No. 22-1876

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOHAMED SALAH MOHAMED A EMAD,

Plaintiff-Appellant,

v.

DODGE COUNTY, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Wisconsin, No. 2:19-cv-00598-LA
The Honorable Lynn Adelman, District Court Judge

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

For the entire 14 months Mr. Emad was detained, defendants' rules prevented him from fulfilling his foremost religious obligations of praying salah five times a day in a clean, pure space and of attending Jumu'ah. All the while, they broke those rules for Christian prisoners, allowing them to pray outside their cells and conduct detainee-led religious services.

Defendants cannot justify either rule. Defendants now argue, for the first time on appeal, that "more involved" prayer – a term for which they offer no definition and which apparently covers Muslim but not Christian prayer – may disturb other detainees, a contention with no support in the record. And defendants' claim that allowing detainee-led religious activity would pose a security threat is belied by the fact that officers regularly allowed Christian detainees to have detainee-led Bible study. Defendants urge that that they cannot be personally liable and that they are entitled to qualified immunity, but each defendant turned a blind eye to the denial of Mr. Emad's constitutional rights, and qualified

immunity cannot be granted where defendants' policies have no penological justification and are applied only to some religions.

This Court should vacate the district court's grant of summary judgment and remand for further proceedings.

ARGUMENT

I. Defendants violated Mr. Emad's Free Exercise rights and are not entitled to qualified immunity.

A. The Jail's prayer bans imposed a substantial burden.

The threshold showing for a First Amendment claim is that defendants imposed a "substantial burden" on Mr. Emad's religious practice – that is, one that "puts substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Neely-Bey Tarik-El v. Conley*, 912 F.3d 989, 1003 (7th Cir. 2019) (citation omitted). The Jail's prayer bans do just that: They forced Mr. Emad to violate his beliefs every time he prayed next to a toilet and made him miss the obligatory communal Jumu'ah prayer that he has done every week since he was seven. ECF 86-1 at 58–59, 255–57.

Defendants acknowledge that Mr. Emad's prayer circumstances were not "ideal," but claim they were not a substantial burden. AB22–

23.[1] They are incorrect. Defendants prevented Mr. Emad from fulfilling his obligation of praying five times a day in a clean, pure space by forcing him to pray in a space that was impossible to sufficiently clean. ECF 86-1 at 33–35, 38–59; *see also* ECF 86-31 ¶¶ 2–3.[2] Every time Mr. Emad prayed in his cell, therefore, he was forced to "violate his beliefs," *Neely-Bey Tarik-El*, 912 F.3d at 1003.

The fact that he prayed anyway is no answer.[3] *Cf.* AB22–23. Each of those prayers offered next to the toilet was invalid. ECF 86-1 at 40. Mr. Emad explained that having to pray "every day" next to a toilet while at the Jail made him think he "did God . . . wrong" and "disrespect[ed] the whole . . . religion." *Id.* at 95, 256–57. This falls squarely within this Court's test for what constitutes a substantial burden. *See Neely-Bey*

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[1] Citations to the opening brief are denoted as OB; citations to the answering brief are denoted as AB.

[2] Defendants' argument that Mr. Emad cites no Islamic law for this proposition is unavailing. AB22. Mr. Emad testified as to the teachings of Prophet Muhammad and was corroborated by an expert in Islamic studies. ECF 86-1 at 59; ECF 86-31 ¶¶ 2–3. Defendants cite no caselaw suggesting that a plaintiff must prove their beliefs by citing authenticated religious law.

[3] Defendants also point to the testimony of a fellow Muslim detainee who prayed in his cell. AB22–23. Defendants fail to mention that the fellow detainee testified that his cell was "an improper space for prayer" and that he also unsuccessfully tried to pray in the dayroom. ECF 86-22 ¶ 7.

Tarik-El, 912 F.3d at 1003. Indeed, the district court easily rejected defendants' same argument. SA-011.

Defendants are also wrong to assert that because, in their view, Mr. Emad received other kinds of religious accommodations,[4] this particular burden was not substantial. AB22. A plaintiff need not establish that they were barred from any religious exercise whatsoever. A burden on a single practice – if that practice is important – is sufficient. *See Thompson v. Holm*, 809 F.3d 376, 380 (7th Cir. 2016) (finding substantial burden where plaintiff was denied a religious dietary accommodation for two days); *Garner v. Muenchow*, 715 F. App'x 533, 536 (7th Cir. 2017) ("[D]enying prisoners access to their holy text or ritual items is a substantial burden on free-exercise rights."); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (finding a prohibition on praying in one particular location violated the Free Exercise Clause). A burden both on the obligatory daily prayer – one of the Five Pillars of Islam – and on

[4] Defendants' representations on this front are also overstated. For instance, defendants suggest that they gave Mr. Emad a Quran, *see* AB8, 22, 33, 52, but in fact, Mr. Emad's request for a Quran was *denied*. He had to borrow one from other Muslim detainees. ECF 86 ¶ 42.

the "most important communal prayer of a Muslim's week," ECF 86-31 ¶¶ 2, 6–7, is certainly substantial enough to qualify.[5]

B. Defendants are liable for preventing Mr. Emad from praying alone outside his cell without penological justification.

1. The individual prayer ban is not reasonably related to any penological interest.

As the opening brief explains, defendants failed to connect the ban on individual prayer in communal spaces to a legitimate penological interest, rendering it clearly unconstitutional. *See Riker v. Lemmon*, 798 F.3d 546, 553 (7th Cir. 2015). The record contains no evidence that there are any security concerns associated with solo prayer; correctional officers and an expert testified that the exact opposite is true. *See, e.g.*, ECF 86-8 at 54–55; ECF 86-18 at 89–91; ECF 86-30 at 76–78; ECF 86-32 ¶ 5. Most tellingly, prayer *does* safely occur in the dayroom all the time –

[5] Defendants cite *Thompson v. Bukowski*, 812 F. App'x 360 (7th Cir. 2020), but in that case, this Court recognized that the denial of Jumu'ah would raise constitutional concerns. *Id.* at 364 ("If the defendants had forbidden Muslim inmates from group worship, Thompson's claim would have heft; the jail would have to justify such a measure."). This Court went on to grant defendants summary judgment because the plaintiff, unlike Mr. Emad, had never requested accommodations for group worship that the jail denied. *Id.*; *cf.* ECF 86-21.

Christians are allowed to openly pray there. ECF 86-2 at 45–48; ECF 86-4 at 108, 116; ECF 86-6 at 94; ECF 86-8 at 51; ECF 86-16 at 50–51.

Defendants barely defended this policy in summary judgment briefing. All of their arguments concerned the security risks of detainees *gathering*, ECF 76 at 11–12 – but this policy is about solo, not group prayer. The district court thus correctly found that they had failed to offer any legitimate penological interest to justify the policy. SA-012. Now, on appeal, defendants argue that the individual prayer ban applies only to "more involved" worship, AB27 – which they conveniently define to exclude the typically-Christian form of prayer that is routinely permitted in the dayroom – and serves a catch-all of institutional interests. AB26–27. This Court should reject defendants' belated attempt to invent a justification.

Even if this Court were to consider these new justifications on their merits, they fail. Defendants rely on a stray line in Defendant Schmidt's testimony that "more involved" worship may "cause difficulties for others in the area." AB27 (citing ECF 78-12 at 47). But prison officials "must come forward with record evidence that substantiates that the interest is truly at risk." *Neely-Bey Tarik-El*, 912 F.3d at 1004; *see also Conyers v.*

Abitz, 416 F.3d 580, 585 (7th Cir. 2005) (rejecting officials' cited penological interest because "they offered no evidence to explain" it). There is none. Defendant Schmidt didn't even elaborate on how solo prayer could lead to disturbances. SA-012. Nor did he explain why Muslim prayer is more likely to do so than the Christian prayer that safely occurs in the dayroom all the time. ECF 86-4 at 108, 116; ECF 86-6 at 94; ECF 86-8 at 51; ECF 86-16 at 50–51. To the extent defendants believe Muslim prayer is "more involved" because it requires the use of a mat, ECF 86-2 at 47, they certainly do not explain why that mat is more likely to disturb other detainees than groups of up to 10 Christian detainees, standing in a circle, holding hands, bowing heads, and praying together. *See* ECF 86-1 at 204–06, 250–53.

Defendants' failure to connect the individual prayer ban to a penological interest is sufficient to show that the policy violates Mr. Emad's free exercise rights under *Turner v. Safley*'s four-factor test. 482 U.S. 78, 89–90 (1987). But the other factors bolster this conclusion.

Defendants advanced no argument on the other *Turner* factors in district court. *See* SA-013 (noting defendants do not dispute factors three and four); ECF 90 at 8 (arguing factor two as to the Jumu'ah ban, but not

the individual prayer ban). Now, on appeal, they contend that Mr. Emad had available options to practice his faith because he could pray in his cell or "at a table before mealtime." AB27. But Mr. Emad's faith does not allow him to pray in a cell that contains a toilet, or to do his five daily prayers while seated at a table; it requires him to pray in a clean space, and stand, kneel, and touch all his limbs to the ground. ECF 86-1 at 35, 38; ECF 86-31 ¶ 2. Defendants' alternatives were no substitute for Mr. Emad to fulfill this central and obligatory tenet of his faith.

Finally, defendants argue that allowing prayer in the dayroom would require more staff to supervise, AB28, but they fail to explain why existing supervision is insufficient. Officers currently supervise both individual Christian prayer and detainee-led group Bible study in the dayroom without apparent detriment to security, *see, e.g.*, ECF 86-4 at 111; ECF 86-17 ¶¶ 26–27, so there's no reason to think they couldn't also supervise Mr. Emad's solo prayer. The *Turner* factors thus all weigh in Mr. Emad's favor. The individual prayer ban was an unreasonable restriction on his religious practice.[6]

[6] *Firewalker-Fields v. Lee*, 58 F.4th 104 (4th Cir. 2023), which defendants cite, AB30, did not involve an individual prayer ban, and is thus irrelevant to this claim.

2. Defendants were personally involved in the constitutional violation.

The district court correctly found that Defendants Schmidt and Brugger were personally involved in this deprivation of Mr. Emad's Free Exercise rights. SA-004–005. It recognized that § 1983 does not authorize liability on supervisors purely because their subordinates commit unconstitutional acts, but it also properly observed that supervisors are directly liable when they "know about" unconstitutional conduct and "facilitate it, approve it, condone it, or turn a blind eye." *Id.* (quoting *Knight v. Wiseman*, 590 F.3d 458, 463 (7th Cir. 2009) (citation omitted)). A senior jail official can thus be directly liable when a jail policy causes a constitutional injury, even if they never directly interact with the plaintiff. *See Childress v. Walker*, 787 F.3d 433, 439–40 (7th Cir. 2015) ("[P]ersonal responsibility is not limited to those who participate in the offending act.").

Contrary to defendants' arguments, Mr. Emad does not argue that either Defendant Schmidt or Brugger is liable solely by virtue of being a supervisor. He argues that they both knew about the unconstitutional individual prayer ban and turned a blind eye to it, which is sufficient to impose liability under this Court's cases. Defendant Schmidt admitted in

his deposition that he was specifically aware that the policy prohibited some members of non-Christian faiths from praying in the dayroom: He testified that he is "aware that there are several different religions that utilize . . . clothing, or mats, or other things that they might need in front of them" for worship – and that these practices are banned. ECF 86-2 at 47. He also testified that the kind of praying Christian detainees engage in, on the other hand, is permitted. *Id.* at 46. As Sheriff, he has the power to change the individual prayer ban to treat all prayer equally, but he instead turned a blind eye. *Id.* at 21–23.

Defendant Brugger also knowingly perpetuated this unconstitutional policy. As Jail Administrator, he reviews all of the Jail's policies on an annual basis and has the power to change them. ECF 86-3 at 29–31, 99–100. He was therefore aware of this policy restricting an important form of religious exercise. *Id.* He testified that prayer was restricted to cells because of a concern of "offending other detainees" but admitted he was not aware of any circumstance where that has actually happened. ECF 86-3 at 101–02. He further admitted that he was aware of no other correctional facilities that similarly prohibit people from praying in common areas. *Id.* A reasonable jury could find he was aware

this ban was for no legitimate reason. Nonetheless, he did not exercise his authority to change the policy.

Many of defendants' counterarguments improperly assume that a defendant must have direct personal contact with the plaintiff to be personally liable. *See* AB18. That is incorrect. In *Daniel v. Cook County*, for example, this Court found that the Sheriff could be personally liable for the jail's deliberately indifferent medical policies because he had notice of systemic deficiencies in the jail's health care, even though he never saw plaintiff's specific medical requests. 833 F.3d 728, 731–33, 737 (7th Cir. 2016);[7] *see also Childress*, 787 F.3d at 439–40. Here, too, defendants are liable because they knew about the prayer ban, and chose not to change it.

[7] Defendants assert that *Daniel* involved only official capacity claims under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). AB19. Not so. This Court discussed the standard of liability for a supervisory official in his individual capacity – exactly the type of claim at issue in this case – although it did so, oddly, under the section header "Daniel's *Monell* Claims." *Daniel*, 833 F.3d at 737.

3. Defendants are not entitled to qualified immunity.

Although the constitutional right at stake must be clearly established, a plaintiff need not point to a factually identical case to show that "in light of pre-existing law the unlawfulness [is] apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In this case, defendants' conduct violated not one, but two clearly established principles: (1) the principle that a regulation that restricts religious exercise without legitimate justification can never be constitutional and (2) the principle that a restriction on religious exercise cannot be constitutional if applied in a discriminatory fashion. *See Turner*, 482 U.S. at 89–90; *Shaw v. Murphy*, 532 U.S. 223, 229–30 (2001); *Cruz v. Beto*, 405 U.S. 319, 322 (1972).

As to the first principle: *Turner* itself made clear that a restriction on religion without penological purpose is unconstitutional, and this Court has articulated the right in question at precisely that level of generality. *See, e.g.*, *Williams v. Lane*, 851 F.2d 867, 882 (7th Cir. 1988) (finding clearly established that "prison officials must demonstrate at a minimum a rational basis for abridging the inmates' religious rights"); *see also Riker*, 798 F.3d at 553 (stating a regulation without a connection

to a legitimate government interest "cannot be sustained"). To be sure, evaluating the constitutionality of a policy under *Turner* may in other cases be a "close issue" where a court must weigh all the factors against the jail's legitimate interests. *See, e.g.*, *Lindell v. Frank*, 377 F.3d 655, 660 (7th Cir. 2004). But where a jail has no legitimate justification for a policy, that is an easy case of unconstitutionality under this Court's precedent. Indeed, this Court has repeatedly denied qualified immunity to defendants in such cases without requiring any sort of factually analogous case on point. *See Williams*, 851 F.2d at 882; *Garner*, 715 F. App'x at 537.

As to the second: It is also clearly established that the Free Exercise Clause forbids applying a policy to one set of religious practices and not to the similarly situated practices of other religions. *Cruz*, 405 U.S. at 322. And again, this Court has denied qualified immunity under that rule without requiring any factually similar case. *See, e.g.*, *Grayson v. Schuler*, 666 F.3d 450, 455 (7th Cir. 2012). This principle independently requires denial of qualified immunity in this case.[8]

[8] Defendants cite two district court cases that they purport hold that it is constitutional to restrict a detainee to praying in his cell, but neither supports their argument. AB37. On the first, they misstate the facts:

C. Defendants are liable for banning group Muslim prayer, while allowing Christians to practice detainee-led group Bible study.

1. The group prayer ban is not reasonably related to a legitimate penological interest because it is applied inconsistently.

Defendants assert that banning Jumu'ah serves security interests, but the record shows that detainee-led group Bible study occurred regularly at the Jail. ECF 86-17 ¶¶ 26–27; ECF 86-22 ¶ 9; ECF 86-29 ¶¶ 5–6; ECF 86-1 at 204–06, 250–54. This evidence of discriminatory enforcement undermines the asserted justification for the detainee-led activity ban, *see Grayson*, 666 F.3d at 453, and at minimum creates a genuine issue of material fact that precludes summary judgment. Defendants have no answer to this argument. *See generally* AB26–34.

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plaintiff was *not* restricted to praying in his cell. *See McRoy v. Cook Cnty. Dep't of Corr.*, 366 F. Supp. 2d 662, 670 (N.D. Ill. 2005) ("[I]nmates are permitted to practice their faith with or without the participation of other inmates in their living tier dayrooms."). The second involved entirely different circumstances than Mr. Emad's – plaintiff challenged the *temporary* suspension of Muslim services. *Walker v. Dart*, No. 1:09-cv-01752, 2010 WL 3307079, at *3–*4 (N.D. Ill. Aug. 19, 2010).

Defendants cite another unpublished district court opinion, *Gill v. Michel*, No. 17-cv-873-pp, 2019 WL 4415638 (E.D. Wis. Sept. 16, 2019), in which the court actually sided with plaintiff on the Free Exercise claim, denying defendants summary judgment for forcing the pro se plaintiff to pray in his cell next to a toilet. *Id.* at *9. It went on to grant qualified immunity, but it made the same errors in its analysis as the district court in this case. *Id.* at *11.

Defendants make much of the fact that this Court has found other bans on detainee-led activities to be constitutional. AB26 (citing *Johnson-Bey v. Lane*, 863 F.2d 1308 (7th Cir. 1988), and *Hadi v. Horn*, 830 F.2d 779 (7th Cir. 1987)). But it has not done so in the face of evidence that a policy was applied inconsistently, as the one in this case was. In fact, the *Johnson-Bey* Court refused to dismiss plaintiffs' suit due to evidence that the ban was "enforced arbitrarily." 863 F.2d at 1312.

Other courts have *denied* summary judgment to defendants in the face of similar evidence of discriminatory enforcement. *See Mayfield v. Texas Dep't of Crim. Just.*, 529 F.3d 599 (5th Cir. 2008). As the Fifth Circuit explained, this evidence casts doubt on the purported justification for the policy and suggests the jail is violating a particular subgroup's First Amendment rights. *Id.* at 608–09; *see also Dingle v. Zon*, 189 F. App'x 8, 10 (2d Cir. 2006) (vacating summary judgment in light of prisoner affidavits that created "an issue of material fact over whether defendants were applying their policy neutrally").

The remaining *Turner* factors make the unconstitutionality of defendants' conduct even clearer, as they demonstrate the strength of Mr. Emad's religious claims and the Jail's unreasonable indifference to them.

Communal worship is a cornerstone of Islamic practice – *required* for Jumu'ah, ECF 86-31 ¶ 6; ECF 86-1 at 74, 87 – and Mr. Emad had no access to it. Defendants argue that Mr. Emad had reasonable alternatives, because he could pray "as many times as he wanted" in his cell. AB27–28. But Mr. Emad had no opportunity at all for *communal* worship while detained. This factor weighs in Mr. Emad's favor, as the district court correctly found. SA-009.

There exist many alternatives to complete denial of Jumu'ah. The Jail could have searched for a volunteer imam during Mr. Emad's detention (which they had not done in many years, ECF 86 ¶¶ 58–67; ECF 86-3 at 53). Defendants also could have allowed Jumu'ah to occur somewhere already supervised, or allocated a program specialist to supervise. Defendants say these options would have a "significant impact" on staffing and resources, AB28, but they provide no concrete evidence to substantiate that. That alone is reason that summary judgment was inappropriate. *See Hunafa v. Murphy*, 907 F.2d 46, 48 (7th Cir. 1990) (reversing grant of summary judgment to defendants where defendants asserted concerns with accommodating plaintiff's religious request but "ma[de] no attempt to estimate their magnitude"); *see also*

Wall v. Wade, 741 F.3d 492, 501 (4th Cir. 2014) ("[T]he record is void of any specific information regarding these purported costs, and we are not content to permit a prison to deny an inmate's constitutional right in the face of such generalized concerns.").

And their limited elaboration on this point is implausible: defendants assert that if they were to allow Jumu'ah along with personal worship, "extra staffing would be required on a 24 hour, 7 days a week basis given the varied religious beliefs" of the Jail population. AB28. Jumu'ah is a 15 to 30-minute event once a week, ECF 86-1 at 248–49, so accommodation of this practice would require far less demand on resources. Defendants also have no answer for why one of the three program specialists working Friday afternoons or the guard who already supervises the dayroom (and, apparently, group Bible study) couldn't spare 15 minutes. ECF 86 ¶¶ 16, 59.

Defendants attempt to analogize this case to *Firewalker-Fields v. Lee*, 58 F.4th 104 (4th Cir. 2023), in which the Fourth Circuit held that a jail was not required to offer Jumu'ah to a maximum-security prisoner. AB30. But even if *Firewalker-Fields* were binding on this Court, it would be inapposite, because it lacks the determinative feature of this case –

evidence that the jail's detainee-led group activity ban was enforced against some religions and not others. 58 F.4th at 113. Further distinguishing the case, the jail in *Firewalker-Fields* provided a concrete reason why it couldn't logistically accommodate supervising Jumu'ah: it was on lockdown for lunch and midday count during the time when prisoners wanted to perform Jumu'ah, which tied up all available officers. *Id.*

In this case, by contrast, defendants allowed Christian detainees to ignore the policy, and cannot explain why they couldn't implement one of the obvious, easy alternatives for Jumu'ah. A reasonable jury could easily find this policy fails *Turner* scrutiny.

2. Defendants were personally involved in this constitutional violation.

Defendants do not dispute that Defendants Buckner, Marvin, and Myers were personally involved. AB16. And despite their objection, Defendants Brugger, Schlegel, and Schmidt were as well. Defendant Brugger had the power to change the group worship ban to allow detainee-led prayer for Muslims, the way it's allowed for Christians, but instead turned a blind eye. ECF 86 ¶ 70. Defendants' only response is that Defendant Brugger was ignorant of the discriminatory enforcement

of this policy, AB18, but there is a genuine issue of material fact on this. The Jail is a small facility and Brugger closely oversees everything that goes on there. ECF 86-3 at 23–24; ECF 86 ¶¶ 12, 16. Detainee-led group Bible study was a regular and conspicuous practice, occurring almost daily for 30 to 45 minutes and involving groups of up to 10 moving chairs, reading aloud, standing, holding hands, and bowing heads. ECF 86-1 at 207, 251–53; ECF 86-29 ¶ 8. Defendant Brugger spends time walking through the Jail living areas and hears daily updates about what's going on there from his direct reports. ECF 86-3 at 23–24. This Court has held that a jury may infer actual knowledge of a fact from circumstantial evidence that it is obvious. *See Vinning-El v. Long*, 482 F.3d 923, 924–25 (7th Cir. 2007). A reasonable jury could infer that Brugger must have been aware of this frequent and obvious practice of detainee-led Bible study.

Defendant Brugger also had the authority to find someone other than a detainee to lead Jumu'ah. ECF 86 ¶ 72. He was aware that the Jail was not meeting the religious needs of its substantial Muslim

population. ECF 86-3 at 47, 117.[9] In fact, sometime in the last nine years, he instructed an officer to try to find an imam to come lead Jumu'ah. *Id.* at 53. Defendant Brugger chose not to hire the resulting candidate because he wanted to be paid, and didn't even find out what it would cost, despite knowing that there is no Jail policy prohibiting compensation. *Id.* at 54–57. Since that one time, years before Mr. Emad's detention, Defendant Brugger has not directed any of his subordinates to search again for an imam volunteer. *Id.* He also has not taken any other corrective action, such as assigning a guard or program specialist to supervise Jumu'ah. *Id.* at 136. A reasonable jury could thus easily find he turned a blind eye to the ongoing deprivation.

Defendant Schlegel was also personally involved in this constitutional violation. Administering religious programming and finding providers to lead that programming is in his job description. ECF 86 ¶¶ 18–19. He reviews detainee religious requests and is responsible

[9] Defendant Brugger now attempts to avoid liability by arguing he never responded to any of Mr. Emad's grievances. AB18. But the record contains a grievance appeal that he personally reviewed and denied involving the exact same issue as to a different detainee. ECF 86-28. And again, a plaintiff need not show personal contact with a defendant. *Childress*, 787 F.3d at 439–40.

for trying to coordinate religious accommodations based on those requests. ECF 86-9 at 16. He has held the job for more than 22 years. ECF 86 ¶ 26. In his entire tenure, he can remember a Muslim service provider coming to the Jail only once, years ago. *Id.* He was aware that the Jail offered no programming for Muslim detainees, but ample programming for Christian detainees. ECF 86-9 at 43, 73–74. Despite the obvious need for Islamic programming, Defendant Schlegel has never personally searched for a volunteer imam, nor taken any other action to organize some Islamic programming. *Id.* at 44, 100. He too, therefore, acquiesced in the status quo.

Finally, Defendant Schmidt, too, was personally involved. As Sheriff, he had the power to change the Jail's policies requiring outside volunteers to lead religious services and prohibiting detainee-led group activities, and yet did nothing. ECF 86 ¶ 69. He also had the authority and budget to pay religious service providers or allocate staff to supervise a Jumu'ah service, yet never did. *Id.* ¶¶ 29, 71. He regularly communicates with Defendant Brugger about Jail operations, *Id.* ¶ 11, and was similarly aware of the policies and practices that deprived Muslim detainees of an obligatory religious practice. Indeed, he was sued

in September 2018 for this exact issue – denial of Jumu'ah services. *Pozo v. Schmidt*, No. 18-cv-1486, Dkt. No. 2 (E.D. Wis. Sept. 24, 2018). Nonetheless, he took no action to ensure Mr. Emad and other Muslim detainees had adequate opportunity to participate in Jumu'ah. ECF 86 ¶ 30. He, too, therefore "turn[ed] a blind eye" to the ongoing violation of Mr. Emad's constitutional rights. *See Knight*, 590 F.3d at 463.

3. Defendants are not entitled to qualified immunity.

The group prayer ban violates two clearly established principles: a policy that burdens religious exercise must be reasonably related to legitimate penological interests, and must "operate[] in a neutral fashion." *Turner*, 482 U.S. at 90; *see also Grayson*, 666 F.3d at 455 (denying qualified immunity because a policy that discriminated between different religious sects "could not reasonably be thought constitutional."). As explained *supra*, I.B.3, no more specific precedent is necessary.

In response, defendants assert that there is no clearly established right to participate in detainee-led group services in common areas when an outside volunteer cannot be located. AB38. But that argument depends on resolving disputed issues of fact in defendants' favor – most

notably, ignoring the inconsistent enforcement of the policy. This contravenes Supreme Court law that, when assessing if a right is clearly established, a court must define the clearly established right "in light of the specific context of the case and construing facts in a light most favorable to the nonmovant." *Tolan v. Cotton*, 572 U.S. 650, 657 (2014) (citation omitted). "[C]ourts must take care not to define a case's context in a matter that imports genuinely disputed factual propositions." *Id.* In this case, there are material disputes of fact over (1) whether the policy was consistently applied and (2) whether an alternative to complete denial of Jumu'ah would be easy to implement. This Court must construe these disputed facts in Mr. Emad's favor when defining the right in question.

The same defect defeats defendants' argument that previous Seventh Circuit cases have sanctioned group activity bans. AB39 (citing *Turner v. Hamblin*, 590 F. App'x 616, 620 (7th Cir. 2014), *Johnson-Bey*, 863 F.2d at 1310, *Hadi*, 830 F.2d at 784–85). This is not the relevant body of caselaw. Defendants ask this Court to treat their policy like a generic ban on detainee-led group activities. But in fact, their policy was one that allowed detainee-led Christian group worship but barred detainee-led

Muslim group worship, while Jail officials all but ignored Muslim detainees' requests for Jumu'ah. That policy clearly violates the Constitution. *See Grayson*, 666 F.3d at 455.

II. Defendants violated Mr. Emad's Equal Protection rights and are not entitled to qualified immunity.

A. Discriminatory enforcement of prayer bans violates the Fourteenth Amendment.

Notably, defendants don't dispute that Mr. Emad suffered disparate treatment. AB47–52. They never dispute that Christian prayer, but not Muslim prayer, was allowed to occur in the dayroom. And they never dispute that detainee-led group Bible study, but not Jumu'ah, regularly occurred, with the permission of Jail guards. Rather, they dispute only that these particular defendants should be liable for that disparate treatment.

They are incorrect. To be personally liable, defendants need only have been aware of and condoned the manner in which the policies were enforced, *see Daniel*, 833 F.3d at 737; they need not have been actually involved in enforcing them. And, as the opening brief recounts, there is plenty of evidence that they were. OB56–57.

First, Defendant Schmidt *admitted* that he knowingly allows in the dayroom a typically-Christian form of prayer, but not Muslim prayer.

ECF 86-2 at 46–47. Moreover, officers routinely granted groups of Christian detainees an exception to the supposedly universal ban on detainee-led group activities. ECF 86-1 at 207, 251–54; ECF 86-29 ¶¶ 5–7; ECF 86-17 ¶¶ 26–27; ECF 86-22 ¶ 9. Regular group activities within a small facility cannot escape notice. A reasonable jury could conclude that Defendant Brugger witnessed and was aware of this conspicuous practice. ECF 86-3 at 23–24; *see also Vinning-El*, 482 F.3d at 924–25. So too Defendant Schmidt, who receives the same information through twice-weekly meetings with Defendant Brugger. ECF 86 ¶ 11.

Defendants dispute Mr. Emad's comparison to *Tenison v. Byrd*, 826 F. App'x 682 (10th Cir. 2020), a case in which the Tenth Circuit reversed a grant of summary judgment to defendants on a similar equal protection claim. AB49. Most notably, an officer in that case made an almost identical admission to Defendant Schmidt's about prayer in the dayroom. *Tenison*, 826 F. App'x at 689. Defendants argue that *Tenison* involved evidence absent here: the chaplain had inconsistently applied the policy prohibiting religious activities in the dayroom. AB50. But the same evidence is, in fact, present in this case. Multiple officers admitted that they allow Christian but not Muslim prayer in the dayroom: Lieutenant

Hundt, one of Defendant Brugger's direct reports, testified that "saying grace" is permitted, while prayer that involves "pulling out their prayer rug" and "fac[ing] the east to pray" is not. ECF 86-4 at 108, 116; *see also* ECF 86-8 at 51. The same officers further admitted that they allow groups of detainees to pray together – a group activity – while still claiming to enforce the group activity ban, *see* ECF 86-4 at 101–02, 108–09; ECF 86-8 at 48, 50–51.[10]

Defendants unsuccessfully attempt to rehabilitate Defendant Schmidt's testimony about the individual prayer ban. First, they say that there is no evidence that the Sheriff knew the policy did or would have a negative impact on Muslim detainees. AB49. His testimony directly refutes that. He explained that he was "aware that there are several different religions" that have prayer practices that are prohibited by the policy. ECF 86-2 at 47. He was therefore fully aware that the policy would selectively burden the prayer practices of certain non-Christian religions.

[10] Defendants argue that *Tenison* is inapposite because it only involved official capacity claims. AB49–50. This is false. Tenison sued defendants in their individual *and* official capacities, and the court in fact found that defendants, as private prison employees, "d[id] not possess an 'official capacity' in which to be sued." *Tenison*, 826 F. App'x at 686–87.

Defendant Schmidt now claims that he was not drawing a distinction between Christian prayer and Muslim prayer but between Christian "prayer" and Muslim "worship," which are "entirely different." AB50. But it's not clear how. Defendant Schmidt might call prayer with a mat by a different name, but it is still prayer. Additionally, to the extent that defendants suggest that Mr. Emad is not similarly situated to Christian detainees engaging in prayer, that is incorrect. To be similarly situated for equal protection purposes, the conduct in question need not be identical, but only "alike in all relevant respects." *Ashaheed v. Currington*, 7 F.4th 1236, 1241, 1251 (10th Cir. 2021) (finding plaintiff sufficiently stated an equal protection claim where defendant refused to let him keep his beard, while allowing other detainees to keep other religious items such as crosses, bibles, and small wedding rings). Regardless of the format of prayer, other detainees may see it, hear it, or be bothered by it. They are thus "alike in all relevant respects." *See id.*

And, of course, we must view Defendant Schmidt's testimony, along with all the other evidence, in the light most favorable to Mr. Emad. Here, that means construing his comments – as a reasonable jury could – as an admission of intentional discrimination.

B. Denial of all religious programming to Muslim detainees violates the Fourteenth Amendment.

In addition to barring Mr. Emad from praying in the dayroom or participating in detainee-led worship, defendants further violated the Fourteenth Amendment by overwhelmingly allocating programming resources to administering the numerous Christian group worship programs as opposed to trying to find ways to accommodate Mr. Emad's faith.

Defendants argue that the treatment of Christian and Muslim detainees was even-handed. AB44. But it wasn't. Not only was the number of group programs five to zero, ECF 86 ¶ 22, the record shows that defendants spend time and resources administering Christian programming, while they spend little to none on seeking out comparable Islamic options or exploring alternatives to bringing in an imam. ECF 86-6 at 17–18, 46; ECF 86-10 at 27, 63–64; OB59–61. Contrary to defendants' assertions, Mr. Emad does not claim the Jail must treat all religious sects identically. AB43. But here, "the facts in the aggregate" and "the totality of the situation" demonstrate that defendants "denied [Mr. Emad] a reasonable opportunity of pursuing his faith comparable to

the opportunity afforded fellow prisoners who adhere to conventional religious precepts." *See Maddox v. Love*, 655 F.3d 709, 719 (7th Cir. 2011).

When a plaintiff makes a showing of disparate treatment, as Mr. Emad has, it is defendants' burden to show that the disparate treatment was not arbitrary. *See Reed v. Faulkner*, 842 F.2d 960, 964 (7th Cir. 1988) ("Having shown an apparent pattern of arbitrary enforcement of the regulation, Reed shifted to the defendants the burden of producing some evidence from which it might be inferred that the pattern was not arbitrary.").

Defendants argue that the reason for the programming imbalance is that they couldn't find a volunteer imam. AB42. But they have scant evidence to support that. No one made any inquiries during Mr. Emad's 14-month detention. ECF 86-3 at 56; ECF 86-6 at 126; ECF 86 ¶¶ 58–67. And no one can even remember the last time they tried (it may very well have been nine years ago). ECF 86-3 at 53; ECF 86-6 at 41–42; ECF 86-10 at 31. Defendants assert that Defendant Myers made "repeated efforts," AB44, but this is false. He testified that he made a couple of calls to mosques on a single occasion, but he does not recall when, only that it was "way back." ECF 86-10 at 30–31, 94–95, 125. This evidence does not

come close to establishing that an imam was unavailable. And the unavailability of a volunteer imam would still not justify the denial of Jumu'ah altogether. *See* ECF 86-21 (Mr. Emad explaining that the service doesn't need to be led by an imam). Defendants' attempted explanation for the lack of Islamic programming is insufficient to warrant summary judgment.

Defendants also seek to escape liability by arguing that they didn't affirmatively prevent any imam from offering services at the Jail, and thus did not "den[y]" Mr. Emad "a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners," *Cruz*, 405 U.S. at 322; AB46. But the proper question is not whether the Jail stopped an imam from coming, but rather whether "the efforts of prison administrators, *when assessed in their totality*, [are] evenhanded." *Al-Alamin v. Gramley*, 926 F.2d 680, 686 (7th Cir. 1991) (emphasis added). And here, where those efforts were near-absent, and the result was a 14-month denial of any communal worship, a cornerstone of Islamic faith, the Jail cannot seriously allege that they provided Muslim detainees a reasonable opportunity of pursuing their faith comparable to the group worship opportunities afforded Christian detainees.

Finally, Defendants argue that Mr. Emad has not identified any evidence of discriminatory intent. AB44. To the contrary, Mr. Emad supplied evidence that defendants were all aware of the lack of Muslim group services and made close to no effort, in the face of sustained requests (and a lawsuit), to provide any. ECF 86 ¶¶ 24–31, 50–75. In other contexts, this Court has held that "consciously cho[osing] not to [act]" is sufficient for a jury "to infer [] the specific intent to discriminate." *Locke v. Haessig*, 788 F.3d 662, 670 (7th Cir. 2015). Defendants attempt to distinguish *Locke* by arguing the Jail *did* respond to religious requests from Muslim detainees by looking for an imam. AB46. But that is disputed, and a reasonable jury could easily disagree that a handful of phone calls over nine or more years is a meaningful response to repeated requests for an obligatory religious practice.

This evidence of refusal to do anything about Jumu'ah requests, in conjunction with the evidence of discriminatory prayer bans, is more than enough to permit a jury to infer discriminatory intent. *See Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736–37 (7th Cir. 1994) (where plaintiff offers a "convincing mosaic" of circumstantial evidence of discriminatory intent, that is sufficient to "get over the hurdle of summary judgment").

C. Defendants are not entitled to qualified immunity.

Defendants are wrong to assert that they preserved a qualified immunity defense to Mr. Emad's Equal Protection claims merely by positioning the qualified immunity section of their summary judgment brief at its end. AB52. All of the argument in that brief revolved around the First Amendment. ECF 76 at 14–17. "Arguments not developed in any meaningful way are waived." *Central States, Southeast and Southwest Areas Pension Fund v. Midwest Motor Express, Inc.*, 181 F.3d 799, 808 (7th Cir. 1999).

They are also wrong on the merits. This Court has held that "[p]risons cannot discriminate against a particular religion except to the extent required by the exigencies of prison administration." *Maddox*, 655 F.3d at 719–20 (citation omitted). And a prison must make "reasonable efforts to provide some opportunity for religious practice," treating members of every religion in a manner that is "qualitatively comparable." *Id.*

If this Court agrees with Mr. Emad that a reasonable jury could find defendants knowingly turned a blind eye to pervasive discrimination against Muslim detainees, then the question is whether *that* conduct

violates clearly established law. *See Tolan*, 572 U.S. at 657. It clearly does. *See Maddox*, 655 F.3d at 719.

It is no answer that Mr. Emad has no caselaw involving a supervisor that was *ignorant* of a subordinate's discriminatory conduct. AB53. That is not this case. *See supra*, II.A. And by suggesting that Mr. Emad must point to a case that "requires a jail to pay for certain services," or "provide the identical programming," AB53, defendants frame the right incorrectly. The discrimination was in failing to make "reasonable efforts" to provide Muslim detainees with *any* opportunity for group worship, while managing a full schedule of Christian group worship programs.

III. This Court should remand the issue of whether Dodge County is a proper defendant.

The district court did not reach the merits of whether Dodge County is a proper defendant for purposes of indemnification. SA-017. The Seventh Circuit has long recognized indemnification claims against cities and counties under Wis. Stat. § 895.46. *See, e.g.*, *Martin v. Milwaukee Cnty.*, 904 F.3d 544, 549 (7th Cir. 2018). This Court should remand the issue so the district court can consider the question in the first instance.

CONCLUSION

For the foregoing reasons, this Court should vacate the district court's grant of summary judgment and remand for further proceedings.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH FRAP RULE 32(A)(7), FRAP RULE 32(G) AND CR 32(C)

The undersigned, counsel of record for the Plaintiff-Appellant, Mohamed Salah Mohamed A Emad, furnishes the following in compliance with F.R.A.P. Rule 32(a)(7):

I hereby certify that this brief conforms to the rules contained in F.R.A.P. Rule 32(a)(7) for a brief produced with a proportionally spaced font. The length of this brief is 6,997 words.

Dated: March 13, 2023

/s/Meghan Palmer
Meghan Palmer

CERTIFICATE OF SERVICE

I hereby certify that on March 13, 2023, I electronically filed the foregoing Appellant's Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: March 13, 2023

/s/Meghan Palmer
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