Nos. 18-6282 & 18-6324

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM A. DOYLE III,

Plaintiff - Appellant

v.

UNITED STATES OF AMERICA; MARK S. INCH; J. RAY ORMOND; BRYAN MESSER; RONALD WILSON,

Defendants - Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

PLAINTIFF-APPELLANT'S OPENING BRIEF

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Sixth Circuit Local Rules 34(a) and 28(b)(1)(B), Plaintiff requests oral argument. This case presents several significant legal issues, including the scope of prisoners' right to religious liberty and the appropriate standard for summary judgment under the Religious Freedom Restoration Act. Prisons increasingly restrict the rights of Muslim prisoners to engage in religious practices such as daily prayer under the guise of security or other interests. Many if not most of these cases are litigated *pro se* by the prisoners themselves. This case presents an opportunity for this Court to ensure that district courts receive the appropriate guidance concerning the standard for evaluating claims relating to prisoners' religious rights. The issues presented in this case are important and recurring, and Plaintiff believes oral argument would materially assist the Court in resolving them.

INTRODUCTION

Plaintiff William Doyle, a federal prisoner at United States Penitentiary McCreary ("McCreary" or "the Prison"), seeks nothing more than the ability to pray daily with other members of his faith. But McCreary has implemented a policy—enforced only against Muslim prisoners—that limits prayer to groups of three prisoners and requires that they obtain consent from correctional staff before beginning their worship. Prisoners of other faiths are permitted to engage in group prayer without permission and in groups larger than three. Other non-religious group activities are also liberally permitted throughout the facility. Plaintiff filed suit in the court below alleging, *inter alia*, equal protection violations and violations of his rights under the Religious Freedom Restoration Act ("RFRA"). Despite the failure of the prison to provide any meaningful justification for its policies, the district court dismissed Plaintiff's equal protection claim and granted pre-discovery summary judgment to Defendants on his RFRA claim.

The right to the free exercise of religion is one of the most fundamental freedoms protected by federal law. Even in prisons, where the nature of confinement requires prisoners to surrender many liberties they enjoy in the outside world, Congress and the U.S. Constitution demand that prisoners like Plaintiff be permitted to worship free from unnecessary interference and religious discrimination. RFRA specifically requires federal prisons to justify all substantial burdens on a prisoner's

religious practice as the least restrictive means of furthering a compelling government interest. And the Equal Protection Clause prohibits discrimination on the basis of religion in all contexts.

Plaintiff has demonstrated through undisputed evidence that he is an observant Muslim whose beliefs require him to perform five daily prayers together with all other Muslims who are present. Relying only on a few paragraphs of speculation in the affidavit of a prison chaplain, Defendants assert that their policy of obstructing his ability to do so is necessary for prison security and movement of staff. Yet the Prison regularly permits prisoners of other faiths to pray together in groups larger than three. It also permits prisoners to come together in groups of eight to twenty-two for non-religious activities like sports, card games, and dining. Defendants fail to explain how a security threat could result from Muslim group prayer when it does not result from any of the comparable activities it regularly permits. Nonetheless, disregarding the statute's plain direction to undertake a more searching inquiry, the district court accepted this record as sufficient to grant summary judgment to Defendants on Plaintiff's RFRA claim.

Plaintiff also sufficiently alleged in his Complaint that the group prayer policy was intentionally enforced only against Muslim prisoners, while Christian, Asatru, and Native American prisoners are permitted to pray in groups of more than three without needing to seek staff permission. The district court nonetheless dismissed

Plaintiff's equal protection claim *sua sponte* before Defendants even appeared in the case. Because Plaintiff's allegations state a claim for violation of equal protection and because Defendants have not met their burden on summary judgment under RFRA, this Court should reverse and remand both claims for further proceedings.

JURISDICTIONAL STATEMENT

The district court's jurisdiction arose under 28 U.S.C. § 1331 for civil actions arising under the Constitution and laws of the United States. The district court entered final judgment disposing of all claims on Nov. 13, 2018. R.62, Judgment, Page ID 1027-28. Plaintiff timely filed his first notice of appeal on Dec. 3, 2018, R.64, Pl.'s First Notice of Appeal, Page ID 1032-33, and his second notice of appeal on Dec. 12, 2018. R.66, Pl.'s Second Notice of Appeal, Page ID 1039-40. This Court has jurisdiction under 28 U.S.C. § 1291 over appeals from final decisions of district courts of the United States.

STATEMENT OF ISSUES

(1) Did the district court err by granting summary judgment to Defendants where Defendants failed to show that a policy limiting group prayer is the least restrictive means of achieving a compelling government interest in accordance with RFRA, when other comparable activities are permitted throughout the prison?

(2) Did the district court err in *sua sponte* dismissing Plaintiff's claim for violation of a Muslim prisoner's Fifth Amendment right to equal protection when he

alleged facts sufficient to show that the Policy is intentionally enforced only against Muslims, but not against prisoners of other faiths?

STATEMENT OF THE CASE

I. Plaintiff's sincere religious belief is that all Muslims who are present together must be permitted to pray their five daily prayers together.

Plaintiff is an observant Muslim. R.7, Pl.'s Suppl. Compl., ¶ 9, Page ID 133. He is currently incarcerated in the general population of McCreary. Like many Muslims, Mr. Doyle adheres to the five "Pillars" of Islam—practices that provide the foundation for the Muslim faith. Of these Pillars, the second most important is *salah*, or the offering of five daily prayers. R.1-3, Exs. to Pl.'s Compl., Page ID 44. Plaintiff believes that "if Muslims are together in [an] area without barriers they are enjoined by the Qur'an to pray together." *Id.* at Page ID 50; *see also* R.7, Pl.'s Suppl. Compl., ¶ 57, Page ID 138.

Salah prayers are brief and non-disruptive. The praying people line up behind a single prayer leader (an *imam*). R.60, Pl.'s Reply to Defs.' Response to Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 1002. Those praying must speak only to offer the prayer; engaging in other speech invalidates the prayer. R.1-3, Exs. to Pl.'s Compl., Page ID 89. The prayers vary slightly in length, with the shortest prayers (such as the morning prayer) lasting only three to four minutes. R.7, Pl.'s Suppl. Compl., ¶ 40, Page ID 136; R.1-3, Exs. to Pl.'s Compl., Page ID 97. The

record contains no evidence of any violence, contraband, or other security incidents occurring during group prayer at McCreary or any other facility.

II. McCreary's policy restricts group prayer to groups of three or less, regardless of circumstance.

The United States Bureau of Prisons ("BOP") has no system-wide policy limiting the number of prisoners who can pray together. McCreary has adopted its own prison-specific institutional supplement restricting the availability of group prayer by prisoners (the "Policy"). While the supplement has been revised during the pendency of this lawsuit, each version has always included two key features: first, that group prayer throughout McCreary is limited to a maximum of three prisoners; and second, that prisoners must seek permission each time from the area supervisor before engaging in prayer. R.45-3, Decl. of Michael Jones, ¶ 5, § k(4), § Q, Page ID 799, 825, 837.

The Policy has been enforced against Plaintiff on numerous occasions. On September 11, 2016, Plaintiff led four other Muslim prisoners in the noon *salah* in one of the Prison's exercise yards. R.7, Pl.'s Suppl. Compl., ¶ 19, Page ID 134. Defendant Lt. Messer approached and told them that they could only pray in groups of three. *Id.* at ¶ 22. The following day, Plaintiff was with five other Muslims in the Prison's exercise yard at prayer time. *Id.* The six Muslims, attempting to comply with the Policy, divided into two groups of three for their prayer. *Id.* at ¶ 23. Defendant Messer and three other correctional officers approached and told them

that now only two prisoners would be permitted to pray together at one time, and that having multiple groups praying at the same time—even if the groups were not physically together—constituted a violation of the Policy. *Id.* at ¶¶ 24-25. The Policy, and the threat of discipline for its violation, remain in place at McCreary.

III. McCreary permits prisoners to engage in many activities comparable to prayer in groups larger than three.

Prisoners are permitted to engage in many secular activities other than prayer in groups larger than three and without seeking permission from correctional staff. For example, in one of McCreary's housing units, there are fifteen tables bolted to the ground, some of which have four chairs attached to them. *Id.* at ¶ 33, Page ID 135. At these tables, prisoners engage in many activities, including eating, writing, playing card games, and playing chess. *Id.*

In the Prison's exercise yards, prisoners are permitted to exercise together in large numbers. Exercise equipment is bolted to the ground in such a way that eight people can use the equipment together at one time. R.1-3, Exs. to Pl.'s Compl., Page ID 51. Games of basketball can involve ten prisoners at a time, while baseball games can include 18 prisoners, and football games as many as 22. *Id.*

IV. McCreary only enforces the Policy against Muslim prisoners.

Although the Policy purportedly restricts group prayer by all faith groups, *see* R.45-3, Decl. of Michael Jones, § Q, Page ID 837, faith groups other than Muslims are routinely permitted to pray in groups larger than three. Within a designated space

in the prison yard, Asatru and Native American prisoners are permitted to pray in congregations larger than three and without seeking permission from any correctional staff. R.1-3, Exs. to Pl.'s Compl., Page ID 55. Christian prisoners pray openly at the tables in groups of four, including by bowing their heads, raising their hands, and making a cruciform sign. *Id.* at Page ID 95. Staff, including Defendant Messer, do not interfere with these prayers even though they are plainly visible. *Id.*

IV. Procedural history.

Plaintiff fully exhausted his administrative remedies with respect to his claims regarding the group prayer policy. R.7, Pl.'s Suppl. Compl., ¶ 8, Page ID 133; R.1-3, Exs. to Pl.'s Compl., Page ID 14-105. On January 3, 2018, Plaintiff timely filed a complaint in the U.S. District Court for the Eastern District of Kentucky, R.1, Pl.'s Compl., Page ID 1-9, superseded by his supplemental complaint, R.7, Pl.'s Suppl. Compl., Page ID 132-42, alleging, *inter alia*, violations of RFRA and the Fifth Amendment right to equal protection. The district court, screening Plaintiff's complaint pursuant to the Prison Litigation Reform Act ("PLRA"), dismissed for failure to state a claim Plaintiff's equal protection claim and all other claims except his as-applied challenge to the group prayer policy under RFRA. R.20, Mem. Op. & Order re Pl.'s Suppl. Compl., Page ID 220-35. Plaintiff timely filed objections. R.23, Pl.'s Objs. to Mem. Op. & Order, Page ID 637-42. The district court adhered to its ruling in full. R.24, Order re Objs., Page ID 645-46.

Before the district court entered a scheduling order, Defendants moved for dismissal or, in the alternative, for summary judgment on Plaintiff's RFRA claim. R.45, Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 771-72. Plaintiff opposed the motion, R.47, Pl.'s Response to Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 851-71, noting in part that he sought discovery. R.47, Pl.'s Response to Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., ¶ 61, Page ID 867. During the pendency of the motion, Plaintiff sought leave of court to serve discovery requests on Defendants, R.51, Pl.'s Mot. for Permission to Engage in Disc., Page ID 936, which the court denied. R.52, Order re Pl.'s Mot. for Permission to Engage in Disc., Page ID 943. The district court granted summary judgment to Defendants on Plaintiff's remaining claims. R.61, Mem. Op. & Order re Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 1007-26. The court entered final judgment on November 13, 2018. R.62, Judgment, Page ID 1027-28.

Plaintiff filed two notices of appeal, timely appealing the district court's judgment related to the grant of summary judgment on his RFRA claim, R.64, Pl.'s First Notice of Appeal, Page ID 1032-33, and the dismissal of his equal protection

claim.[1] R.66, Pl.'s Second Notice of Appeal, Page ID 1039-40. This Court has consolidated the appeals. (6th Cir. No. 18-6282 ECF No. 10); (6th Cir. No. 18-6324 ECF No. 12).

SUMMARY OF THE ARGUMENT

The district court improperly granted summary judgment to Defendants on Plaintiff's challenge to the Policy under RFRA. Summary judgment is inappropriate on a RFRA claim unless the undisputed facts show that any substantial burden on a prisoner's religious exercise is the least restrictive means of furthering a compelling government interest. Plaintiff has shown through undisputed evidence that his sincere religious beliefs require him to pray his five daily *salah* prayers with all other Muslims who are present at the time of prayer, and the Policy forces him to choose between this practice and facing discipline from prison officials. Forcing Plaintiff to make this choice amounts to placing a substantial burden on his religious practice under RFRA. This substantial burden is only exacerbated by the fact that Plaintiff's religious beliefs affirmatively *require* him to engage in praying *salah* with other Muslims, and the burden is not relieved by any accommodations Defendants make for other religious practices unrelated to *salah*.

[1] Plaintiff does not appeal the dismissal of his damages claims, nor of his Federal Tort Claims Act claims (or any claim against the United States), his claims related to the denial of medication during Ramadan, or his retaliation claim.

In granting summary judgment to Defendants on the ground that the Policy is the least restrictive means of furthering a compelling government interest, the district court made numerous errors. First, the district court credited Defendants' conclusory affidavits, prepared during litigation, which assert without evidence that the Policy furthered compelling government interests. Further, Defendants' asserted interest in avoiding the tension caused by religious accommodations is on its face not a legitimate government interest under RFRA, which affirmatively directs prisons to make such accommodations on the basis of religion. Second, the district court erred in granting summary judgment to Defendants when they made no demonstration that a less restrictive version of the Policy was unworkable, while Plaintiff introduced evidence that prayer and other activities occur in large groups throughout the Prison without interfering with Defendants' asserted interests. Finally, the court erred in relying on the nature of Plaintiff's 30-year-old convictions to support a denial of group prayer when the record lacks any nexus between the convictions and the harms Defendants assert.

The district court's grant of summary judgment also warrants reversal for the independent reason that the district court abused its discretion by granting summary judgment before the parties commenced discovery. As a *pro se* litigant, Plaintiff's only burden at summary judgment was to put the district court on notice of the need for additional discovery. Because Plaintiff did so repeatedly in his briefing and

through motions, the court was obligated to ensure that Plaintiff had a full and fair chance to obtain such discovery by denying summary judgment to Defendants.

Finally, the district court erred in *sua sponte* dismissing Plaintiff's equal protection claim. When screening a complaint under the PLRA, a district court must construe the complaint in the light most favorable to the plaintiff, accept his factual allegations as true, and determine whether he can prove any set of facts that would entitle him to relief. At the pleading stage, an equal protection plaintiff need only allege facts showing that prison officials intentionally discriminated on the basis of religion. Here, Plaintiff alleged that Defendants are intentionally enforcing the Policy only against Muslims who wish to pray in large groups and not against similarly-situated members of other faiths. Under these circumstances and at this stage of the case, such a clear pattern of disparate treatment is sufficient to establish intentional discrimination for purposes of an equal protection claim. Accordingly, the district court's dismissal of Plaintiff's claim was premature.

STANDARD OF REVIEW

Grants of summary judgment are reviewed by this Court *de novo*, construing the facts in the light most favorable to the nonmoving party. *Audi AG v. D'Amato*, 469 F.3d 534, 542 (6th Cir. 2006) (citing *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005)). A district court's decision to grant summary judgment

before the close of discovery is reviewed for abuse of discretion. *Plott v. Gen. Motors Corp.*, 71 F.3d 1190, 1196-97 (6th Cir. 1995).

A dismissal for failure to state a claim under the Prison Litigation Reform Act is reviewed by this Court *de novo*, construing the complaint in the light most favorable to the plaintiff, accepting his factual allegations as true, and determining whether he can prove any set of facts that would entitle him to relief. *Wershe v. Combs*, 763 F.3d 500, 505 (6th Cir. 2014).

ARGUMENT

I. The District Court Improperly Granted Summary Judgment to Defendants on Plaintiff's RFRA Claim.

A. Under RFRA, any substantial burden on a prisoner's sincere religious exercise must be the least restrictive means of furthering a compelling government interest.

RFRA permits the government to "substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest." 42 U.S.C. § 2000bb-1(b). This standard—also known as "strict scrutiny"—is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997).

The burden is on the plaintiff asserting a RFRA claim to show that his exercise of religion is sincere and substantially burdened by the government policy at issue. *New Doe Child #1 v. Cong. of U.S.*, 891 F.3d 578, 584-85 (6th Cir. 2018). Forcing

a prisoner to choose between engaging in a religious practice and incurring serious discipline constitutes a substantial burden. *Id*. Once a substantial burden is established, the burden shifts to the defendants to introduce evidence that the policy is the least restrictive means of furthering a compelling government interest. *Id*. Prison officials' judgments receive some deference under RFRA, but "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalization will not suffice to meet the act's requirements." *Lindh v. Warden,* No. 2:09-cv-215, 2013 WL 139699, at *12 (S.D. Ind. Jan. 11, 2013) (citing S. Rep. No. 103–11, 1993 U.S. Code Cong. & Admin. News at 1900). Where disputed facts remain regarding whether a policy furthers a compelling interest or whether a policy is the least-restrictive means of furthering that interest, summary judgment is inappropriate. *See Sossamon v. Texas*, 560 F.3d 316, 335 (5th Cir. 2009) (construing RLUIPA's identical least-restrictive means test), *aff'd*, 563 U.S. 277 (2011).[2]

[2] While RFRA applies to federal prisoners, the Religious Land Use and Institutionalized Persons Act ("RLUIPA") applies strict scrutiny to policies that substantially burden the sincere religious exercise of state prisoners. 42 U.S.C. §§ 2000cc-2000cc—5. Because the two statutes are "nearly identical," *Haight v. Thompson*, 763 F.3d 554, 562 (6th Cir. 2014), courts have held that RFRA and RLUIPA establish the same standard for what constitutes a substantial burden, *Jones v. Carter*, 915 F.3d 1147, 1149-50 (7th Cir. 2019), and what constitutes the least-restrictive means of furthering a compelling government interest. *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015) (quoting *Gonzales v. O Centro Espírita Beneficente Uniõ do*

B. Plaintiff has demonstrated that the Policy substantially burdens his sincere religious exercise of engaging in congregate prayer.

1. Plaintiff's sincere religious beliefs require him to pray *salah* in congregation with all other Muslims present at the time of prayer.

Under RFRA's substantial burden test, Plaintiff must show only that the religious exercise burdened by Defendants is consistent with his personal faith. *New Doe Child #1*, 891 F.3d at 586. The undisputed evidence establishes that Plaintiff is a sincere, observant Muslim. R.3, Pl.'s Mot. for Prelim. Inj., ¶¶ 2-3, Page ID 114; R.7, Pl.'s Suppl. Compl., ¶ 9, Page ID 133.[3] His religious beliefs require him to observe the five daily prayers of *salah*, as identified in the Qu'ran and the practices of the Prophet Muhammad. R.7, Pl.'s Suppl. Compl., ¶¶ 9, Page ID 133 (citing Qur'an 2:43 and 4:103), Page ID 138. While RFRA protects even an individual's idiosyncratic religious beliefs, Plaintiff's beliefs are widespread in Islam; courts have recognized that, "[d]epending on the school of Islam to which an adherent belongs, making [*salah*] prayers in congregation, if possible, is either considered to

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Vegetal, 546 U.S. 418, 436 (2006)). Accordingly, Plaintiff relies on both RFRA and RLUIPA cases to make his argument.

[3] Plaintiff's Supplemental Complaint, like most of his court filings, was verified under penalty of perjury. *See* R.7, Pl.'s Suppl. Compl., Page ID 142. This Court can therefore consider the statements contained therein not only as allegations but as record evidence equivalent to testimony. *See United States v. $525,695.24*, 869 F.3d 429, 441 (6th Cir. 2017) ("A verified complaint carries the same weight as would an affidavit for the purposes of summary judgment." (quoting *ACLU of Ky. v. Grayson Cty.*, 591 F.3d 837, 844 n.2 (6th Cir. 2010))), *cert. denied sub nom. Salouha v. United States*, 138 S. Ct. 978 (2018).

be theologically preferable or required." *Lindh v. Warden*, No. 2:09-CV-00215, 2013 WL 139699, at *3 ¶¶ 23-26 (S.D. Ind. Jan. 11, 2013). Plaintiff adheres to a school of Islam that considers groups prayer to be required. R.3, Pl.'s Mot. for Prelim. Inj., ¶ 2, Page ID 114.

2. Because Plaintiff is threatened with discipline when he prays in groups larger than three, the Policy creates a substantial burden on Plaintiff's religious practice.

Plaintiff has introduced evidence showing that the Policy substantially burdens his sincere religious practice of practicing *salah* in congregation. The district court did not reach the question of whether Plaintiff had shown a substantial burden on his religious activity, assuming without deciding that he had. R.61, Mem. Op. & Order re Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 1014. Because the Policy forces Plaintiff to choose between engaging in his mandatory religious practice or facing discipline by prison officials, it meets RFRA's standard for a substantial burden.

The substantial burden test examines whether a policy prohibits a specific religious exercise, "not whether the [] claimant is able to engage in other forms of religious exercise." *Holt*, 135 S. Ct. at 862 (construing RLUIPA's identical substantial burden test). Accordingly, the burden created by a policy forbidding prisoners to have beards is not ameliorated by giving the prisoners opportunities to pray, *id.*, nor is a ban on certain foods during a religious ceremony ameliorated by

the permission to use other foods. *Haight*, 763 F.3d at 565 (construing RLUIPA's identical substantial burden test). Here, Plaintiff seeks to engage in *salah* prayer with all Muslims who are present at prayer time. R.1-3, Exs. to Pl.'s Compl., Page ID 50. In the district court, Defendants improperly asserted that this religious exercise was not burdened because Plaintiff is able to pray in groups of three with permission and because he is able to engage in *Jumu'ah* (Islam's weekly religious service) and religious self-study. R.45-1, Mem. in Supp. of Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 809-10. These other opportunities for religious exercise fail to remove the burden on the "specific, meaningful acts of religious expression" in which Plaintiff seeks to engage. *Lindh*, 2013 WL 139699, at *11 (quoting *Meyer v. Teslik,* 411 F. Supp. 2d 983, 989 (W.D. Wis. 2006)); *see also Sossamon v. Texas*, 560 F.3d 316, 332-33 (5th Cir. 2009) (construing RLUIPA's identical substantial burden standard), *aff'd*, 563 U.S. 277 (2011).

A specific religious practice is substantially burdened when "the Government is effectively forcing plaintiffs to choose between engaging in conduct that violates sincerely held religious beliefs and facing a serious consequence." *New Doe Child #1*, 891 F.3d at 589. A prisoner facing "serious disciplinary action" for engaging in a religious practice faces just such a choice. *Id*. (citing *Holt*, 135 S. Ct. at 862). Such a burden is especially substantial where the policy at issue prohibits an exercise mandated by the plaintiff's religion. For while RFRA protects religious exercise

even when it is merely motivated by, and not required by, a plaintiff's religious beliefs, 42 U.S.C. § 2000bb-2(4), "[w]hether a particular practice is religiously mandated is surely relevant to resolving whether a particular burden is substantial." *Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003) (*per* Sotomayor, J.) (construing the First Amendment's equivalent substantial burden standard). Plaintiff's evidence shows that his religion requires him to pray *salah* in congregation with other Muslims who are present, and that the Policy forbidding it is a substantial burden.

C. The district court erred by holding that the Policy is the least restrictive means of furthering any compelling government interest.

Once a plaintiff has demonstrated that a policy places a substantial burden on his religious exercise, "the burden is placed squarely on the government" to demonstrate that the policy is the least restrictive means of furthering a compelling government interest. *Gonzales*, 546 U.S. at 429-30 (2006) (citing 42 U.S.C. §§ 2000bb-1(b), 2000bb-2(3)). When the resolution of the least restrictive means test turns on disputed facts, summary judgment is unwarranted and reversal and remand is the appropriate remedy. *See Spratt v. R.I. Dep't Of Corr.*, 482 F.3d 33, 43 (1st Cir. 2007) (construing RLUIPA's identical least restrictive means test).

In holding that Defendants had met this burden and granting summary judgment, the district court made numerous errors. First, the district court relied on Defendants' conclusory assertions and scant evidence in finding that the Policy

furthers their asserted interests. Second, the district court found that the Policy is the least restrictive means of furthering those interests without considering whether any less restrictive alternatives exist. Third, the district court improperly relied on the fact of Plaintiff's 30-year-old conviction as a ground for denying Plaintiff an individualized exemption from the Policy. Because none of these grounds justify summary judgment in favor of Defendants, this Court must reverse the district court and remand the case for further proceedings.

1. The district court erred in accepting Defendants' asserted compelling interests without sufficient evidence.

The district court improperly found on this threadbare record that the Policy furthers the compelling government interests asserted by Defendants. This Court has noted that, in asserting that a policy furthers a compelling government interest, "[o]nly the true explanations for the policy count." *Haight*, 763 F.3d at 562 (citing *Shaw v. Hunt*, 517 U.S. 899, 908 n.4 (1996)) (construing RLUIPA's identical least-restrictive means test). "[E]xplanations offered for the first time in litigation ought to come with a truth-in-litigating label, requiring the official to disclose whether the new explanations motivated the prison officials at the time of decision or whether they amount to post hoc rationalizations." *Id*. at 562. To justify the Policy, Defendants offer only a single declaration from Michael Jones, McCreary's supervisory chaplain, which was prepared specifically for this litigation. R.45-3, Decl. of Michael Jones, ¶¶ 10-12, 801-02 ("Jones Declaration"). The government

did not assert these interests when it denied Plaintiff's grievances; in those denials, prison officials offered only the conclusory statement that the Policy is "consistent with maintaining the orderly running of the facility." R.1-3, Exs. to Pl.'s Compl., Page ID 21, 33). Here, as in *Haight*, the asserted interests served by the Policy "appear only in affidavits that form the litigation record in the case, not the record memorializing the prison's decision-making process in response to the inmates' grievance," and therefore "[a] genuine issue of material fact exists over whether these affidavits represent the true explanations for the warden's decision, as required." 763 F.3d at 562 (citing *Spratt,* 482 F.3d at 39 and *United States v. Virginia*, 518 U.S. 515, 533 (1996)).

Even if the Court credits these asserted interests, Defendants have failed to explain with the specificity RFRA requires how the Policy supposedly furthers their asserted interests. Under the least-restrictive means test, "an affidavit that contains only conclusory statements about the need to protect inmate security is [not] sufficient to meet [a prison's] burden." *Spratt,* 482 F.3d at 40 n.10 (construing RLUIPA's identical least-restrictive means provision). As an initial matter, the Jones Declaration is completely lacking in any explanation for why group prayer, but not other comparable group activities, raises security concerns for the prison administration. Moreover, the asserted interests themselves are unsupported and conclusory. The Jones Declaration identifies three purportedly compelling

government interests furthered by the Policy: avoiding the perception that a group of prisoners is a "show of force" to intimidate other prisoners; permitting staff movement without obstruction; and avoiding "tension" with groups that are not provided the benefit of praying in groups larger than three. R.61, Mem. Op. & Order re Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 1015, 1018-19. But beyond these conclusory assertions, the record contains no meaningful, concrete evidence that group prayer in particular threatens these interests. The First Circuit, reversing a grant of summary judgment to prison officials on a RLUIPA claim, held that an affidavit that "cites no studies," "discusses no research in support of its position," and "cites no past incidents" of security threats could not justify the prison's ban on preaching in prison. *Spratt,* 482 F.3d at 39. The record in this case also contains no studies or research; nor does it contain any actual incidents showing that group prayer interfered with any of the government's asserted interests, either at McCreary or at other facilities. Plaintiff, on the other hand, has introduced uncontested evidence that Asatru, Native American, and Christian prisoners are all permitted to pray at McCreary in groups larger than three without seeking prior permission. R.1-3, Exs. to Pl.'s Compl., Page ID 55, 95. On this record, granting summary judgment to Defendants was tantamount to accepting the government's "bare say-so" that the Policy furthers the asserted interests—something forbidden

under both RLUIPA and RFRA. *See Yellowbear v. Lampert*, 741 F.3d 48, 59 (10th Cir. 2014) (*per* Gorsuch, J.) (construing RLUIPA's least-restrictive means test).

Moreover, Jones raises only hypothetical negative consequences of group prayer ("groups of inmates *can* impede staff members" R.45-3, Decl. of Michael Jones, ¶ 11, Page ID 801 (emphasis added)); "Giving a group of inmates a benefit . . . *can* lead to tension" *id*. ¶ 12, Page ID 801-02 (emphasis added)); "A large group of inmates . . . *will often* be interpreted by other groups of inmates to be a show of force" *id*. ¶ 10, Page ID 801 (emphasis added))), without demonstrating how group prayer in particular either has or will actually interfere with these interests. This affidavit's "cloud-level height of abstraction" is "far too high to establish as a matter of law that a compelling interest undergirds the decision." *Haight*, 763 F.3d at 562 (construing RLUIPA's least-restrictive means test).

While Defendants have failed to show that the Policy furthers *any* of the asserted interests, Defendants' asserted interest in avoiding potential "tension" caused by religious accommodations is also on its face not a compelling government interest under RFRA. By passing RFRA, Congress rejected "the classic rejoinder of bureaucrats throughout history: If I make an exception for you, I'll have to make one for everybody, so no exceptions." *Gonzales*, 546 U.S. at 436-37. RFRA actually compels prison officials to make exceptions to policies, and to make those exceptions on the basis of religious belief. Yet Defendants assert they are justified

in denying Muslim prisoners the chance to pray because doing so may cause tensions with other prisoners. R.45-3, Decl. of Michael Jones, ¶ 12, Page ID 801-02. The least-restrictive means test requires prison wardens to manage this tension. As this Court held in a RLUIPA case, "[r]ejecting accommodation requests on the ground that an exception to a general prison policy will make life difficult for prison wardens is a fine idea in the abstract and may well be a fine idea under [the First Amendment's more permissive standard]. But it has no place as a stand-alone justification under [strict scrutiny]." *Haight*, 763 F.3d at 562 (citing *Gonzales*, 546 U.S. at 436). To hold otherwise would permit other prisoners (or prison officials' speculation about other prisoners) to control the scope of Plaintiff's religious freedom. Indeed, "relying on other inmates' *reactions* to a religious practice [to justify denying a religious accommodation] is a form of hecklers' veto", and "RFRA does not allow governments to defeat claims so easily." *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003).

2. The district court erred in holding that the Policy is the "least restrictive means" without evidence that less-restrictive policies were unworkable.

Critically, the district court improperly failed to consider whether Defendants evaluated the availability of less restrictive policies in finding that the Policy is the least restrictive means of furthering their asserted interests. RFRA requires a defendant to "demonstrate that 'no alternative forms of regulation'" would suffice

to accomplish the government's stated interests. *McAllen Grace Brethren Church v. Salazar*, 764 F.3d 465, 480 (5th Cir. 2014) (quoting *Sherbert v. Verner*, 374 U.S. 398, 407 (1963)). A prison "cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice." *Warsoldier v. Woodford,* 418 F.3d 989, 999 (9th Cir. 2005) (construing RLUIPA's least-restrictive means test); *accord Washington v. Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (same). Defendants introduced no evidence, either in the Jones Declaration or elsewhere, that Defendants considered *any* alternatives to the Policy.

Defendants' failure to consider alternatives to the Policy extends to what this Court has called "the most obvious route to studying this issue: looking at how other prisons have dealt with these requests." *Haight*, 763 F.3d at 563 (discussing RLUIPA's least restrictive means test). Other prisons, including federal prisons, permit prayer in groups larger than three. *E.g. Lindh v. Warden*, No. 2:09-CV-215, 2013 WL 139699, at *7, 12–13, 16 (S.D. Ind. Jan. 11, 2013) (entering permanent injunction requiring federal prison to accommodate daily prayer, noting "the undisputed fact that daily prayer does occur in other BOP facilities" and that daily group prayer occurred without incident for three years in prison's Communications Management Unit before being restricted). The Communications Management Unit at USP Terre Haute, which is among the most restrictive facilities in the federal

prison system, provides a day room in which Muslims are permitted to pray *salah* in groups of as many as ten prisoners. *See* Def.'s Rep. to Ct., *Lindh v. Warden*, No. 2:09-CV-215 at *1-2 (S.D. Ind. Aug. 16, 2013), ECF No. 234. Many prison systems do not place any categorical or numerical restrictions on group prayer at all; for example, Indiana's state prison system explicitly provides that prisoners "may gather for religious discussion and/or prayer, provided the gathering is not disruptive to the area or operation of the unit or facility." Development and Delivery of Religious Services, Ind. Dep't Corr. No 01-03-101, at 16 (Jan. 1, 2018).[4] Defendants do not acknowledge the existence of these other policies and fail to explain why McCreary is unable to make such an accommodation to Plaintiff and his fellow Muslims. As the Supreme Court has noted, "when so many prisons offer an accommodation, a prison must, at a minimum, offer persuasive reasons why it believes that it must take a different course." *Holt*, 135 S. Ct. at 866 (construing RLUIPA's least restrictive means test). McCreary has offered no such persuasive reasons.

Defendants also fail to address or rebut Plaintiff's evidence that less-restrictive alternatives are possible at McCreary. In applying the least-restrictive means test, "[c]ourts must hold prisons to their statutory burden, and they must not 'assume a plausible, less restrictive alternative would be ineffective.'" *Id.* at 866

[4] *Available at* https://secure.in.gov/idoc/files/01-03-101%20Religious%20Services%201-1-2018.pdf (last visited Mar. 11, 2019).

(quoting *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 824 (2000)). To meet this statutory burden, "prison officials *must* set forth detailed evidence, tailored to the situation before the court, that identifies the failings in the alternatives advanced by the prisoner." *Nance v. Miser*, 700 F. App'x 629, 633 (9th Cir. 2017) (quoting *Warsoldier*, 418 F.3d at 1000) (construing RLUIPA's least-restrictive means test). As the district court acknowledged, Plaintiff has introduced evidence that groups of five and six Muslims were able to pray together without disrupting prison activity. R.61, Mem. Op. & Order re Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 1016; R.7, Pl.'s Suppl. Compl., ¶ 57, Page ID 138; R.3, Pl.'s Mot. for Prelim. Inj., ¶ 19, Page ID 118. Plaintiff also introduced evidence that Christians routinely pray in groups of more than three without creating any difficulty. R.7, Pl.'s Suppl. Compl., ¶¶ 27-28, Page ID 135. Defendants do not rebut this evidence with any evidence of their own. In the absence of such evidence, the district court had no basis for concluding that McCreary can function normally with three prisoners praying together but five or six prisoners praying together would suddenly begin impeding staff members and cause disruption and violence among groups of prisoners.

Defendants also introduce no evidence explaining why they are unable to set aside a space in the recreation yard for Muslims to pray *salah*—even though Plaintiff has introduced evidence that Asatru and Native American prisoners are permitted,

in a designated portion of the recreation yard, to engage in group prayer without permission and in groups larger than three. *Id.* at ¶ 15, Page ID 134. To satisfy the least restrictive means test, a defendant must introduce evidence that provides a "complete answer" as to why a proferred alternative would be ineffective. *Haight*, 763 F.3d at 563 (construing RLUIPA's least restrictive means test). Because Defendants have failed to provide such an answer, they have failed to justify the Policy as the least restrictive means of furthering their interests—and the district court erred in holding otherwise.

The district court's holding is also incompatible with the record evidence that Defendants accommodate secular activities in groups larger than three. Under RFRA, "[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist." *McAllen Grace Brethren Church*, 764 F.3d at 475-76 (citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 547 (1993)). Then-Judge Gorsuch noted in a RLUIPA case that when a prison "grants secular exceptions more readily than religious exemptions to a putatively compelling policy [it] can raise the inference . . . that its most compelling interest may actually be discrimination against, or at least indifference to, the religious liberties of incarcerated persons—precisely the scenario RLUIPA identified as too prevalent in our society and sought to redress." *Yellowbear*, 741 F.3d at 60-61.

Plaintiff's evidence shows that prisoners are permitted to gather around tables in groups of four to eight R.7, Pl.'s Suppl. Compl., ¶ 12, Page ID 133, exercise together in groups of eight, *id.*, and play prison-sanctioned sports like basketball and baseball involve groups of prisoners as large as ten to eighteen. *Id.* Football games can include as many as 22 prisoners. R.1-3, Exs. to Pl.'s Compl., Page ID 51. In his briefing to the district court, Plaintiff highlighted the absurdity of McCreary's Policy, noting that twelve Muslims can line up behind one quarterback during a football play without threatening prison security, but if they suddenly began praying in that same formation, the Policy would subject them to discipline. R.60, Pl.'s Reply to Defs.' Response to Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 990. If McCreary is willing to invest the resources necessary to supervise and accommodate these secular activities, it must also expend equivalent efforts to accommodate sincere religious practitioners. *See Holt*, 135 S. Ct. at 865 (in RLUIPA case, prison officials must offer religious exception to no-beard policy if they offer medical exceptions); *Yellowbear*, 741 F.3d at 60 (in RLUIPA case, prison officials must lock down prison to transfer plaintiff to sweat lodge for religious reasons if it locks down prison to transfer other prisoners for medical reasons).

3. The district court improperly relied on the nature of Plaintiff's decades-old conviction in denying Plaintiff an individualized exemption from the Policy.

The district court incorrectly held that the nature of Plaintiff's decades-old criminal record warranted a denial of a religious exemption from the Policy, despite the lack of any evidence of a disciplinary record while in custody.[5] The district court correctly identified that RFRA requires courts to "look[] beyond broadly formulated interests" and "scrutinize[] the asserted harm of granting specific exemptions to particular religious claimants." *Gonzales*, 546 U.S. at 431. Prison officials must introduce *evidence* that prisoners "would be more likely to cause violence or safety disturbances" as a result of receiving the religious accommodation; "bare assertions" of a security threat are not sufficient. *See Moussazadeh v. Tex. Dep't of Criminal Justice*, 703 F.3d 781, 794 (5th Cir. 2012), *as corrected* (Feb. 20, 2013) (in RLUIPA case, holding defendants failed to justify policy of denying kosher meals to violent, high-security prisoners while providing such meals to the general prison population). Instead of undertaking such an inquiry and requiring such evidence, the district court here deferred to Defendants' assertion that the Prison had a special interest in

[5] Plaintiff was held in segregated housing over a weapon that was supposedly found in his cell, but Plaintiff introduced evidence that the accusation was false and that he was accused of possessing the weapon as retaliation for filing his case. The incident was then expunged from his record. R.7, Pl.'s Suppl. Compl., ¶¶ 49-51, 64, 69, Page ID 137, 139, 140. He has no other disciplinary history at the Prison.

denying Plaintiff the ability to pray in groups larger than three in light of the nature of his conviction three decades ago. R.61, Mem. Op. & Order re Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 1018.[6] In doing so, the district court adopted Defendants' position that the Policy is appropriate with regard to Plaintiff because the Policy "limits his opportunity to engage in group-based criminal activity." R.53, Defs.' Reply to Pl.'s Response to Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 949. Yet Defendants do not explain what "group-based criminal activity" Plaintiff will supposedly engage in by praying

[6] It is not clear that Defendants properly introduced all the evidence regarding Plaintiff's conviction into the record. While Defendants did introduce evidence of which statutes Plaintiff was convicted of violating R.45-2, Decl. of Robin Eads, Page ID 791-97, Defendants waited until their reply brief to make assertions regarding the predicate criminal acts for Plaintiff's conspiracy convictions. R.53, Defs.' Reply to Pl.'s Response to Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 949. This Court has held that it is reversible error to grant summary judgment based on new evidence introduced in a reply brief without giving the plaintiff an opportunity to respond. *Seay v. Tenn. Valley Auth.*, 339 F.3d 454, 482-83 (6th Cir. 2003). The predicate acts on which Defendants rely, including the gang-related nature of his crime, are derived from his pre-sentencing report, which Defendants did not introduce into the record. R.53, Defs.' Reply to Pl.'s Response to Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., Page ID 949. Even if this document were properly in the record, pre-sentencing reports often contain multiple levels of hearsay, which is inappropriate for summary judgment. *See Alpert v. United States*, 481 F.3d 404, 409 (6th Cir. 2007) (quoting *U.S. Structures, Inc. v. J.P. Structures, Inc.,* 130 F.3d 1185, 1189 (6th Cir. 1997)). These reports also contain charges that were dropped and indictments that were not proven at trial. Regardless of these procedural improprieties, Plaintiff's convictions simply do not justify depriving Plaintiff of the opportunity to engage in sincere religious exercise.

in these groups with other prisoners in a heavily-supervised yard; nor do they explain why a prisoner could not engage in this activity during a sports game or at one of the Prison's tables.

By choosing to protect the religious practices of prisoners, Congress made a judgment that a criminal history would not disqualify a prisoner from asserting a right to religious exercise. Accordingly, the district court's invocation of Plaintiff's criminal history, without establishing a nexus to any specific security or operational concern, is an inappropriate ground on which to deny Plaintiff's requested religious accommodation.

D. ("Jones Declaration")The district court abused its discretion by granting summary judgment before close of discovery.

Not only did the district court improperly grant summary judgment on the record before it, the district court also abused its discretion by granting summary judgment before discovery had even commenced. This Court has repeatedly held that "[i]f the non-movant makes a proper and timely showing of a need for discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion." *Moore v. Shelby Cty.*, 718 F. App'x 315, 318–21 (6th Cir. 2017) (quoting *Vance v. United States*, 90 F.3d 1145, 1149 (6th Cir. 1996)). This rule is necessary because a motion for summary judgment tests the sufficiency of the evidence, and "[c]ommon sense dictates that before a district court tests a party's evidence, the party should have the opportunity

to develop and discover the evidence." *Id*. at 320. Although this Court has in some cases upheld grants of summary judgment prior to discovery, "such cases are extraordinary and not the norm." *Id*. A plaintiff's notice of the need for additional discovery does not have to meet all formal procedural requirements as long as the plaintiff "fulfill[s] [his] obligation to inform the district court of [his] need for discovery prior to a decision on the summary judgment motion." *Id.* at 319 (quoting *Plott*, 71 F.3d at 1196-97 (6th Cir. 1995)). This is especially true for *pro se* plaintiffs, whose pleadings and papers are held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

Plaintiff made multiple efforts to inform the district court of his need for additional discovery. Plaintiff affirmatively requested the opportunity to perform discovery in his opposition to Defendants' motion to dismiss or in the alternative for summary judgment. R.47, Pl.'s Response to Defs.' Mot. to Dismiss or in the Alternative Mot. for Summ. J., ¶ 61, Page ID 867. During the pendency of Defendants' motion, Plaintiff filed a formal motion requesting leave of court to engage in discovery, R.51, Pl.'s Mot. for Permission to Engage in Disc., Page ID 936, which the district court denied. R.52, Order re Pl.'s Mot. for Permission to Engage in Disc., Page ID 943. Plaintiff also attempted unsuccessfully to obtain information from Defendants through McCreary's internal "Inmate Request to Staff" forms and filed a copy of the request in court. R.34-1, Ex. in Supp. of Pl.'s

Mot. to Provide Sufficient Identifying Information on R. Wilson & His Actions, Page ID 682. This Court has found that lesser efforts sufficed to put a district court on notice of the need for additional discovery. In *Moore v. Shelby County*, the plaintiff did not submit a Rule 56 affidavit or a formal request for additional discovery, arguing for the need for additional discovery only in her opposition to the defendants' motion for summary judgment. 718 F. App'x at 318-20. Indeed, not only did the plaintiff in *Moore* fail to file a motion for discovery like Plaintiff's, she affirmatively consented to a stay of all discovery pending the outcome of defendants' motion. *Id*. at 320-21. However, this Court found that the district court was properly on notice of the plaintiff's need for additional discovery, and therefore abused its discretion in granting summary judgment. *Id*. at 321. This Court should hold the same here and find that the district court abused its discretion.

Because the district court erred in applying RFRA's requirements to Plaintiff's claim and because the district court abused its discretion by granting summary judgment before Plaintiff had the opportunity to obtain discovery on his claims, this Court should reverse the district court's grant of summary judgment to Defendants.

II. Plaintiff Stated a Claim That the Prison Violated His Rights to Equal Protection Under the Law.

The district court erred in *sua sponte* dismissing Plaintiff's equal protection claim. A dismissal for failure to state a claim under the Prison Litigation Reform Act

is reviewed by this Court *de novo*, construing the complaint in the light most favorable to the plaintiff, accepting his factual allegations as true, and determining whether he can prove any set of facts that would entitle him to relief. *Wershe,* 763 F.3d at 505 (6th Cir. 2014). As this Court has directed district courts in the past, "[*p*]*ro se* complaints are to be held 'to less stringent standards than formal pleadings drafted by lawyers,' and should therefore be liberally construed." *Williams v. Curtin*, 631 F.3d 380, 383 (6th Cir. 2011) (quoting *Martin v. Overton,* 391 F.3d 710, 712 (6th Cir. 2004)).

"The liberty protected by the Fifth Amendment's Due Process Clause contains within it the prohibition against denying to any person the equal protection of the laws." *United States v. Windsor*, 570 U.S. 744, 774 (2013). As this Court recently held in denying qualified immunity to prison officials on a prisoner's equal protection claim, equal protection is simply "the principle that all persons similarly situated should be treated alike." *Maye v. Klee*, 915 F.3d 1076, 1085 (6th Cir. 2019) (quoting *Scarbrough v. Morgan Cty. Bd. of Educ.*, 470 F.3d 250, 260 (6th Cir. 2006)) (construing the Fourteenth Amendment's Equal Protection Clause).[7] A plaintiff

[7] The Supreme Court's "approach to Fifth Amendment equal protection claims has always been precisely the same as to equal protection claims under the Fourteenth Amendment." *Sessions v. Morales-Santana*, 137 S. Ct. 1678, 1686 n.1 (2017) (quoting *Weinberger v. Wiesenfeld,* 420 U.S. 636, 638, n.2 (1975)). Accordingly,

alleging a violation of his equal protection rights in the prison context must allege that "(1) he was treated disparately from similarly situated prisoners, and (2) the disparate treatment is the result of intentional and purposeful discrimination." *Davis v. Heyns*, No. 17-1268, 2017 WL 8231366, at *4 (6th Cir. Oct. 16, 2017) (citing *Robinson v. Jackson*, 615 F. App'x 310, 314 (6th Cir. 2015)) (Fourteenth Amendment). In this case, Plaintiff has sufficiently alleged both elements.

By alleging that the Policy was enforced only against Muslims and not against other religious groups, Plaintiff has alleged disparate treatment sufficient to support an equal protection claim. Plaintiff alleged that non-Muslim prisoners—and only non-Muslim prisoners—are permitted to "pray more than three [persons at a time] on the yards, in the dining hall, and at the tables in the Housing Unit" without being disrupted or threatened with discipline for violating the Policy. R.7, Pl.'s Suppl. Compl., ¶ 69, Page ID 140. Plaintiff also alleged that prison officials decline to enforce the Policy against Christian prisoners who pray openly at dining tables in full view of prison staff and against Asatru and Native American prisoners who pray in a designated space in the recreation yard. R.7, Pl.'s Suppl. Compl., ¶¶ 15, 28, 69, Page ID 134, 135, 140. In contrast to the Christian prisoners who are permitted to

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this brief cites to Fourteenth and Fifth Amendment equal protection cases interchangeably.

pray openly in groups of four in the dining hall, Plaintiff alleged that he was threatened with discipline and removed from the dining hall for praying there. R.7, Pl.'s Suppl. Compl., ¶¶ 59-60, Page ID 139.

These allegations of disparate treatment also suffice to show the element of intentional discrimination. No allegation of hatred is required to prove intentional discrimination; rather, "[t]he 'intent to discriminate' forbidden under the Equal Protection Clause is merely the intent to treat differently." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008) (collecting Supreme Court cases). Nor is a clear statement of an intent to discriminate required; discriminatory intent can be shown by circumstantial evidence such as "a clear pattern, unexplainable on grounds other than" the invidious classification. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) ("*Arlington*") (Fourteenth Amendment); *see also Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000) (Fourteenth Amendment) (holding that allegations of "irrational and wholly arbitrary" treatment by government was sufficient to state equal protection claim "quite apart from the [Defendant's] subjective motivation").

In equal protection cases, in other words, "the type of impact sufficient in itself to prove intentional discrimination is that which is significant, stark, and unexplainable on other grounds." *Horner v. Ky. High Sch. Athletic Ass'n*, 43 F.3d 265, 276 (6th Cir. 1994) (citing *Arlington*, 429 U.S. at 266). Plaintiff has alleged that

the Policy is enforced against Muslims but not against any other religion, which is just such a "clear pattern" of discrimination without other justification. Under similar circumstances, the Tenth Circuit reversed the dismissal of a prisoner's equal protection claim where the plaintiff alleged that Christian prisoners had access to visitations rooms and prison jobs that were denied to Muslim prisoners. *Abdulhaseeb v. Saffle*, 65 F. App'x 667, 674–75 (10th Cir. 2003). This Court also recently reversed a grant of summary judgment to defendants where the record showed that prison officials "made a conscious decision" to permit adherents of one Muslim sect to participate in a religious feast but denied the same opportunity to another Muslim sect. *Maye*, 915 F.3d at 1086. This "facially discriminatory distinction" between the two religious groups meant that "an invidious purpose may be inferred" for purposes of an equal protection claim. *Id*. Plaintiff has alleged such facially discriminatory treatment here, and has thus also alleged the intentional discrimination element of an equal protection claim.

While this clear pattern is sufficient by itself to demonstrate intentional discrimination, intentional discrimination can also be demonstrated when prison officials learn of ongoing discrimination but make no attempt to remedy it. *See Flynn v. Doyle*, 672 F. Supp. 2d 858, 877 (E.D. Wis. 2009) ("The defendants' ongoing knowledge of the disparity in treatment [of female and male prisoners] is circumstantial evidence of discriminatory animus" for purposes of equal protection

claim.). Here, Plaintiff alleged that Defendants had ongoing knowledge of the discriminatory enforcement. Plaintiff also alleged that he had conversations with correctional officers concerning the discriminatory enforcement. Plaintiff's grievances, which served to alert prison officials to the problem of the Policy's differential enforcement, were attached to his Complaint. R.1-3, Exs. to Pl.'s Compl., Page ID 14-105. Plaintiff also alleged that Defendants took no action to rectify the situation. Therefore, the *sua sponte* dismissal of Plaintiff's equal protection claim was inappropriate.

The right to equal protection "prohibits selective enforcement based on an unjustifiable standard such as . . . religion." *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) (Fourteenth Amendment). Where a plaintiff can show that prison officials have engaged in religious discrimination, the officials' action will be sustained "only if it is 'suitably tailored to serve a compelling state interest.'" *Maye*, 915 F.3d at 1086 (quoting *Harbin-Bey v. Rutter*, 420 F.3d 571, 576 (6th Cir. 2005)) (Fourteenth Amendment); *cf. Johnson v. California*, 543 U.S. 499, 515 (2005) (Fourteenth Amendment) (holding that strict scrutiny applies to equal protection claims based on race discrimination in prisons). Since Plaintiff properly alleged religious discrimination and sought injunctive and declaratory relief to remedy that discrimination, his equal protection claim should move forward and should be sustained unless the government can show that its actions meet strict scrutiny.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court and remand the case for further proceedings.

Dated: March 11, 2019

Respectfully submitted,

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   /s/ **Matthew W. Callahan**

   Attorney for **Plaintiff-Appellant**

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I hereby certify that on this 11th day of March 2019, a true and correct copy of the foregoing **PLAINTIFF-APPELLANT'S OPENING BRIEF** was electronically filed with the Clerk of Court using the Court's CM/ECF system, which will send notification to all counsel of record that this document has been filed and is available for viewing and downloading.

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