No. 23-15385

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Charles E. Nealy, Jr.,

Plaintiff-Appellant,

v.

David Shinn, et. al.,

Defendants-Appellees.

On Appeal from a Final Judgment of the
United States District Court for the District of Arizona
No. 2:20-cv-20-01123-DLR-JFM, Judge Douglas L. Rayes

REPLY BRIEF FOR PLAINTIFF-APPELLANT CHARLES E. NEALY, JR.

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Introduction

Defendants' answering brief is significant not for what it says but for what it ignores or concedes. It does not deny that Defendants forcefully interrupted Charles Nealy's Jumu'ah prayer, tightly handcuffing him and injuring his wrists. It does not contest that this interruption led to a weeks-long punitive suspension of prayer services. It does not suggest that any penological purpose justified either interference with Nealy's religious exercise. It does not even claim the suspension was lawful.

And the arguments that Defendants do make all fail. They contend that the prayer interruption—during which Defendants degraded Nealy and his fellow worshippers, calling them "terrorists," ER-127—was not a big deal, imposing no substantial burden on Nealy's religious exercise. *See* Resp. Br. 21. But government animus toward religion invariably violates the First Amendment and RLUIPA. As for the suspension, Defendants make Nealy play whack-a-mole, saying that the Deputy Warden was behind it, not Chaplain Willis. But a reasonable jury could find both of them liable. Finally, Defendants' assertion that the injunctive claims are moot is wrong because Nealy continues to experience interference with his Jumu'ah prayers.

This Court should reverse and remand for a trial on Nealy's claims.

Argument

I. The prayer interruption violated the Free Exercise Clause.

Defendants' violent, animus-motivated interruption of Nealy's prayer violated the Free Exercise Clause. None of Defendants' contrary assertions is persuasive.[1]

A. A free-exercise plaintiff need not show a substantial burden.

To trigger Free Exercise Clause protection, a plaintiff need only demonstrate that the government infringed on his sincerely held religious beliefs. Opening Br. 14-15. Once that is established, Defendants bear the burden of justifying their conduct. Opening Br. 15. Unable to rebut the sincerity of Nealy's beliefs or justify the violent interruption of Nealy's Jumu'ah prayer, however, Defendants instead argue that Nealy must also show that his religious exercise was substantially burdened. *See* Resp. Br. 19-28. Not so.

The substantial-burden requirement is a relic of now-outdated doctrine, under which neutral, generally applicable laws could nevertheless violate the Free Exercise Clause if they imposed a substantial burden on religion and were not justified by a compelling government interest. *See, e.g.*, *Sherbert*

[1] Nealy's excessive-force claim arising from the prayer interruption was severed from his First Amendment and RLUIPA claims. ER-17-18. But contrary to Defendants' assertion, Resp. Br. 9 n.2, these facts are relevant to an accurate understanding of Defendants' interference with his religious exercise. *See* Opening Br. 27.

v. Verner, 374 U.S. 398, 406-07 (1963), *abrogated by Emp. Div. v. Smith*, 494 U.S. 872 (1990). The substantial-burden inquiry was necessary to avoid invalidating large swaths of neutral, generally applicable law.

But *Employment Division v. Smith* obviated that concern by holding that the Free Exercise Clause does not invalidate neutral, generally applicable laws that incidentally burden religious exercise. 494 U.S. at 884-85. In doing so, *Smith* recognized that inquiring into the degree of the burden is "no different from inquir[ing] into [the] centrality" of an adherent's religious beliefs. *Id.* at 887 n.4. The question that a burden inquiry demands—"How great will be the harm to the religious adherent if X is taken away?"—is the same as the impermissible question "How important is X to the religious adherent?" *Id.* Courts may not inquire into centrality because "[i]t is not within the judicial ken to question the centrality of particular beliefs or practices to a faith." *Id.* at 887 (quoting *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989)); *Shakur v. Schriro*, 514 F.3d 878, 884-85 (9th Cir. 2008) (same). In the decades since *Smith*, the Supreme Court has excluded a substantial-burden inquiry from its free-exercise analyses. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022); *Fulton v. City of Phila.*, 593 U.S. 522, 532-33 (2021); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531-33 (1993).

Today, therefore, this Court regularly conducts free-exercise analysis without asking whether the plaintiff has been substantially burdened. *See,*

e.g., *Al Saud v. Days*, 50 F.4th 705, 714 (9th Cir. 2022); *Jones v. Slade*, 23 F.4th 1124, 1144 (9th Cir. 2022); *Walker v. Beard*, 789 F.3d 1125, 1138 (9th Cir. 2015); *Shakur*, 514 F.3d at 885. Instead, this Court asks whether the government action had any effect on the plaintiff's sincerely held religious beliefs. In *Slade*, for instance, the plaintiff was required to prove only "that the challenged regulation *impinges* on his sincerely held religious exercise," without requiring a specific degree of impingement to trigger Free Exercise Clause protection. 23 F.4th at 1144 (emphasis added). In *Al Saud*, the Court left out the effect altogether, describing sincerity and religiosity of belief as the only two elements necessary to state a free-exercise claim. 50 F.4th at 714. *Slade* and *Al Saud* followed *Walker v. Beard*, where this Court found that a plaintiff "easily satisfie[d] the threshold requirements for a Free Exercise Clause claim because he ha[d] alleged a sincerely held religious belief." *Walker*, 789 F.3d at 1138. Accordingly, when the Second Circuit "join[ed] those circuits that have held that an inmate does not need to establish a substantial burden in order to prevail on a free exercise claim," it counted this Court, as well as the Third and Fifth Circuits, among them. *Kravitz v. Purcell*, 87 F.4th 111, 125-26 (2d Cir. 2023) (citing *Shakur*, 514 F.3d at 885; *Williams v. Morton*, 343 F.3d 212, 217 (3d Cir. 2003); *Butts v. Martin*, 877 F.3d 571, 585 (5th Cir. 2017)) (but acknowledging that other circuits hold otherwise).

Defendants insist that this Court still requires proof of substantial burden, Resp. Br. 19-20, but offer only inapposite RLUIPA cases or unreported and outdated decisions, *see* Resp. Br. 20-26. Three of the cases Defendants trumpet as "directly on point," Resp. Br. 21, do not involve free-exercise claims at all. *See Holt v. Hobbs*, 574 U.S. 352, 359 (2015) (involving only RLUIPA claim); *Camacho v. Shields*, 2009 WL 10691050, at *1 (D. Nev. Jan. 9, 2009), *aff'd*, 368 F. App'x 834 (9th Cir. 2010) (same); *Warsoldier v. Woodford*, 418 F.3d 989, 992 (9th Cir. 2005) (same). To be sure, *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998), is a free-exercise case that alternatively held in one cursory paragraph that a guard's proselytizing did not substantially burden a plaintiff's individual prayer. *See* Resp. Br. 22-23; *see also infra* at 12. But *Canell* is stale, and nothing should be taken from its brief foray into substantial-burden analysis. In the decades since, this Court has never cited it in a published free-exercise decision. *See, e.g.*, *Al Saud*, 50 F.4th 705; *Slade*, 23 F.4th 1124; *Walker*, 789 F.3d 1125; *Shakur*, 514 F.3d 878.

We acknowledge that, in the past decade, two cases assessed the plaintiff's substantial burden in analyzing prisoners' Free Exercise Clause claims. *Long v. Sugai*, 91 F.4th 1331, 1337-38 (9th Cir. 2024) (involving religious dietary requirements); *Jones v. Williams*, 791 F.3d 1023, 1031-33, 1035 (9th Cir. 2015) (same). But these cases relied on *Ward v. Walsh*, 1 F.3d 873 (9th Cir. 1993), and *Ashelman v. Wawrzaszek*, 111 F.3d 674 (9th Cir. 1997), in which the Court characterized religious-dietary requirements as "important,"

Ward, 1 F.3d at 878-79, and as "central tenets" of religion, *Ashelman*, 111 F.3d at 675. This Court, following the Supreme Court's lead, has since held the centrality test invalid. *See supra* at 3. So, in *Long* and *Williams*, the Court relied on precedent entangled in the "unacceptable 'business of evaluating the relative merits of differing religious claims.'" *Smith*, 494 U.S. at 887 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)); *see also Ford v. McGinnis*, 352 F.3d 582, 593 (2d Cir. 2003) (Sotomayor, J.) ("Applying the substantial burden test requires courts to distinguish important from unimportant religious beliefs, a task for which … courts are particularly ill-suited.").

Given this confusion, apparent in the decision below, ER-90 (relying on cases with and without a substantial-burden requirement), this Court should clarify that free-exercise claims are not encumbered by a substantial-burden requirement. *Cf. Wiggins v. Griffin*, 86 F.4th 987, 999-1001 (2d Cir. 2023) (Menashi, J., concurring) (concluding that the inconsistent application of a substantial-burden requirement demands clarification because "[t]hree decades is too long for federal judges to be telling litigants which of their religious beliefs are 'unimportant'" (quoting *Ford*, 352 F.3d at 593)). And if this Court does so, reversal is required because Defendants concede that Nealy's religious beliefs are sincere and offer no penological interest to justify their actions. *See infra* at 14-15.

B. In any event, the interruption substantially burdened Nealy's religious practice.

Even if this Court imposes a substantial-burden requirement, Nealy survives summary judgment.

1. Government actions curtailing religious practice coupled with expressions hostile to religion, as Nealy experienced here, necessarily impose a substantial burden. No showing of additional burden is necessary because "[t]he indignity of being singled out for special burdens on the basis of one's religious calling is so profound that the concrete harm produced can never be dismissed as insubstantial." *Locke v. Davey*, 540 U.S. 712, 731 (2004) (Scalia, J., dissenting). That understanding is the upshot of the Supreme Court's recent free-exercise decisions. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 618-19 (2018) (finding free-exercise violation given government's explicit hostility towards religion with no mention of a substantial-burden requirement); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541-42, 546 (1993) (same); *see also Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 690 (9th Cir. 2023) (en banc) (same). Defendants uttered epithets and denounced Islam when they violently terminated Nealy's Jumu'ah prayer. ER-82; *infra* at 10. This hostility substantially burdened Nealy's religious practice.

2. Even assuming (counterfactually) a lack of animus, Defendants' actions substantially burdened Nealy's sincerely held religious beliefs. The substantial-burden inquiry considers whether the "government action …

tends to coerce the individual to forego her sincerely held religious beliefs or to engage in conduct that violates those beliefs." *Jones v. Williams*, 791 F.3d 1023, 1033 (9th Cir. 2015); Opening Br. 26. It is not concerned with the duration of the impingement, *contra* Resp. Br. 21-25, or how often it occurred. *Contra* ER-89. Defendants concede that Nealy sincerely believes in uninterrupted Jumu'ah prayer, *see* Resp. Br. 26, a sacred practice that requires deep, unbroken concentration. *See* ER-40, 108, 131. Intentionally putting severe pressure on Nealy to choose between ceasing Jumu'ah prayer or disregarding Defendants' orders under threats of discipline—including that that "[they] would not have Jumah prayer anymore," ER-57—was a substantial burden. *See Holt v. Hobbs*, 574 U.S. 352, 361 (2015); *Shakur v. Schriro*, 514 F.3d 878, 889 (9th Cir. 2008).

The district court recited these facts without engaging with them, instead focusing entirely on the duration of the interruption. But doing so required the court to implicitly draw impermissible conclusions: that the final moments of Jumu'ah prayer do not merit protection and that Nealy's religion does not actually require uninterrupted prayer. *See* ER-88-89; *supra* at 2-4.

Defendants' caselaw is inapt. *See* Resp. Br. 21-25. They point, for example, to *Woods v. Staton*, 2017 WL 3623835 (D. Or. June 2, 2017), which found that interrupting the plaintiff's individual prayer to conduct an inmate count was not a substantial burden under RLUIPA. *See id.* at *9; Resp. Br. 24-25. But Woods's individual prayer was unlike Nealy's Jumu'ah prayer, which must

be done in congregation at a specific time and without interruption (so, unlike Woods, Nealy could not continue prayer in his cell). *See* ER-111. Canceling any part of Nealy's Jumu'ah prayer is thus more akin to a denial of group prayer services, which *Woods* had "no difficulty … concluding … constitutes a substantial burden." 2017 WL 3623835, at *7. Or take *Howard v. Skolnik*, 372 F. App'x 781 (9th Cir. 2010), where this Court found that an interference with fasting was not a substantial burden. *See id.* at 782; Resp. Br. 23-24. But there, again more consistent with Nealy's position, the "cancellation of Nation of Islam prayer services" substantially burdened the plaintiff's sincere religious beliefs. *Howard*, 372 F. App'x at 782.

C. A reasonable jury could find that Defendants' actions were unconstitutional under any mode of analysis.

1. As explained, the interference with Nealy's prayer was accompanied by expressions of religious animus, rendering it unconstitutional. "[G]overnment actions coupled with 'official expressions of hostility to religion … [are] inconsistent with what the Free Exercise Clause requires … [and] must be set aside.'" *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. Of Educ.*, 82 F.4th 664, 690 (9th Cir. 2023) (en banc) (quoting *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 639 (2018)).

Masterpiece Cakeshop reviewed a state commission's adjudication of a discrimination claim brought against a baker based on his refusal to provide a service that would violate his sincere Christian beliefs. 584 U.S. at 621-22.

The Court found that during the adjudication some commissioners made "inappropriate and dismissive comments showing lack of due consideration for [the baker's] free exercise rights" that compromised the "neutral and respectful consideration" of the baker's free-exercise claim. *Id.* at 634-35. Thus, the commission violated the Free Exercise Clause. *Id*. at 639-40.

Recently, this Court sitting en banc applied *Masterpiece Cakeshop* to derogatory statements made by government officials outside of adjudicative proceedings. *Fellowship of Christian Athletes*, 82 F.4th at 690-93. After concluding that a school committee had made statements hostile to religion prior to revoking a religious group's campus privileges, the Court subjected the committee's action to strict scrutiny (which it failed). *Id.* at 690-94.

Here, analogously, Defendants referred to Nealy and his fellow praying Muslims as "terrorists" before interrupting their prayer. ER-127. Those comments came after Chaplain Willis's repeated refusals to bring Muslim prisoners to prayers. ER-124, 126. Willis also informed Nealy that "[y]ou guys are lucky to even be having a Jumu'ah prayer." ER-124. Based on these facts alone, either Defendants have violated the Free Exercise Clause, *see Masterpiece Cakeshop*, 584 U.S. at 639-40, or Nealy's claim triggers strict scrutiny, *see Fellowship of Christian Athletes*, 82 F.4th at 694, a standard Defendants make no attempt to meet. *See* Resp. Br. 21-28. Summary judgment must be reversed on this ground alone.

2. Even if this Court looks past the evidence of animus, Defendants say nothing to defend the constitutionality of the interruption under *Turner v. Safley*, 482 U.S. 78 (1987). Instead, they blithely assert that *Turner* does not apply here, without presenting an alternative standard for analyzing Nealy's free-exercise claims. *See* Resp. Br. 28. And Defendants certainly haven't shown that the interruption passes muster under strict scrutiny—the only alternative. As just noted, they fail to offer even a single penological interest to justify the interruption. Because the government must offer (at least) a legitimate interest to withstand either strict scrutiny or *Turner* analysis, reversal is warranted.

D. Defendants are not entitled to qualified immunity from damages.

In seeking qualified immunity for the prayer interruption, Defendants misconstrue the right at issue, describing Nealy's claims as focused on "a brief, spontaneous interruption" of his prayers. Resp. Br. 33. Their preoccupation with the interruption's duration misses the point. Nealy's claim is that Defendants violated the First Amendment's prohibition on government hostility toward his religious exercise. *See supra* at 9-11. That kind of hostility to religious practice is impermissible under clearly settled law. *See Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 638-39 (2018); *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 690 (9th Cir. 2023) (en banc).

1. Even under *Turner*, the First Amendment prohibits interference with Jumu'ah prayer without penological justification. *See* Opening Br. 18-23. This Court established in *Mayweathers v. Newland*, 258 F.3d 930 (9th Cir. 2001), that forcing prisoners to choose between avoiding punishment and completing their Jumu'ah prayers without penological justification is a free-exercise violation. *See id.* at 938. Nealy faced that same choice when Milligan ordered him to stop praying under threat of a violent Incident Command System response. *See* ER-121. And *Mayweathers*, 258 F.3d 930, did not involve evidence of animus, making the violation here even more apparent. *See supra* at 9-11.

In arguing for qualified immunity, Defendants rely on *Canell v. Lightner*, 143 F.3d 1210 (9th Cir. 1998). *See* Resp. Br. 32. *Canell* affirmed summary judgment for a correctional officer because his sporadic singing and speaking around the prison unit did not meaningfully interfere with a prisoner's prayer. *Id.* at 1215. Nealy's case is different in kind. His prayer was intentionally disrupted by prison officers who targeted him with anti-Muslim slurs while seizing him, injuring his wrists. ER-121, 125, 127. The interruption's forceful nature and Defendants' expressions of animus likewise distinguish Nealy's case from the prayer interruptions in other (almost all unpublished) decisions Defendants cite. *See, e.g.*, *Camacho v. Shields*, 2009 WL 10691050, at *1 (D. Nev. Jan. 9, 2009), *aff'd*, 368 F. App'x 834

(9th Cir. 2010) (prayer interrupted by headcount); *Woods v. Staton*, 2017 WL 3623835, at *9 (D. Or. June 2, 2017) (same).

2. In addition, courts properly deny qualified immunity without referencing precedent involving similar facts when overarching constitutional principles make the violation obvious. *See Hernandez v. City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018); *Hope v. Pelzer*, 536 U.S. 730, 745 (2002). The Third Circuit followed this approach in *Mack v. Yost*, 63 F.4th 211 (3d Cir. 2023), rejecting qualified immunity when officers verbally disparaged a Muslim prisoner's faith, made noise, and kicked boxes near where he prayed. *Id.* at 219, 233-35. Noting the fundamental role of prayer in religious exercise and "tak[ing] account of the Defendants' failure to tie their behavior to any legitimate penological interest," the court found it "so obvious" that the officers could not interfere with a prisoner's prayer while expressing anti-Muslim animus. *Id.* at 230, 233. Here, Defendants' interference with Nealy's Jumu'ah practice was even more significant, escalating from verbal harassment to forceful restraint of Nealy and his fellow worshippers. *See* ER-82, 125, 127. Though *Mack* was decided after the conduct here, its rejection of qualified immunity was based on "long-standing … general [free-exercise] principles," 63 F.4th at 234, which applied with no less vigor when Defendants violently disrupted Nealy's Jumu'ah service.

II. The prayer interruption violated RLUIPA.

A. The interruption substantially burdened Nealy's religious practice.

As already shown (at 7-9), Defendants' interruption substantially burdened Nealy's religious beliefs. That is true under RLUIPA as under the First Amendment, because RLUIPA must be construed to "protect[] … religious exercise to the maximum extent permitted by the … Constitution," 42 U.S.C. § 2000cc-3(g). And as we have shown, a violent interruption of religious practice coerces the plaintiff by forcing him to either violate his religious beliefs or disobey the prison's demands and face discipline. *See* Opening Br. 26-28.

B. The interruption was unjustified.

As explained (at 9-10), the prayer interruption was motivated by unconstitutional animus. Even if it wasn't, Defendants do not posit any penological interest that could justify the interruption or show it was the least restrictive means to achieve that interest. Instead, they quote a single sentence from *Cutter v. Wilkinson*, 544 U.S. 709 (2005), referencing an institution's general need for "order and safety," without ever arguing that order and safety interests justified their interruption here (much less detailing how those interests were threatened by Nealy's conduct). *See id.* at 722; Resp. Br. 25.

That won't do under RLUIPA. "[P]rison officials cannot justify restrictions on religious exercise by simply citing to the need to maintain

order and security in a prison." *Johnson v. Baker*, 23 F.4th 1209, 1217 (9th Cir. 2022) (quotation marks and citation omitted). RLUIPA's "least-restrictive-means standard is exceptionally demanding," requiring the government to show it had no other means to achieve its interest that would avoid imposing a substantial burden on religious exercise. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014); *see also Holt v. Hobbs*, 574 U.S. 352, 364-65 (2015). Given Defendants' silence regarding its interests and means, this Court should reverse the district court's grant of summary judgment on Nealy's RLUIPA claim.

III. The eight-week prayer suspension violated the First Amendment and RLUIPA.

Defendants do not argue—and the district court did not find—that the eight-week suspension of Jumu'ah prayers did not impinge on Nealy's sincere religious beliefs or that the suspension was justified by any penological interest. *See* Resp. Br. 19-29; ER-27-30. Defendants thus concede that the suspension violated Nealy's rights under the First Amendment and RLUIPA. And Defendants do not argue that qualified immunity bars Nealy's suspension-related damages claim. *See* Resp. Br. 29-33. This Court should credit these significant concessions.

Defendants' only argument is that someone other than Chaplain Willis was responsible for the suspension. Resp. Br. 28-29. But a factual dispute exists regarding whether Willis was involved in the suspension decision,

demanding reversal. The Court should also reverse the dismissal of Deputy Warden Carr—whom Defendants now *admit* participated in the suspension, *see* Resp. Br. 28—because Nealy's First Amended Complaint stated a plausible basis for relief against him.

A. Chaplain Willis is liable for the Jumu'ah prayer suspension.

Considerable evidence indicates that Chaplain Willis was involved in the suspension. He made oral and written reports that led to the interruption and suspension. *See* ER-120-21. And a reasonable jury could find that during the suspension he monitored the conditions for resuming services. *See* ER-38; Opening Br. 32. Moreover, Chaplain Henry—someone Willis blames for the suspension, *see* ER-53—copied Willis on an email the day of the Jumu'ah interruption, saying: "Jumah services have been deactivated for the time being. *We* will review the status of this service in a couple weeks." ER-55 (emphasis added). That email was addressed to "DW Carr and ADW Scott," as well as to "Sgt. Milligan, Captains, and your staff." *Id*. Because Willis received the email, was not one of its addressees, and directly oversaw Jumu'ah services, a jury could reasonably infer that Willis was among the "we," ER-55, who were "personally involved" in suspending services, *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998).

But that's not all. Willis concedes he discussed the resumption of Jumu'ah prayers with Henry. *See* Resp. Br. 29; ER-38. Defendants argue that this does not tend to show that Willis "made the previous decision to *suspend*

[prayers]." Resp. Br. 29. That's flatly wrong. A discussion of when services will resume is necessarily a discussion of how long the suspension will persist. So, Willis's admitted consultation on when to restart Jumu'ah prayer allows a jury to infer he was involved in imposing the suspension. And because Willis conferred with Henry about ending the suspension—and because the suspension did not end immediately—a jury could reasonably conclude that Willis was "personally involved," at the least, in maintaining the suspension. *Barren*, 152 F.3d at 1194. Though the district court acknowledged Willis's consultation, ER-28, it failed to credit Nealy's evidence and draw inferences in his favor, as is required at summary judgment. *See Bernal v. Sacramento Cnty. Sheriff's Dep't*, 73 F.4th 678, 695 (9th Cir. 2023).

Even assuming Willis did not make the initial suspension decision, a reasonable jury still could conclude from Henry's November 22, 2019 email documenting the decision that Willis knew of the suspension from its inception and participated without objection in discussions that continued the suspension until January 24, 2020. *See* ER-38, 55; *see also* ER-124 (reflecting that Willis manages Jumu'ah prayer attendance). This too, if credited by the jury, would establish liability.

Contrary to Defendants' position, Section 1983 liability does not require that Willis *himself* decided to suspend Jumu'ah prayers (though he may well have). *See Boyd v. Benton Cnty.*, 374 F.3d 773, 780 (9th Cir. 2004). It is enough

that Willis "kn[e]w about and acquiesce[d] in the [suspension] as part of a common plan with those whose conduct constitutes the violation." *Peck v. Montoya*, 51 F.4th 877, 889 (9th Cir. 2022); *see also Boyd*, 374 F.3d at 780; *cf. Sjurset v. Button*, 810 F.3d 609, 619 (9th Cir. 2015) (noting that the defendants' liability was not established, in part, because they "were [not] privy to any discussions, briefings, or collective decisions" regarding alleged unlawful conduct). Because considerable evidence indicates that Willis was more than "a mere bystander" in the suspension—indeed, well more—Nealy's claims against Willis should proceed. *See Boyd*, 374 F.3d at 780.

B. Defendants do not seek to justify the suspension.

By offering no penological interest supporting the suspension, much less a compelling one, Defendants concede that the suspension violated Nealy's First Amendment and RLUIPA rights and forfeit any contrary arguments. *See Clem v. Lomeli*, 566 F.3d 1177, 1182 (9th Cir. 2009); *see also Turner v. Safley*, 482 U.S. 78, 89 (1987); 42 U.S.C. § 2000cc-1(a). In the district court (but not in this Court), Defendants relied on the conclusory assertion that the suspension "stemmed from the [Arizona Department of Corrections'] need to ensure a safe[] and secure environment for inmates and staff." ER-73. This offhand snippet did not establish a neutral, non-pretextual justification for interfering with Nealy's religious exercise, even under *Turner*. 482 U.S. at 90; *see also Jones v. Slade*, 23 F.4th 1124, 1137-38 (9th Cir. 2022). That's because other religious services continued during the suspension, and the prison

made no post-suspension changes to Jumu'ah services to promote its asserted security interest. *See* ER-47, 54, 128; Opening Br. 34-35.

Defendants' bare invocation below of facility security fell well short of the specific factual showings required under *Turner*. *See Tiedemann v. von Blanckensee*, 72 F.4th 1001, 1013-14 (9th Cir. 2023) (citing *Shakur v. Schriro*, 514 F.3d 878, 893 (9th Cir. 2008); *Ward v. Walsh*, 1 F.3d 873, 879 (9th Cir. 1993)). And Defendants have not put forward the "detailed evidence" needed to satisfy RLUIPA's compelling-interest and least-restrictive-means tests. *Johnson v. Baker*, 23 F.4th 1209, 1217 (9th Cir. 2022) (quoting *Warsoldier v. Woodford*, 418 F.3d 989, 1000 (9th Cir. 2005)). At a minimum, Defendants do not demonstrate the absence of disputed material facts regarding the suspension's justification given Nealy's evidence of religious animus, the arbitrariness of the suspension's length, and the absence of any consideration of less drastic responses. *See* Opening Br. 33-36, 42-44.

C. Defendants do not seek qualified immunity.

Defendants advance no argument for qualified immunity as to the suspension, effectively conceding the issue. *See* Resp. Br. 28-29. Nor could they. Circuit law unambiguously establishes that the Free Exercise Clause is violated when a prisoner is prevented from attending Jumu'ah prayer without penological justification. *See Mayweathers v. Newland*, 258 F.3d 930, 938 (9th Cir. 2001); *see also Greene v. Solano Cnty. Jail*, 513 F.3d 982, 988-89 (9th Cir. 2008); *Howard v. Skolnik*, 372 F. App'x 781, 782-83 (9th Cir. 2010). Other

circuits likewise have found a prisoner's right to group worship clearly established. *See Sabir v. Williams*, 52 F.4th 51, 63-64 (2d Cir. 2022) (citing *Salahuddin v. Goord*, 467 F.3d 263, 275-76 (2d Cir. 2006)) ("A reasonable officer should have known, based on clearly established law, that denying a Muslim inmate the ability to engage in group prayer without any justification … violates RFRA."); *Williams v. Hansen*, 5 F.4th 1129, 1134-35 (10th Cir. 2021) (citing *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1210 n.4, 1215 (10th Cir. 1999)).[2]

And the Arizona Department of Corrections' manual amplified the notice provided by case law, mandating that wardens "[e]nsure inmates are not denied access to approved religious … opportunities as part of the sanctions of disciplinary isolation." ER-118. The suspension of Jumu'ah services here was a punitive "sanction" contrary to this directive. ER-84 (district court opinion); Opening Br. 35-36. Their violation of prison regulations demonstrates that Defendants "were fully aware of the wrongful character of their conduct." *Hope v. Pelzer*, 536 U.S. 730, 744 (2002).

D. Deputy Warden Carr also is liable.

Nealy's suspension-related claims against Deputy Warden Carr were screened out under 28 U.S.C. § 1915A. SER-21-22. Under Section 1915A, the complaint need state only a plausible claim for relief. *Johnson v. Ryan*, 55 F.4th

[2] Though *Sabir* and *Hansen* postdate the conduct here, the precedent clearly establishing the rights violated in *Sabir* and *Hansen*, including *Salahuddin* and *Makin*, predates Defendants' conduct.

1167, 1179 (9th Cir. 2022); *Byrd v. Phoenix Police Dep't*, 885 F.3d 639, 642-43 (9th Cir. 2018) (reversing Section 1915A dismissal despite terse complaint in "colloquial[] shorthand"). Courts must read the complaints of pro se civil-rights plaintiffs like Nealy "liberally," giving them "the benefit of any doubt." *Ryan*, 55 F.4th at 1179. The district court fell short on this obligation.

Nealy alleged that Carr and others "continued their attack (burden) by suspending Juma'h prayer 10 week's straight in support of lie (Defendant's Milligan & Willis)" in violation of the First Amendment and RLUIPA. ER-148, 152. Yet, the district court concluded that "Plaintiff's allegations against … Karr are based on [his] position[] as supervisor[] of individuals who allegedly violated Plaintiff's constitutional rights." SER-22.[3] That holding misunderstands Nealy's allegation against Carr, which sets forth a plausible factual basis for Carr's *direct* liability for First Amendment and RLUIPA violations. *See supra* at 17-18; Opening Br. 33-39. Nealy alleged that Carr personally participated in suspending Nealy's sincere religious exercise without penological justification, adopting Willis's and Milligan's "falsified" assertions of worshipper misconduct. ER-148. As discussed above (at 17-18), Section 1983 liability extends to everyone personally involved in the suspension, including both Willis and Carr.

[3] Nealy's First Amended Complaint named Carr as "Mr. ? Karr—Deputy Warden." ER-141. This misspelling creates no confusion about the identity of the defendant. *See McGuckin v. Smith*, 974 F.2d 1050, 1057 (9th Cir. 1992), *overruled in part on other grounds by WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc).

We acknowledge that Carr's liability was not raised in Nealy's opening brief. But this Court has discretion to review an issue developed in a reply when it was raised in an appellee's brief or when doing so causes no unfair prejudice. *Koerner v. Grigas*, 328 F.3d 1039, 1048-49 (9th Cir. 2003). Both circumstances exist here.

Defendants raise Carr's participation in the suspension as a sword against Nealy. Resp. Br. 28. They argue that Willis cannot be liable because "a *deputy warden*—in consultation with a senior chaplain and a pastoral administrator—imposed the temporary suspension of Jumu'ah prayers." *Id.* (emphasis added). Their summary-judgment evidence indicates that Carr is the deputy warden referenced. Chaplain Henry declared that he suspended Jumu'ah "in consultation with the Deputy Warden" and submitted an email he sent to Carr confirming the suspension. ECF No. 249-1 at 4-6; ER-55. Yet Defendants never mention that Nealy's claim against Carr was screened out. Defendants should not have their cake and eat it too—pinning blame on Carr to try to protect Willis while escaping the implication of that argument because of an erroneous Section 1915A screening decision.

Moreover, Defendants will not suffer unfair prejudice. They have consistently affirmatively argued that Carr was responsible for the suspension—despite knowing he had been screened out—in an apparent effort to shift liability from Willis. In their motion for summary judgment, Defendants stated that "[t]he decision to temporarily suspend prayer

services was made by the Deputy Warden" who they claimed was a "non-part[y] to this action." ER-66. This Court should therefore exercise its discretion to reverse the district court's erroneous Section 1915A dismissal of Carr. At a minimum, this Court should remand to allow Nealy to amend his complaint against Carr to incorporate information from Henry's declaration. *See Lopez v. Smith*, 203 F.3d 1122, 1131 (9th Cir. 2000) (en banc) (indicating that courts should be particularly tolerant in allowing pro se litigants to amend pleadings).

IV. Nealy's claims for declaratory and injunctive relief are not moot.

A.1. Defendants argue the voluntary-cessation doctrine does not apply to Nealy's suit because the prison did not resume Jumu'ah prayer "in response to litigation." Resp. Br. 17. But the filing of a grievance within a prison's administrative remedy system—which the Prison Litigation Reform Act (PLRA) requires before an inmate can sue, 42 U.S.C. § 1997e(a)—is part of the litigation process. Nealy filed grievances complaining of the now-challenged actions prior to the termination of the suspension, ER-57-58, so a genuine issue of material fact exists as to whether the prison resumed Jumu'ah services in response to his grievances.

Even if filing a grievance is not part of the litigation process, doing so implicates the same gamesmanship concerns targeted by the voluntary-cessation doctrine, which prevents a defendant from ceasing unlawful conduct to moot litigation only to "return to his old ways" after the case

concludes. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). This potential for gamesmanship arises not just when litigation is initiated, but when it is *threatened*, as defendants may temporarily cease their conduct to forestall that threat. *See Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 833-34 (11th Cir. 1989).

Here, Nealy's filing of administrative grievances prior to the resumption of Jumu'ah prayer threatened litigation. *See* ER 57-58. The PLRA's exhaustion requirement is intended to "allow[] a prison to address complaints about the program it administers before being subjected to suit, reduc[e] litigation to the extent complaints are satisfactorily resolved, and improv[e] litigation that does occur by leading to the preparation of a useful record." *Jones v. Bock*, 549 U.S. 199, 219 (2007). Prison officials thus know that *unresolved* complaints are likely to lead to litigation. In this way, grievances place prisons on notice about "potential claims." *E.g.*, *Irvin v. Zamora*, 161 F. Supp. 2d 1125, 1134-35 (S.D. Cal. 2001). Here, Nealy's grievances alerted the prison to potential claims before the Jumu'ah suspension ceased. ER-57-58, 106. And Nealy's grievances alleged that prison officials had violated his free-exercise rights. *Id.* The severity of those potential claims placed prison officials on notice of the threat of litigation.

In any case, it is not settled that the voluntary-cessation doctrine even requires that litigation be the trigger for the cessation of the challenged conduct. The Supreme Court has applied the voluntary-cessation doctrine

without inquiring into whether the litigation caused the cessation. *See Laidlaw*, 528 U.S. at 193-94. And in this Circuit, the requirement has been applied inconsistently. *Compare Norman-Bloodsaw v. Lawrence Berkeley Lab'y*, 135 F.3d 1260, 1274 (9th Cir. 1998) (rejecting mootness where defendant ceased challenged activity in years before litigation was filed), *and TRW, Inc. v. FTC*, 647 F.2d 942, 953 (9th Cir. 1981) (same), *with Pub. Utils. Comm'n of Cal. v. FERC*, 100 F.3d 1451, 1460 (9th Cir. 1996) (suggesting voluntary-cessation doctrine applies only when conduct is ceased in response to litigation), *and Nome Eskimo Cmty. v. Babbitt*, 67 F.3d 813, 816 (9th Cir. 1995) (same). Even in the cases that have relied on this requirement, the Court has emphasized that the conduct was unlikely to reoccur. *See Pub. Utils.*, 100 F.3d at 1460; *Nickler v. Cnty. of Clark*, 2021 WL 3057063, at *1 (9th Cir. July 20, 2021). This reluctance to rest solely on an in-response-to-litigation requirement reveals the unsettled nature of that purported prerequisite in this Circuit. Other circuits have also declined to strictly apply this requirement. *See, e.g.*, *Aref v. Lynch*, 833 F.3d 242, 251 n.6 (D.C. Cir. 2016); *Thomas v. City of Memphis*, 996 F.3d 318, 328 (6th Cir. 2021).

2. Because Defendants believe that the voluntary-cessation doctrine does not apply here, they do not contest that Nealy's case meets its other requirements. First, they do not argue that "the challenged conduct cannot reasonably be expected to start up again." *McCormack v. Herzog*, 788 F.3d 1017, 1024 (9th Cir. 2015) (quoting *Laidlaw*, 528 U.S. at 189); *see* Resp. Br. 17-

18. Nor could they. Defendants admit that Jumu'ah prayer was suspended again on March 27 and April 3, 2020, well after the eight-week suspension. Resp. Br. 18; ER-47-48. And they make no mention of the March 20 incident—when Nealy's name was left off the turnout sheet for Jumu'ah prayer "for some mysterious reason"—and he was again unable to attend prayer. ER-50-51. These interferences with Nealy's ability to pray further suggest that Defendants will continue disrupting Nealy's prayers. *See L.A. Cnty. v. Davis*, 440 U.S. 625, 631 (1979).

Defendants do argue that the two cancellations were caused by a staffing shortage. Resp. Br. 18. But the cause of the cancellations is disputed. When Nealy asked a prison official for the cause of the cancellation on April 3, the official responded: "I don't know what the hold up is, we are not short of staff. The radio response was that the chaplain did not show up, so it was cancelled." ER-49 (cleaned up). And other religious services occurred without interruption. *See* ER-47. Because the moving party cannot rely at summary judgment on a factually disputed issue to establish mootness, Nealy's claims survive. *See, e.g.*, *Blaisdell v. Corr. Corp. of Am.*, 2009 WL 10679032, at *7 (D. Ariz. Sept. 23, 2009); *Kliegman v. Cnty. of Humboldt*, 2010 WL 2382445, at *4 (N.D. Cal. June 10, 2010).

Defendants also make no effort to show that "interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1179 (9th

Cir. 2010) (quoting *Davis*, 440 U.S. at 631). Defendants have made no changes to safeguard Nealy's rights or the rights of other religious adherents in the future. Why would they? Throughout litigation in the district court, Defendants insisted that their suspension of Jumu'ah prayer was lawful. *See* ER-38, 75-76; *cf. Fikre v. FBI*, 904 F.3d 1033, 1038 (9th Cir. 2018) (recognizing that a defendant's continued insistence that the challenged conduct was lawful militated against finding of mootness).

B. Nealy's injunctive claims also are not moot because the challenged conduct is "capable of repetition, yet evading review." *See, e.g.*, *Wiggins v. Rushen*, 760 F.2d 1009, 1011 (9th Cir. 1985); *see also* Opening Br. 46-47. To resist application of this doctrine, Defendants dispute only the significance of the Jumu'ah cancellations following the suspension.

First, Defendants highlight that the cancellations preceded this suit. Resp. Br. 18. But this exception asks whether it is reasonable to expect that the defendant will again engage in the challenged conduct, *Alaska Ctr. for Env't v. U.S. Forest Serv.*, 189 F.3d 851, 856 (9th Cir. 1999), and a plaintiff may satisfy the exception by showing that the challenged conduct has in fact reoccurred, *see id.* at 857; *Hubbart v. Knapp*, 379 F.3d 773, 777-78 (9th Cir. 2004). Here, it has. *See* ER-47-48; Opening Br. 45-46; *supra* at 26. And contrary to Defendants' assertion, this Court has not attached particular significance to whether the reoccurrence happened before or after the initiation of litigation. *See Alaska Ctr. for Env't*, 189 F.3d at 857; *Hubbart*, 379 F.3d at 777.

Second, Defendants fight the facts, arguing that the cancellations were caused by a staffing shortage. As already explained (at 26), this they cannot do at summary judgment.

Conclusion

This Court should reverse and remand for trial on each of Nealy's free-exercise and RLUIPA claims disposed of at summary judgment. It should also reverse the order dismissing Deputy Warden Carr or, alternatively, remand to the district court to allow Nealy to amend his complaint as to Carr.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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