NO. 22-1876

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOHAMED SALEH MOHAMED AHMED EMAD,

Plaintiff-Appellant,

v.

DODGE COUNTY, DODGE COUNTY SHERIFF DALE SCHMIDT, JAIL ADMINISTRATOR ANTHONY BRUGGER, SCOTT BUCKNER, MATTHEW MARVIN, CHRIS MYERS, and JEFFREY SCHLEGEL,

Defendants-Appellees.

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

BRIEF OF *AMICUS CURIAE* MUSLIM ADVOCATES IN SUPPORT OF PLAINTIFF-APPELLANT AND FOR REVERSAL OF THE DISTRICT COURT

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APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 22-1876

Short Caption: Emad v. Dodge County et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party, amicus curiae, intervenor or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Attorney's Printed Name: Christopher Godshall

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** ☑ **No** ☐

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CORPORATE DISCLOSURE STATEMENT

The undersigned, counsel of record for *amicus curiae* Muslim Advocates hereby states the following in accordance with Federal Rule of Appellate Procedure 26.1 and Seventh Circuit Rule 26.1: counsel of record is a staff attorney at Muslim Advocates. Attorneys at Muslim Advocates, and no other organization, assisted in the preparation of this brief. *Amicus* is a non-profit entity, has no corporate parent, and otherwise has nothing to disclose pursuant to these Rules.

/s/ Christopher Godshall

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IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Amicus curiae **Muslim Advocates**, a national legal advocacy and educational organization formed in 2005, works on the frontlines of civil rights to advocate for freedom and justice for Americans of all faiths. The issues at stake in this case relate directly to Muslim Advocates' work fighting religious discrimination against vulnerable communities.

RULE 29(a)(2) STATEMENT

All parties have consented to the filing of this brief.

RULE 29(a)(4)(E) STATEMENT

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amicus curiae*—contributed money that was intended to fund preparing or submitting this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Evidence shows that Mr. Emad and other Muslim detainees were prohibited by the staff of the Dodge County Detention Facility (the "Jail") from exercising two central tenets of their religion.

One relevant central tenet of Islam is the obligation for adult Muslims to pray – perform *salah* – five times a day in a clean place. ECF No. 86-1 at 33-35. Many Muslims believe that prayer in an unclean place – including a place with bodily wastes – does not satisfy the obligation to perform *salah*. *Id.* at 38-40. The district court correctly held that the Jail substantially burdened Mr. Emad's religious practice by not allowing him to pray in a clean place. From this point on, however, the district court erred. The district court's qualified immunity ruling – that no reasonable jail official could have known that denying Muslims the ability to pray individually or in groups in the dayroom, while allowing Christians to do so – was error that *amicus* asks this Court to reverse.

A second central tenet of Islam is the obligation to engage in congregational Jumu'ah prayer services on Fridays. *Id.* at 65-67. The Jail does not permit jumu'ah services because the Jail has failed to hire an imam to conduct services and will not allow Muslim detainees to gather for detainee-led group prayer because of alleged security concerns. Mr. Emad introduced evidence – that the district court improperly disregarded – that the Jail allowed Christian detainees to gather for inmate-led group

prayer. The district court erred in ruling that no reasonable jury could find that this differential treatment unjustifiably and substantially burdened Muslim prayer.

One might think that the Jail, mindful of this failure to hire an Imam or allow Muslim detainees the freedom to worship granted to detainees of other faiths, would at least have allowed Mr. Emad to conduct prayers in the always-supervised dayroom, but no such accommodation was made. Rather, Mr. Emad was forced to pray in his cell next to a toilet—something he and countless other Muslims would explain is unacceptable. According to the Jail, Muslim prayers cannot be permitted in the dayroom because they may disturb other detainees, among whom are Christian detainees praying and conducting Bible studies. In short, the Jail's position is that Muslim religious practices at the Jail are too disruptive of detainee-facilitated Christian group activities to be permitted.

This district court in this case held that no reasonable jury could find that the Jail's effective prohibition on Muslim worship violates the First Amendment, and that, even if it could, Defendants-Appellees would be entitled to qualified immunity. It further held that, while forcing Mr. Emad to pray next to a toilet does violate the Free Exercise Clause, Defendants enjoy qualified immunity because, despite Mr. Emad's protests, they could not have known this to be the case. This decision flows from a mischaracterization of Mr. Emad's constitutional rights and from a procedurally improper view of the facts totally divorced from the reality of

discrimination against Muslim religious practice in detention facilities across the country, including the Jail. For these reasons, this Court should reverse the district court.

ARGUMENT

I. The First Amendment Is Particularly Concerned with the Protection of Religious Minorities in the Detention Setting.

The freedom to practice one's religion is central to the laws of the United States. "[T]he promise of the free exercise of religion [is] enshrined in our Constitution; that guarantee lies at the heart of our pluralistic society." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1754 (2020). The freedom to practice one's religion is among "the cherished rights of mind and spirit" protected by the Constitution. *Malloy v. Hogan*, 378 U.S. 1, 5 (1964). As Justice Murphy noted, "nothing enjoys a higher estate in our society than the right given by the First and Fourteenth Amendments freely to practice and proclaim one's religious convictions." *Martin v. City of Struthers*, 319 U.S. 141, 149 (1943) (Murphy, J., concurring). By including protection for the free exercise of religion in the First Amendment to the Constitution, "the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940).

While the First Amendment was drafted to protect all expressions of religious belief, "[t]he free exercise clause . . . . was especially concerned with the plight of minority religions." *Zelman v. Simmons-Harris*, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring) (quoting Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1159 (1991)). The framers of the Bill of Rights were themselves victims of religious discrimination, and accordingly "it was 'historical instances of religious persecution and intolerance that gave concern to those who drafted the Free Exercise Clause.'" *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532-33 (1993) (quoting *Bowen v. Roy*, 476 U.S. 693, 703 (1986)). As Justice Gorsuch has written, "[p]opular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom." *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1737 (2018) (Gorsuch, J., concurring).

Religious minorities in prison not only suffer the discrimination the First Amendment was designed to prevent, but they are also far more powerless to fight against it. The Supreme Court has referred to prisons as among those state-run institutions "in which the government exerts a degree of control unparalleled in civilian society and severely disabling to private religious exercise." *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005). Nevertheless, "prisoners do not shed all

constitutional rights at the prison gate," *Sandin v. Conner*, 515 U.S. 472, 485 (1995), and the protection of the Free Exercise Clause, "including its directive that no law shall prohibit the free exercise of religion, extends to the prison environment." *Morrison v. Garraghty*, 239 F.3d 648, 656 (4th Cir. 2001) (citing *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987)). The strong protections of the First Amendment ensure that prison officials may not "demand from inmates the same obeisance in the religious sphere that more rightfully they may require in other aspects of prison life." *Barnett v. Rodgers*, 410 F.2d 995, 1002 (D.C. Cir. 1969).

The Equal Protection Clause of the Fourteenth Amendment also protects the religious rights of prisoners because it "prohibits selective enforcement based on an unjustifiable standard such as . . . religion." *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979). The Equal Protection Clause is intended "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents," *Vill. Of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curium) (internal quotation marks omitted). As with the Free Exercise Clause, the right to equal protection of the laws extends to prisons, protecting prisoners "from arbitrary state action even within the expected conditions of confinement." *Sandin*, 515 U.S. at 487 n.11.

This framework of federal law places an obligation on courts to apply the law in such a way that safeguards the liberty of religious minorities. By granting Defendants-Appellees summary judgment based on a flawed application of both the summary judgement standard and of the qualified immunity doctrine, the district court failed to fulfill this obligation.

II. Anti-Muslim Animus is Widespread in the Detention Setting.

A holding in favor of Plaintiff in this case is critical to protecting religious freedom in part because anti-Muslim animus is common in detention centers across the country. Just as is the case in the Jail here, Muslim detainees have a much more difficult time exercising their religious liberties than, say, their peers belonging to the majority religion.

Religious animus in detention settings is, regrettably, a very common occurrence. In 2000, during hearings on the passage of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"),[1] Congress was presented with the widespread problem of prisoners being denied the opportunity to practice their faith without sufficient justification. Some of these "inadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post

[1] Pub. L. 106-274, 114 Stat. 803 (2003), *codified at* 42 U.S.C. § 2000cc *et seq*.

hoc rationalizations"[2] included Michigan prisons prohibiting Chanukah candles,[3] Oklahoma prisons restricting the Catholic use of sacramental wine for celebration of Mass,[4] and prison policies banning jewelry that preventing prisoners from wearing a cross or Star of David.[5] These examples are, unfortunately, as timely as ever—a great number of such cases remains on the docket of every federal judge in the nation.

While prisoners of all faiths experience discrimination, the available evidence shows that anti-Muslim discrimination is among the most widespread. In federal prisons, Muslims are significantly overrepresented as grievers and litigants. *See* U.S. Comm'n on Civil Rights, *Enforcing Religious Freedom in Prison*, Table 3.8, at 70; Table 4.1, at 82 (Sept. 2008) (noting that Muslims filed 42% of administrative remedy requests for accommodation from 1997-2008 and that Muslims litigated 29% of RLUIPA cases from 2001-2006). In 2008, Muslims constituted only 9.3% of federal prisoners but brought the highest percentage of religious discrimination grievances, accounting for 26.3% of all grievances filed. *See id.* at Tables 2.1, 2.6. The Department of Justice also consistently reports a disproportionately high

[2] 146 Cong. Rec. S7774-01, S7775 (statement of Sens. Hatch & Kennedy) (quoting S. Rep. No. 103-111, at 10 (1993)).
[3] *Cutter*, 544 U.S. at 717 n.5 (citing *Hearing on Protecting Religious Freedom After Boerne v. Flores before the Subcommittee on the Constitution of the House Committee on the Judiciary*, 105th Cong., 2d Sess., Pt. 3, p. 41 (1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute)).
[4] *See* 105th Cong., 2d Sess., Pt. 2, at 58-59 (prepared statement of Donald W. Brooks, Reverend, Diocese of Tulsa, Oklahoma).
[5] *Hearing before the Subcomm. on the Const. of the H. Comm. On the Judiciary*, 105th Cong., 1st Sess. 86 (July 14, 1997) (testimony of Prof. Douglas Laycock).

number of discriminatory incidents against Muslims in particular. *See* U.S. Dep't of Justice, *Update on the Justice Department's Enforcement of the Religious Land Use and Institutionalized Persons Act: 2010-2016*, at 4 (2016).

The presence of such anti-Muslim bias in the Jail is perhaps more disturbing because it purposefully sets out to house immigration detainees, many of whom are Muslim, to turn a profit. Defendant-Appellee Schmidt explained in his deposition that the Jail is paid $86 per immigration detainee per day by the federal government. ECF No. 86-2 at 26. For the two years including the time of Mr. Emad's detention, there were 175 Muslim detainees at the Jail. ECF No. 86 at 3. If even half of these of these were immigration detainees, the Jail produced over *five million dollars* for the Dodge County general fund directly by housing Muslim detainees. None of that money was used to meet the basic religious needs of those detainees by hiring an imam. It is bad enough that the Jail refused to accommodate Mr. Emad and other Muslim detainees. That it produced profit for the county while doing so is beyond the pale.

Plaintiff-Appellant's allegations that Defendants-Appellees forced him to pray in his cell with a toilet and forbid the observance of Jumu'ah while Christian detainees prayed and held Bible studies in common areas are clear instances of the anti-Muslim bigotry described above. The Constitution provides Plaintiff-Appellant with a remedy in the courts. But by misapplying the summary judgement standard

and the qualified immunity doctrine, the district court failed to vindicate the Plaintiff-Appellant's rights.

III. The District Court Misapplied Summary Judgment and Qualified Immunity.

The district court's Order is based on two intertwined errors. First, in its substantive *Turner* analysis of Plaintiff-Appellant's Jumu'ah claim, the court misapplied the summary judgment standard by making inferences in Defendants-Appellees' favor to belie the arbitrary nature of Defendants-Appellees' differential treatment of Christians and Muslims. Second, in its qualified immunity analysis of both the Jumu'ah and salah claims, the court mischaracterized Plaintiff-Appellant's First Amendment rights in ways that particularly harm members of minority religions, leading it to inappropriately conclude that his rights were not clearly established.

A. The District Court's Turner *Analysis of Plaintiff-Appellant's Jumu'ah Claim Improperly Relied on Inferences in Defendants-Appellees' Favor.*

As Plaintiff-Appellant argued, the district court misapplied the *Turner* test at the summary judgment stage by improperly crediting the version of the relevant facts put forth by the Jail, the moving party. *See* Opening Br. § I.B.1 at 24-29. The Jail's favoritism toward members of the dominant religion – including its arbitrary enforcement of policy that allowed Christians, but not Muslims, to pray, worship,

and study in groups with typical day-room supervision, is all too common.[6] Yet rather than interrogating the evidence of inconsistent enforcement, the district court went out of its way to ignore this dispute. The court artificially limited the reach of this allegation to two Defendants-Appellees and then inferred that they did not know the worship policy is inconsistently enforced across religious groups. Read in the light most favorable to him, Plaintiff-Appellant's allegations dispute the Jail's claim that its employees neutrally enforce the challenged policy. The conclusion that Defendants-Appellees did not know their own policy was discriminatorily enforced, despite testimony from employees and detainees that this was the case, requires inferences in their favor, inappropriate under the summary judgment standard applicable here. Indeed, it strains credulity to conclude that Defendants-Appellees were simply unaware that the Jail's staff regularly permitted Christian religious activities in common areas. Worse still, these inferences fly in the face of the well-established evidence described above that Muslim practices are frequently the object of discrimination.

For this reason, the district court's grant of summary judgment on the Jumu'ah claim should be reversed. Its grant of qualified immunity fares no better.

[6] *See, e.g.*, Jeffrey Ian Ross, *Resisting the Carceral State: Prisoner Resistance from the Bottom Up*, 36 SOC. JUST. 28, 32 (2009–10) (finding that Departments of Correction "have made it increasingly difficult for many inmates to practice their religious beliefs. Followers of the Christian and Jewish faiths have found it easiest to follow their spiritual convictions, while Muslims . . . have found it more difficult.").

B. The District Court's Qualified Immunity Analysis Mischaracterized Plaintiff's First Amendment Rights.

The district court's granting of qualified immunity to Defendants-Appellees was an offensive abdication of its responsibility to protect religious freedom. As noted above, federal law has long been a source of critical protection for the religious practices of religious minorities. To effectuate these rights, however, the law must also provide remedies when they are violated. The Supreme Court has noted that "[i]n situations of abuse, an action for damages against the responsible individual can be an important means of vindicating constitutional guarantees." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Damages deter violations of rights by making officials internalize the costs of their illegal activity rather than forcing their victims to bear them. *See* John C. Jeffries, Jr.*, In Praise of the Eleventh Amendment and Section 1983*, 84 Va. L. Rev. 47, 72 (1998). Section 1983 of Title 42 of the U.S. Code, which provides a cause of action for claims under the Constitution, was created to make the courts "guardians of the people's federal rights," *Haywood v. Drown*, 556 U.S. 729, 735 (2009) (citation omitted), including the right to be free from religious discrimination.

Because these remedies are so important to safeguarding constitutional rights, it is critical that any defense to them is construed narrowly to preserve meritorious claims. Recognizing this, the Supreme Court has repeatedly stated that the standard for qualified immunity does not require that "the very action in question has been

previously held unlawful;" rather, "the unlawfulness must be apparent . . . in light of pre-existing law." *Hope v. Pelzer*, 536 U.S. 730, 739 (2002). The relevant case law need not be "directly on point," *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018), or even "fundamentally similar." *Hope* at 741. "[O]fficials can . . . be on notice that their conduct violates established law even in novel factual circumstances." *Id.*

It has long been established that a prison official cannot burden a detainee's religious exercise rights without real justification. The Supreme Court has repeatedly held for decades that any prison restriction on religious practice must be rationally related to a legitimate government interest. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 89-91 (1987). Important for this case, it is also well-established that discriminatory enforcement of restrictions calls this required relationship into question. *See Grayson v. Schuler*, 666 F.3d 450, 453 (7th Cir. 2012).

In its analysis of qualified immunity for both claims, the district court mischaracterized Plaintiff-Appellant's rights, allowing it to ignore the factual dispute about whether the Jail's asserted interest was real and grant summary judgment to Defendants-Appellees. The court described Plaintiff-Appellant's Jumu'ah claim as one of a "right to congregational services or inmate-led services" and his salah claim as of a right to "worship in the dayroom." ECF No. 92 at 10, 13. But these are not the rights in question. The right in question is to not have Plaintiff-

Appellant's religious practices, in the form of congregational services and praying in a room without a toilet, *prohibited* without a rational relationship to a legitimate government interest.

By framing Plaintiff-Appellant's rights as positive rights to inmate-led services or prayer in a particular room, rather than as negative rights against burdens without reason, the district court stacked the deck in Defendants-Appellees' favor. This approach replaces the requirement that restrictions be rationally related to a legitimate interest with a blank check to restrict religious liberty unless a court has explicitly said that restriction is unlawful. This is exactly the outcome the Supreme Court has made clear is not appropriate when analyzing claims of qualified immunity. *See Hope* at 739.

Furthermore, a rule like this—that qualified immunity is available unless the exact factual circumstances of the case at bar were previously held to be unlawful—is not only contrary to precedent, but it would also discriminate against minority religions. Adherents to minority religions are by definition less numerous than those to mainstream religions. Accordingly, they would be presented with fewer opportunities to litigate the content of their beliefs and obtain the kind of decisions that are necessary to escape qualified immunity under the district court's rule. Further, federal courts have proven disproportionately hostile to Muslim litigants'

Free Exercise claims,[7] limiting the development of case law. As noted above, the Free Exercise Clause was affirmatively intended to protect "members of minority religions against quiet erosion by majoritarian social institutions that dismiss minority beliefs and practices as unimportant, because unfamiliar." *Goldman v. Weinberger*, 475 U.S. 503, 524 (1986) (Stevens, J., concurring). By adopting a version of qualified immunity that effectively rewards the frequency with which a religious practice is recognized by a court, the district court denied the protection of the Free Exercise Clause to these same beliefs and practices that are among the central concerns of the Constitution. Such a rule is error, and this Court must act to correct it by restoring a version of qualified immunity that is "more than a scavenger hunt for prior cases with precisely the same facts." *Perea v. Baca*, F.3d 1198, 1204 (10th Cir. 2016).

With the proper analysis applied, qualified immunity is clearly inappropriate here. Prison officials may not prohibit religious practice without reason. The district court correctly found that Defendants-Appellees violated Plaintiff-Appellant's First Amendment rights by forcing him to pray in a room with a toilet without reason. But there is a dispute as to whether the restrictions on religious activities in the dayroom

[7] Michael Heise & Gregory C. Sisk, *Free Exercise of Religion before the Bench: Empirical Evidence from the Federal Courts*, 88 NOTRE DAME L. REV. 1371, 1374 (2013) ("While judicial ideology did not emerge as a significant influence in the Free Exercise context, however, other variables did. Notably, among claimants, Muslims were significantly and powerfully associated with adverse outcomes before the courts.") available at: *https://scholarship.law.nd.edu/ndlr/vol88/iss3/6.*

were enforced in a discriminatory manner. A reasonable jury could decide this to be the case and that all Defendants-Appellees participated and approved. As such, summary judgment is inappropriate.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the district court.

Dated: November 14, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify on this 14th day of November 2022, that:

1. This brief complies with the type-volume limitations of the Federal Rules of Appellate Procedure because it contains 3,412 words, excluding the items 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 type-style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared on a computer, using Microsoft Word, in Times New Roman (proportionately spaced) typeface with serifs, 14-point type, and double-spaced.

/s/ Christopher Godshall

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of November 2022, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users, and that service will be accomplished by the CM/ECF system.

/s/ Christopher Godshall