c]ourts have consistently found … that there is no right to non-vegetarian meals." JA 300–01. The district court read too much into the cited authority, which held merely that "no 'substantial burden' exists if the regulation merely makes the practice of a religious belief more expensive." *Patel*,

515 F.3d at 813. No reasonable officer could understand *Patel* and cases like it to hold that religious inmates may be denied an appropriate meat-based diet for no real reason.

A. Coleman Has Demonstrated A Sincerely Held Religious Belief

Coleman believes that he has a religious obligation to eat Halal, and that in these circumstances the Kosher meals would satisfy that obligation. The district court held that a reasonable jury could find those beliefs to be sincere. JA 293. Defendants dispute the sincerity of Coleman's belief that the Kosher meals would satisfy his religious commitments with their own expert Joe Regenstein, who testified that "[t]he Halal Diet and the Kosher Diet are each derived from specific religious dictate and tradition, and are not the same." JA 37. That objection misunderstands Coleman's claim and the judicial role.

Coleman does not contend that Halal and Kosher requirements are "the same," but instead that they are close enough that he may eat Kosher foods in exigent circumstances (such as prison) if he takes appropriate precautions. Professor Faghfoory confirmed that Coleman's understanding is consistent with "the consensus among Islamic scholars and jurists." JA 256–57. It also is consistent with the studied conclusions of the federal Bureau of Prisons—which, after "consult[ing] with various religious leaders, including Muslims, and research[ing] the beliefs and practices of numerous faiths in extensive detail," has

"concluded that a kosher meal was the strictest diet and subsumed all other religious dietary needs" except for those faiths that required vegetarianism, and now serves Kosher meals to Jewish and Muslim prisoners alike. *Patel*, 515 F.3d at 810.

Regardless, "religious beliefs need not be acceptable, logical, consistent or comprehensible to others in order to merit First Amendment protection." *Thomas v. Review Bd. of Indiana Employment Sec. Div*., 450 U.S. 707, 714 (1981). To qualify as a sincerely held religious belief, that belief need not accord with the commands of any particular religious organization. *Frazee v. Illinois Dept. of Employment Sec*., 489 U.S. 829, 834 (1989). Rather, courts apply a "broad subjective test" subject only to the limitation that "an asserted belief might be 'so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection.'" *Ford v. McGinnis*, 352 F.3d 582, 589 (2d Cir. 2003) (quoting *Frazee*, 489 U.S. at 834 n.2). Coleman's beliefs are widely shared and mainstream, as reflected in the record and the nationwide case law.

B. Defendants Imposed A Substantial Burden On Coleman's Sincerely Held Religious Belief

The district court correctly held that a reasonable jury could find that defendants substantially burdened Coleman's sincerely held religious belief.

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*, 450 U.S. at 718), including when it "forces a person to choose between following the precepts of h[is] religion and forfeiting [governmental] benefits, on the one hand, and abandoning one of the precepts of h[is] religion . . . on the other hand," *Couch*, 679 F.3d at 197 (quoting *Lovelace*, 472 F.3d at 187). *See also, e.g.*, *Lyng v. N.W. 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 beliefs").

Defendants essentially forced Coleman to choose between abandoning his religious beliefs and becoming a vegetarian for the rest of his two years at Henrico. That ultimatum obviously put "substantial pressure" on Coleman to renounce his Muslim faith—aggravated here by the bizarre twist that the Jail would have fed him a meat-based diet consistent with his understanding of Islam *if* he declared himself to be Jewish. To state the obvious, the vast majority of human beings who are accustomed to a diet including meat place great value on their ability to eat meat. Forcing a person to become an involuntary vegetarian is a tremendous burden, with great potential for coercion. The Supreme Court has made clear that the loss of unemployment benefits or educational tax credits is unacceptably coercive. *See Thomas*, 450 U.S. at 717–18; *Sherbert v. Verner*, 374 U.S. 398, 404 (1963); *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2261 (2020) (denial

of tax credits for religious schools impermissibly required families and private schools to choose between "being religious or receiving government benefits."). More recent decisions under RLUIPA have held that even the relatively modest financial burden associated with being forced to pay for Kosher meals is a substantial burden. *See, e.g., Jones v. Carter*, 915 F.3d 1147, 1150–51 (7th Cir. 2019) (collecting cases).

The question is not whether prisoners have a right to eat meat, in the abstract. The Jail offers meat to all inmates, and would allow Coleman to eat meat if he abandoned his Islamic beliefs. In *Jehovah v. Clarke*, 798 F.3d 169 (4th Cir. 2015), a prisoner argued that his exercise of religion was substantially burdened by the fact that the available prison jobs would not accommodate his Sabbath observance, which prevented him from earning good time credits. The district court dismissed that claim "because 'prisoners have no constitutional right to job opportunities while incarcerated.'" *Jehovah*, 798 F.3d at 179 (citation omitted). But this Court reversed, explaining that the district court misunderstood "the correct focus of the RLUIPA and First Amendment inquiries." *Id*. "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*. This Court explained that the fact that Jehovah would "face sanctions and lose the opportunity to accrue good conduct

allowances" unless he worked on his Sabbaths coerced him to abandon his religious beliefs, even though there is no constitutional right to a prison job or to earn good time credits. *Id*. Similarly, forcing Coleman "to choose between following the precepts of h[is] religion" and "forfeiting [governmental] benefits" otherwise available to him imposes a substantial burden, even if the Jail would have been entitled to serve all inmates a vegetarian diet. *Couch*, 679 F.3d at 200 (quoting *Lovelace*, 472 F.3d at 187).

The coercion associated with being forced to give up meat is more than sufficient to satisfy the substantial burden requirement by itself. But Coleman also testified that he experienced significant health consequences from the vegetarian diet. That diet left him undernourished, bony, and feeling weak and unbalanced. JA 241. Coleman also experienced significant bowel pain and discomfort, and lost 15 to 25 pounds during his incarceration at the Henrico County Jail. JA 241, 247–52. The weakness Coleman experienced from not eating meat interfered with his ability to pray, and, accordingly, "prevented him from worshipping and submitting his will to Allah." JA 241. Coleman also confirmed in his interrogatory responses that the vegetarian diet "prevented [him] from adhering to tenets of Islam that require men to sustain and nourish themselves with meat to aspire to bodily and spiritual health." JA 242; *see also* JA 240–41 (quoting teachings requiring Muslims to eat meat 10–12 times a month). The district court wrongly held that

Coleman did not "seem to rest his argument on that basis," citing argument of counsel that "some Islamic scholars" hold that view. JA 293 n. 8. Counsel cited Professor Faghfoory's declaration for the views of Islamic scholars, *see* JA 256, but also Coleman's interrogatory response that outlines his own beliefs.

In *Shakur v. Schriro*, the Ninth Circuit reversed a grant of summary judgment against a Muslim inmate who was experiencing discomfort caused by an all-vegetarian diet and asked for the Kosher meals instead. 514 F.3d 878, 885 (9th Cir. 2008). The Ninth Circuit noted the inmate's argument that he was effectively being pressured to "chang[e] his religious designation to Jewish simply to obtain the desired kosher meat meals," and remanded for consideration of whether the prison policy "pressured Shakur to betray his religious beliefs." *Id.* at 889. *Shakur* also reversed and remanded the case because "the district court failed to consider Shakur's claim that the gastrointestinal distress caused by the vegetarian diet substantially burdened his religious activities and required him to find an alternative protein source consistent with Islam." *Shakur*, 514 F.3d at 885.

Coleman's case for a substantial burden is at least as strong as those in *Jehovah* and *Shakur*.

C. A Reasonable Jury Could Easily Find That The Substantial Burden on Coleman's Sincerely Held Religious Beliefs Was Not Reasonably Related To Any Legitimate Penological Interest

The district court also correctly held that a reasonable jury could "easily find that the burden to [Coleman] was not reasonably related to any legitimate penological interest." JA 297.

Turner articulates four relevant factors: (1) whether there is "a valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) "whether there are alternative means of exercising the right that remain open to prison inmates"; (3) "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether there are "ready alternatives." *Greenhill*, 944 F.3d at 253 (quoting *Turner*, 482 U.S. at 89–90).

As the district court concluded, "[t]he *Turner* factors weigh heavily in [Coleman]'s favor." JA 296. Defendants claim a rational justification in the need to maintain a food system that can "feed hundreds of inmates three meals a day." JA 296. But this justification is belied by the record, which establishes that it would involve "no administrative burden" and no additional cost to order a Kosher meal for Coleman or to offer all Muslim and Jewish inmates the same dual-certified meals. JA 300. "In short, the administrative burden is so low, and the impact on the functioning of Henrico and food service is so minimal, that a reasonable jury

could easily find that the burden to [Coleman] was not reasonably related to any legitimate penological objective." JA 297.

The third and fourth *Turner* factors weigh even more dramatically in Coleman's favor. Defendants do not suggest that allowing Coleman to eat a Kosher diet would have a detrimental effect on prison guards and other inmates, or on traditional penological interests like the "deterrence of crime, rehabilitation of prisoners, and institutional security," or that it would be cost prohibitive. *O'Lone v. Estate of Shabazz*, 482 U.S 342, 348 (1987). As Barthel explained, Kosher meals are prepackaged offsite, and jail staff merely specify the number of Kosher meals for a particular meal window. JA 32–33. And the "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Turner*, 482 U.S. at 90 (citation omitted). The alternatives are so easy and obvious here that the district court thought a reasonable jury could infer intentional discrimination from defendants' stubborn and inexplicable refusal to consider them.

D. Defendants Are Not Entitled To Qualified Immunity

The district court misunderstood the case law and the nature of Coleman's rights when it concluded that defendants have qualified immunity because there is no clearly established "right to non-vegetarian meals." JA 301. Coleman has a clearly established right to avoid substantial burdens on his sincere religious

beliefs, unless those burdens are justified by legitimate penological interests. No reasonable officer could fail to understand that it violates clearly established law to deny Mr. Coleman the accommodation he requested *for no discernible reason at all*, other than perhaps a desire to enforce conformity.

The district court erred by looking beyond those general principles clearly established by the Supreme Court and Fourth Circuit case law for a case specifically holding that Muslim inmates have some freestanding "right to non-vegetarian meals." JA 301. This Court has recognized that a right can be clearly established if it is manifested in "more general applications of the core constitutional principles invoked." *Williamson v. Stirling*, 912 F.3d 154, 187 (4th Cir. 2018) (quoting *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 (4th Cir. 2017)). In *Thompson v. Commonwealth*, for example, the plaintiff brought a § 1983 action against officers who allegedly retaliated against him for prior complaints by giving him a "rough ride" during transportation. 878 F.3d 89, 94–95 (4th Cir. 2017). This Court rejected the district court's narrow characterization of the issue as whether Thompson had a clearly established right to avoid injury from "an officer's use of a vehicle." *Id*. at 103. Instead, this Court held that there is a clearly established right to be free from "infliction of pain and suffering without penological justification." *Id.*

In a case about religious dietary accommodations in prison, this Court held that defendants' focus on the absence of past precedent on specific issues "overlooks the broader right at issue: that inmates are entitled to religious dietary accommodations absent a legitimate reason to the contrary." *Wall v. Wade*, 741 F.3d 492, 502 (4th Cir. 2014). 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)).[2]

This Court also has emphasized that it "look[s] ordinarily to 'the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose,'" and only considers a potential "'consensus of cases of

[2] *See also, e.g., Holley v. Johnson*, No. 7:08-CV-00629, 2009 WL 3172793, *6 (W.D. Va. 2009) (concluding it "was clearly established at the time of the alleged violations that prison officials may not substantially burden an inmate's right to exercise his personal religious beliefs without some legitimate penological justification"); *Bayadi v. Clarke*, No. 7:16CV00003, 2017 WL 1091946, *5 (W.D. Va. Mar. 22, 2017) ("While it may be true that [the Court of Appeals] ha[s] never specifically evaluated [the degree of contamination a Common Fare tray may have with pork products], this argument overlooks the broader right at issue: that inmates are entitled to religious dietary accommodations absent a legitimate reason to the contrary.").

persuasive authority' from other jurisdictions" if no controlling authority is available. *Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (citations omitted).

Similarly, here, it is not expecting too much of correctional officers to recognize that it has been clearly settled law for decades that forcing inmates to make unpleasant and coercive sacrifices in order to practice their religion demands at least a real penological justification and the consideration of "obvious, easy alternatives." *Turner*, 482 U.S. at 90. The district court admonished defendants that, "going forward, where the administrative burden is low, or non-existent, Defendants should carefully consider whether burdening Plaintiff's religious beliefs, or providing inconsistent meals to persons of different faiths, is substantially related to any penological interest." JA 301. But the obligation to carefully consider inmates' rights under those principles is already clearly established, and did not need to await the district court's opinion in this case. The Jail's own Inmate Handbook required defendants to make "[e]very reasonable effort" to "facilitate" the free exercise of Mr. Coleman's faith. JA 108.

The out-of-circuit case law the district court cited is in no way inconsistent with those well-settled principles. The district court's only citation for the proposition that there is no clearly established "right to non-vegetarian meals" was *Patel*, in which the Eighth Circuit held that a Muslim inmate failed to establish a substantial burden from dietary policies enforced by the federal Bureau of Prisons.

But by the time he reached the Eighth Circuit, Patel was not complaining that he was being denied meat. He "s[ought] a *halal* diet consisting of either *halal* meat or *halal* vegetarian entrées" and his claim was that obtaining that diet to his satisfaction would be *too expensive*. *Patel*, 515 F.3d at 814 n.8.

Patel surely framed his claim that way because he *was* being offered a meat-based religious diet. As noted above, the BOP has concluded that its Kosher diet also meets Halal requirements, and therefore accommodates its Muslim and Jewish inmates with a common Kosher diet. *Id.* at 814. That diet included meat at ten out of fourteen dinners. *Id.* But Patel demanded the "strictest type of ceremonial and cleanliness requirements" in his understanding of Halal. *Id.* at 810. His extremely strict interpretation caused him to reject the Kosher meat, and also to refuse vegetables from the main line due to cross-contamination concerns. *Id.* Patel wanted to purchase additional Halal vegetarian meals from the commissary, but complained that he "th[ought] the cost would be prohibitive." *Id* at 811. The Eighth Circuit concluded that Patel "provide[d] no financial information to support his claim," and that "[w]hile th[e commissary] option places a financial burden on him, Patel has not shown that it is substantial." *Id* at 814. It then held that "no substantial burden exists if the regulation merely makes the practice of a religious belief more expensive." *Id.* at 813. And it added that Patel also failed to show a substantial burden because he had not "exhausted alternative means of

accommodating his religious dietary needs," such as asking to be first in line at the hot bar, eating less expensive but Halal-compliant food from the commissary, or seeking help from an outside religious organization. *Id.* at 815.

The Eighth Circuit in *Patel* did not consider any claim that denial of meat was a substantial burden. It certainly did not hold "that there is no right to non-vegetarian meals." JA 301. It held only that Patel had not established a substantial burden based on the *cost* of the Halal vegetarian meals that he wanted to buy from the commissary. Correctly understood, nothing in *Patel* would give defendants any comfort that they could deny the accommodation requested by Coleman here.

To the extent that the out-of-circuit authority is relevant, the clear consensus of the decisions most closely on point is that prison officials cannot refuse to consider giving Muslim inmates access to Kosher meals simply because they are not Jewish, particularly if the inmate is experiencing health consequences. In *Shakur*, the Ninth Circuit reversed a grant of summary judgment against a Muslim prisoner who had been denied access to a Kosher diet, both because of evidence that his health was suffering from the lack of meat and because the prison's policies pressured him to change his religious affiliation. 514 F.3d at 885–89. In *Jones*, the Seventh Circuit held that it could "find no principled reason for endorsing [defendant's] practice of withholding a readily available food [the Kosher meals] for Jones—one that it is serving to other inmates," and also that

forcing Jones to instead pay "a few dollars a day" for meat-based Halal meals from the commissary was a substantial burden on his religious beliefs. 915 F.3d at 1150–52. *See also, e.g., Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010) (holding under RLUIPA that refusing to provide a meat-based Halal diet substantially burdens inmates' religious beliefs).

Some of these cases were decided in part under RLUIPA. But while RLUIPA imposes a more stringent standard of justification for prison policies that burden religious exercise, the statute adopts pre-existing Free Exercise precedent on what constitutes a "substantial burden" in the first place. *See, e.g., Patel*, 515 F.3d at 813 ("Once it is determined that a regulation imposes a substantial burden on a prisoner, the review of that burden under the Free Exercise Clause differs from RFRA and RLUIPA").

The cases that have rejected specific claims for access to a meat-based diet have done so on the basis of fact-specific concerns—often including either a serious showing of penological interests based on cost considerations not present here, or a showing that the plaintiff had access to a meat-based diet in some way that he was not taking advantage of. *See, e.g., Williams v. Morton*, 343 F.3d 212, 217, 220–21 (3d Cir. 2003) ("no evidence of record" contradicting prison's significant budgetary and security concerns); *Watkins v. Shabazz*, 180 F. App'x 773 (9th Cir. 2009) (plaintiff "failed to contradict defendants' assertion that the

expense of providing him with Halal meat would interfere with the prison's goal of running a simplified food service" and failed to exhaust other options offered to him).

Defendants have pointed previously to the Sixth Circuit's decision in *Cochran v. Schotten*, No. 97-3052, 1998 WL 898871 (6th Cir. 1998), and to *Couch v. Jabe*, 479 F. Supp. 2d 569, 585 (W.D. Va. 2006). *Cochran* is an unpublished decision with essentially no reasoning, which concludes in one sentence that an inmate who was denied Halal-compliant meat during Ramadan, a thirty-day period, suffered no Free Exercise violation. *Couch* similarly rejected a claim by an inmate who was served only cold food during Ramadan. The court found no substantial burden because the plaintiff made no allegation that the cold meals pressured him to change his religious practice or caused any hazards to his health. *Couch*, 479 F. Supp. 2d at 585. These cases involved periods shorter than the six weeks that Coleman was denied even the Common Fare diet, and nothing like the burden of being forced to give up meat for *years*, with significant consequences for his health and ability to pray.

It is always possible to identify cases that come out different ways on different facts. But no reasonable officer could believe that the case law supports any simplistic rule that Muslim inmates never have a right to eat meat, or never have a right to elect Kosher meals. And none of these cases question or modify the

long-settled principles (1) that any denial of benefits that has the effect of placing substantial pressure on an inmate to compromise his religious beliefs constitutes a substantial burden, and (2) that substantial burdens on religious exercise demand a real penological justification and consideration of easy and obvious alternatives.

III. COLEMAN HAS A TRIABLE ESTABLISHMENT CLAUSE CLAIM BASED ON SUBSTANTIVELY UNEQUAL TREATMENT

Section I, *supra*, explained that Coleman has a triable claim that defendants violated the Establishment Clause based on intentional discrimination against Muslim inmates, or an intentional preference for Jewish inmates. But even without intentional discrimination, Coleman also has a triable Establishment Clause claim based in the obvious objective lack of neutrality in the Jail's policy, the absence of any secular penological justification for this differential treatment, and the endorsement of one faith over others that it implies.

A. The Defendants Violated The Establishment Clause By Treating Religious Faiths Differently Without Penological Justification

Even if defendants did not *intentionally* disfavor Islam and favor Judaism in their dietary policies, for all of the reasons discussed in § I(A), *supra*, a violation of objective neutrality is obvious on the face of the policies. Any objective observer can see that the Jail is taking great care to provide its Jewish inmates with an appealing diet that complies carefully with their religious needs while avoiding overbroad restrictions or hardships that are not mandated by Jewish law. Muslim

inmates, by contrast, are tossed together with a group of completely unrelated religions that impose much stricter dietary requirements. They are denied any ability to eat meat, even though Islam does not mandate or even support vegetarianism. And unlike the Kosher meal plan, the "Common Fare" diet makes no effort to comply with the particular preparation, storage, and service requirements that are unique to Islam. Defendants' relative indifference to the needs, health, and comfort of Muslim inmates, as compared to the very carefully accommodated Jewish inmates, is plain for all to see.

That obvious preference violates the core Establishment Clause principles that government must remain neutral between faiths and must have a secular purpose for its choices. "The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson*, 456 U.S. at 244. In *Kiryas Joel*, the Supreme Court ruled that a special school district created by the New York State legislature that encompassed only the Satmar Hasidim Jewish community violated the Establishment Clause. 512 U.S. at 690. Even though the Court did not "impugn the motives of the New York Legislature, . . . which no doubt intended to accommodate the Satmar community without violating the Establishment Clause," *id.* at 708, the Court held that providing a benefit that was not generally available to other religions violated

"[t]the general principle that civil power must be exercised in a manner neutral to religion"—a principle the Court affirmed was "well grounded in our case law." *Id.* at 704. Accommodation is commendable, "[b]ut accommodation is not a principle without limits . . . . [and] it is clear that neutrality as among religions must be honored." *Id.* at 706–07; *see also id.* at 727 (Kennedy, J., concurring in the judgment) (noting that religious communities treated less generously in the future could sue on the ground that "New York's discriminatory treatment of the two religious communities violated the Establishment Clause"); *id.* at 746 (Scalia, J., dissenting) (same).

Of course, in a prison accommodation program some differences are inevitable. But in *Cutter* the Supreme Court held unanimously that, even in prison, accommodations programs must be administered neutrally among different faiths. 544 U.S. at 720–24. Officials violate the Establishment Clause if they "confer[] . . . privileged status on any particular religious sect" or "single[] out [a] bona fide faith for disadvantageous treatment." *Id* at 724.

Defendants' inability to provide any persuasive justification for this difference in treatment further reinforces the appearance that they are not treating different faiths with neutrality, and indeed suggests the absence of any secular purpose for their actions. *See Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). As

the district court noted, defendants "have largely failed to provide a reasonable explanation" for their actions, "instead relying solely on their claim that they are entitled to qualified immunity." JA 298. The court found that "[d]efendants and Henrico could have easily remedied these potential constitutional violations by providing an equally-priced dual-certified meal through Summit, with no administrative burden." JA 300.

B. Defendants Are Not Entitled To Qualified Immunity For Their Violations Of The Establishment Clause

The district court's qualified immunity analysis focused entirely on whether a "right to non-vegetarian meals" is clearly established. JA 301. As discussed above, that analysis misunderstood the case law and the rights at issue. But even if it were more persuasive, the district court's qualified immunity reasoning pertained principally to the Free Exercise issue of whether defendants' policies impose a "substantial burden" on Coleman's religious exercise. That reasoning is largely unresponsive to the distinct violation of the Establishment Clause evident here.

Coleman had a clearly established right under Establishment Clause to be free from official religious preference, or, put differently, to be treated neutrally with respect to his religion. Even if cases like *Patel* stood for the proposition that "there is no right to non-vegetarian meals" (they do not), that principle would have little bearing on the clearly established prohibition of official religious preferences

under the Establishment Clause. The district court reasoned that "[i]n Defendants' views, they were plainly satisfying Plaintiff's religious beliefs that he must eat only Halal, and were satisfying Jewish inmates' beliefs that they must eat Kosher." JA 301. But satisfying the Free Exercise rights of each religious group, considered in separate silos, is not enough. The Establishment Clause demands genuine neutrality, under clearly and long-settled law.

IV. THE FEDERAL LAW OF QUALIFIED IMMUNITY DOES NOT GOVERN COLEMAN'S STATE CONSTITUTIONAL CLAIMS

The district court assumed that "because Virginia courts analyze state and federal constitutional claims similarly . . . those courts would apply qualified immunity analysis in the same way." JA 302. But as the Virginia Supreme Court explained just last year, "federal immunity doctrines . . . are independent of state immunity doctrines." *Viers v. Baker*, 841 S.E.2d 857, 861 (Va. 2020). Virginia state law immunity for individual defendants, sometimes called "official immunity," does not follow the same analysis as federal qualified immunity and must be analyzed separately. Under that analysis, the jail's employees, sued in their individual capacities, are not immune under Virginia law.

A. The Religious Liberty Provisions Of The Virginia Constitution Are Self-Executing And Waive Immunity

The "official immunity" sometimes enjoyed by individual officers under Virginia law derives from, and depends upon, the sovereign immunity of their

governmental employer. *Messina v. Burden*, 321 S.E.2d 657, 663 (Va. 1984). Accordingly, it is first necessary to determine whether the defendants' employer is protected by sovereign immunity.

The Supreme Court of Virginia has explained that "self-executing" provisions of the Virginia Constitution waive the Commonwealth's sovereign immunity and provide a private right of action. *E.g.*, *Gray v. Virginia Sec'y of Transp.*, 662 S.E.2d 66, 71–73 (Va. 2008). A constitutional provision is self-executing if "no further legislation is required to make it operative." *Id.* at 71. Provisions "of a negative character" or those contained in the Virginia Bill of Rights, which is Article I of the Virginia constitution, "are generally, if not universally, construed to be self-executing." *Id.* (quoting *Robb v. Shockoe Slip Foundation*, 324 S.E.2d 674, 676 (Va. 1985)).

In *Gray*, the Virginia Supreme Court held that Article I, Section 5; Article III, Section 1; and Article IV, Section 1 are all self-executing and therefore waive the Commonwealth's sovereign immunity. *Id.* at 73. The first two concern separation of powers in government. The court held that a statement as amorphous as "the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct" did not require further legislation to be operative. *Id.* at 71–72. It also concluded that Article III, Section 1 is self-executing, despite the fact that it is not located in the Bill of Rights, because "it is of a negative

character and specifically prohibits certain conduct." *Id.* at 73. Article IV, Section 1—which vests legislative power in a bicameral General Assembly—"is neither contained in the Bill of Rights nor cast in a negative character." *Id.* Yet the court held that the vesting clause was still self-executing because "it does provide a clear rule" and "needs no further legislation to make it operative." *Id.*

The constitutional provisions under which Coleman pleaded his state law claims present an even easier case under the Virginia Supreme Court's precedent. They are contained in the Virginia Bill of Rights, and are "of a negative character." Section 16 provides that "[n]o man shall . . . suffer on account of his religious opinions or belief." Va. Const. art. I, §16. Section 11 guarantees that "the right to be free from any governmental discrimination upon the basis of religious conviction . . . shall not be abridged." Va. Const. art. I, §11. These provisions specifically prohibit certain conduct and do not require further legislation to be operative. In other cases, the Virginia Supreme Court has held that property guarantees in Section 11 are self-executing. *E.g.*, *Bell Atlantic-Virginia, Inc. v. Arlington County*., 486 S.E.2d 297, 298 (Va. 1997). There is no intelligible principle for declaring that religious freedoms are not self-executing but property rights in the very next clause are.

Since the Virginia Bill of Rights abrogates the sovereign immunity otherwise enjoyed by the Sheriff's Office in this case, the defendants have no derivative immunity as employees.

B. The Defendants Were Not Carrying Out A Function That Is Entitled To Immunity Under State Law

Even if the employer would be covered by sovereign immunity, a separate analysis determines whether the employee is entitled to shield himself with the sovereign immunity of his employer. *James v. Jane*, 282 S.E.2d 864, 869 (Va. 1980). That analysis essentially determines whether an official is standing in the shoes of the entity possessing sovereign immunity, exercising "acts of judgment and discretion which are necessary to the performance of the governmental function itself." *Heider v. Clemons*, 400 S.E.2d 190, 191 (Va. 1991).

In Virginia, official immunity "protects officers only for simple negligence." *Cromartie v. Billings*, 837 S.E. 2d 247, 254 (Va. 2020). Employees who act "wantonly, or in a culpable or grossly negligent manner," are not entitled to the protection. *Id.* (quoting *James*, 282 S.E.2d at 869). Defendants have attempted to justify their actions in this case by asserting that jail "policy" prevented them from accommodating Coleman's request for the Kosher meals. Yet the record discloses no such formal policy. The Jail's written policies require its employees to make every effort to accommodate religious exercise, and the record indicates that at least one Muslim prisoner was permitted the Kosher meals in the past. JA 42, 267.

The record also suggests that defendants ignored Coleman's requests for extended periods and were simply indifferent to them. *See supra* § I(A). A reasonable jury could conclude that the defendants willfully disregarded Coleman's rights to religious exercise or exhibited gross negligence in failing to fairly consider whether the Kosher meals would be consistent with Coleman's sincere religious beliefs and whether they could be provided without significant cost or disruption.

Even for claims alleging simple negligence, the Virginia case law requires a four-part inquiry into "(1) the nature of the function performed by the employee; (2) the extent of the state's interest and involvement in the function; (3) the degree of control and discretion exercised by the state over the employee; and (4) whether the act complained of involved the use of judgment and discretion." *Messina*, 321 S.E.2d at 663 (citing *James*, 282 S.E.2d at 869). The record supports an inference that the Sheriff's Office exercised very little control over defendants' day-to-day activity in feeding inmates, and accommodating an inmate's request for a religious diet that is already available to other inmates (and at no additional cost) should not involve a significant exercise of judgment or discretion. The Virginia Supreme Court has held that university physicians are not entitled to immunity in certain malpractice suits because the Commonwealth has an interest in "the educational function of the faculty members," but only a "slight" interest in "the provision of patient care." *Lee v. Bourgeois*, 477 S.E.2d 495, 497 (Va. 1996); *see also, e.g.*,

James, 282 S.E.2d at 870 ("The state's interest and the state's involvement, in its sovereign capacity, in the treatment of a specific patient by an attending physician in the University Hospital are slight; equally slight is the control exercised by the state over the physician in the treatment accorded that patient."). Similar considerations indicate that Virginia law would not extend official immunity to these defendants. *See, e.g., Jennings v. Hart*, 602 F. Supp. 2d 754, 759 (W.D. Va. 2009) ("[W]hile the state has a general interest in the treatment of inmates in its local correctional facilities, the degree of control it exercises over the provision of medical care to particular inmates on a day-to-day basis is relatively slight.").

CONCLUSION

For the foregoing reasons, Coleman respectfully asks this Court to reverse the District Court's grant of summary judgment and remand this case 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 12,442 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: October 4th, 2021

Signed,

/s/ J. Scott Ballenger
J. Scott Ballenger