No. 23-10332

United States Court of Appeals for the Eleventh Circuit

REV. STEPHEN JARRARD,

Plaintiff-Appellant

v.

SHERIFF OF POLK COUNTY, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia
No. 4:20-cv-00002-MLB

APPELLANT'S REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-2, the following persons and entities may have an interest in the outcome of this case:

1. Association of County Commissioners of Georgia ("ACCG") (insurer for Defendants and Appellees);

2. Barclay, Stephanie (counsel for Plaintiff-Appellant);

3. Claypool, MaKade (counsel for *Amici Curiae* Professors McConnell, Garnett, and Volokh);

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20. Moats, Johnny (Defendant-Appellee);

21. Morris, Ollie "Mitchell" (Plaintiff);

22. Moscon, Kevin (counsel for *Amici* RFI & JCRL);

23. Notre Dame Law School Religious Liberty Clinic (counsel for Plaintiff-Appellant);

24. Polk County, Georgia (potential indemnitor of Defendants and Appellees);

25. Polk County Sheriff's Office (employer and potential indemnitor of Defendants and Appellees);'

26. Religious Freedom Institute ("RFI") (*Amicus Curiae*);

27. Royer, Ismail (Director of Islam and Religious Freedom Action Team for *Amicus Curiae* RFI)

28. Sharp, Al (Defendant-Appellee);

29. Slugh, Howard (General Counsel, *Amicus Curiae* JCRL);

30. Snow, Corinne (counsel for *Amici* RFI & JCRL);

31. Stroup, Dustin (Defendant);

32. The Honorable Michael L. Brown (United States District Court Judge);

33. Volokh, Eugene (*Amicus Curiae*);

34. Vinson & Elkins LLP (law firm of counsel for *Amici Curiae* RFI & JCRL);

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37. Williams, Terry (counsel for Defendants and Appellees);

38. Williams, Morris & Waymire, LLC (law firm of counsel for Defendants and Appellees).

Undersigned counsel is aware of no publicly traded company or corporation with an interest in the outcome of this case.

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INTRODUCTION

A simple First Amendment principle resolves this case: Government officials may not retaliate against a person because he expresses religious views or engages in religious practices with which they disagree. Yet that is exactly what Polk County Sheriff Johnny Moats and former Chief Jailer Al Sharp did when they banned Stephen Jarrard from the volunteer ministry program because he expressed views about salvation that were "contrary to [their reading] of the Bible" and inconsistent with the Jail's "stance" on the meaning of baptism. Doc. 61-2 at 1–2. Their conduct cannot be justified under any reasonable framing of First Amendment law.

Moats and Sharp offer no meaningful response to the litany of cases that demonstrate the unconstitutionality of their actions. Indeed, they don't even bother to cite many of them. Instead, they offer what amounts to little more than a collection of conclusory assertions, red herrings, and distractions, all centered upon a misguided effort to recharacterize this case as a question of the government's ability to control its own speech. Their scattered efforts miss the mark and fail woefully to justify the district court's rejection of Jarrard's claims.

For the reasons expressed in Jarrard's Opening Brief, this court should reverse.

ARGUMENT

I. A jury could easily find that Moats and Sharp excluded Jarrard from the ministry program because they disfavor his religious expression.

A significant portion of the defendants' argument on appeal tries to convince this Court to adopt their view of the key fact being litigated: whether they excluded Jarrard from the ministry program for a permissible reason (such as jail security) or an unconstitutional one (disagreement with his religious expression). They argue at length that they had valid reason to ban Jarrard's ministry, and that disputed premise is central to their response on both the retaliation and policy claims. Resp. Br. 4–8, 10, 19–24, 30–34.

The problem for the defendants is that none of this is up for debate—or for this Court to resolve—at this stage. To prevail on this point at summary judgment, they would need to show that, reading the record in the light most favorable to Jarrard, *no reasonable jury* could infer that they banned him because they disagree with his religious teachings. *Smith v. Lockheed-Martin Corp.*, 644 F.3d 1321, 1328 (11th Cir. 2011). There is no serious argument that they can meet this high standard. Indeed, the district court already found that a jury could "easily" conclude that illegitimate theological disagreement—not legitimate government interests—motivated their actions. Doc. 75 at 12–13; Doc. 34 at 41–42. The defendants do not engage with that finding or with the ample evidence in support, including: undisputed evidence that they disagree with Jarrard's religious views, Doc. 61 at 29–

30; Doc. 62 at 12–13; Doc. 73-1 ¶ 25; Doc. 75 at 11; their own testimony that they worked to stop inmates from being influenced by Jarrard's views—including by inviting ministers to rebut them, Doc. 60 at 64–65; Doc. 61 at 35–36; and, most alarming, the letter in which Moats told Jarrard that his views would not be allowed because they are "contrary to the teaching of the Bible" and contradicted the Jail's official "stance [that] . . . baptism can wait until after release since it is not a requirement for salvation," Doc. 61-2 at 1–2. This is more than enough for a jury to find that the defendants' distaste for Jarrard's religious messages is the reason for his continued expulsion.

To be sure, Moats and Sharp now say that they excluded Jarrard because his views on salvation "upset inmates" and caused "distractions" and that he "lacked candor" about similar disruptions elsewhere. Resp. Br. 19–24. But the mere fact that they *assert* another rationale hardly suffices to prove that it was their true motivation. As the district court recognized, the defendants' account is largely unsupported. Rather, "the only contemporaneous evidence . . . focuses on theology, not safety or security," and "Defendants' after-the-fact testimony about safety and security is mostly vague or conclusory." Doc. 75 at 12. Their accusations of Jarrard's "disruptions" are particularly incredible given Moats's testimony that he would be "shock[ed]" if more than a few inmates had requested baptism, which "really wasn't causing a disruption." Doc. 61 at 32–33. Indeed, Moats outright

denied that Jarrard was "being hostile or aggressive," admitting that "he was just expressing his interpretation of the Bible." Doc. 61 at 40. And, as the district court observed, Doc. 34 at 42, these accusations of disruption are inextricably tied to the underlying theological disagreements, as they focus on the supposed harms caused when inmates hear or adopt views on salvation that differ from the defendants' preferred orthodoxy. *See* Doc. 60 at 36–37; Doc. 61 at 35–36; Opening Br. 6–7, 40–41.

Even if there is some evidence that might support Moats and Sharp's view of the facts, this Court may not adopt that view at summary judgment. Jarrard must only "create[] a triable issue concerning the [defendants'] discriminatory intent." *Smith*, 644 F.3d at 1328. He surely has done that.

II. County officials may not ban Jarrard because they disagree with his religious views.

With the record and procedural posture correctly understood, the question becomes: *assuming* that Moats and Sharp excluded Jarrard from the Jail because they disagree with his religious expression, can he prevail on his First Amendment retaliation claim? The answer is yes—and plainly so.

For his retaliation claim, Jarrard must show the defendants took adverse action against him because he engaged in constitutionally protected conduct. *Brannon v. Finkelstein*, 754 F.3d 1269, 1274 (11th Cir. 2014). The key issue on appeal is whether the First Amendment protects Jarrard's religious expression and exercise in

his ministry at the Jail. Settled law makes clear that it does. The remaining elements are for a jury to decide.

A. Officials may not suppress disfavored religious beliefs, even within a jail.

A "core postulate" of the First Amendment is that "[t]he government may not discriminate against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019). The government may not punish a person or deny him access to benefits, opportunities, or facilities for expressing disfavored views. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 144 (1983); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). This is true even where there is "no entitlement to that benefit," *Agency for Int'l Dev. v. All. for Open Soc'y Int'l*, 570 U.S. 205, 214 (2013) (quotation omitted), and "even in places or under circumstances where people do not have a constitutional right to speak in the first place," *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004). Excluding Jarrard from the ministry program because of his religious views blatantly violates this principle. The Jail may not invite community members to share "a diversity of [religious] views" and then "discriminate based on the [religious] viewpoint of private persons whose speech [that program] facilitates." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 834 (1995).

The defendants resist this conclusion by misconstruing basic First Amendment doctrine. They insist that the Jail is not any kind of "forum" for

expression and thus they are free to engage in viewpoint discrimination. Resp. Br. 26–28. That argument misses three key points. *First*, even if the Jail is not generally designated for expressive activities, the *ministry program* creates a "limited public forum" to which the County offers "selective access" for the purpose of religious expression. *See Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n*, 942 F.3d 1215, 1237 (11th Cir. 2019). *Second*, and more fundamentally, even if the Jail had not created a limited public forum, it still could not suppress the speech of visitors based on disagreement with their religious views. Even in a facility that has *not* been opened for expressive activity—a so-called "nonpublic forum"[1]—the government may not "den[y] access to a speaker solely to suppress the point of view he or she espouses." *Searcey v. Crim*, 815 F.2d 1389, 1391 (11th Cir. 1987). *Third*, and relatedly, the fact that the Jail might exercise some control over who may enter or what they may say does not mean that speech within the Jail is immune to nonpublic forum analysis. Facilities like jails, military bases, and airports are quintessential nonpublic fora where the government has wider latitude to regulate

[1] Admittedly, "nonpublic forum" seems an odd description of a facility where the government does not invite expression, but that is the term that has been adopted. *See, e.g.*, *Cambridge Christian Sch.*, 942 F.3d at 1237 ("nonpublic forum is a government space" not designated for public communication "where the state is acting only as a proprietor, managing its internal operations" (quotations omitted)); Randy J. Kozel, *Government Employee Speech and Forum Analysis*, 1 J. Free Speech Law 579, 581, 597–98 (2022) (nonpublic fora are facilities where "speech will occur incidentally within the structure [the government] has created").

speech and control visitors, but even there "any barrier to access or restriction on speech must be viewpoint neutral." *Cambridge Christian Sch.*, 942 F.3d at 1240; *accord Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992); *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 48–49 (1983). Indeed, elsewhere in their brief, the defendants *admit* that jails which have not been opened for expressive activity are still nonpublic fora, which may not discriminate by viewpoint. Resp. Br. 30.

Moats and Sharp also defend their suppression of Jarrard's views by attempting to redefine "viewpoint discrimination." They insist that they do not disfavor Jarrard's views on baptism but want to keep out messages that "create problems" and "significantly agitate inmates." Resp. Br. 32. The emptiness of that distinction is made clear when they explain what messages they think will do so: any religious message that might cause existential concern or that expresses the belief that some sins are punished in the afterlife. Resp. Br. 6, 21, 33. Thus, the Jail would allow—indeed, went out of its way to *invite*, Doc. 61 at 35–36—a minister to say that baptism is *not* required for salvation or perhaps that Hell does not exist. But Jarrard's messages to the contrary are forbidden. This is textbook viewpoint discrimination; ministers may discuss subjects like baptism, salvation, and the afterlife *but only if* they express the Jail's preferred views on the matter. *See Cambridge Christian Sch.*, 942 F.3d at 1240–41.

Finally, to the extent that Sharp and Moats suggest that their aversion to particular views is justified, that is the very argument that the First Amendment forbids. Whenever the government censors a viewpoint it presumably has some reason why. The First Amendment, however, prevents the government from enforcing such value judgments about contested ideas. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

B. *Pickering* does not apply to Jarrard's volunteer ministry.

Primarily, Moats and Sharp attempt to evade these basic restraints by recharacterizing Jarrard's ministry as speech by a "government employee" under *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563 (1968). According to them, if Jarrard were the Jail's employee, then they would have free rein to retaliate against his religious teachings. That assertion fails to engage with the nature of Jarrard's volunteer ministry or the point of *Pickering*'s doctrine.

Moats and Sharp lack any answer to the fundamental problem that *Pickering* and its progeny have nothing to do with the ministry program at issue. Opening Br. 20–26. Jarrard was not an employee of the Jail or anything close to one. He was merely a "participant in the volunteer programs and activities offered by the" Jail, which "encourage[d] Clergy from the community to minister to the inmates." Doc. 60-1 at 20; Doc. 53-5 at 3. Jarrard did not deliver messages on behalf of the Jail,

and the Jail's officials did not direct the content of his ministry. *See generally* Doc. 60-1; Doc. 60-7 at 3–4; Doc. 61 at 24–25. Nor is Jarrard's ministry anything like the kind of speech relating to internal workplace concerns which enjoys more limited protections under *Pickering*. *See infra* pp. 13–16; Opening Br. 30–38. In short, Jarrard's ministry bears none of the hallmarks of employment, and the unique government interests that animate *Pickering*—"promoting the efficiency of the public services [the government] performs through its employees," *Pickering*, 391 U.S. at 568—are absent.

The defendants do not engage with the core principles underlying *Pickering*. Instead, they summarily recite the same cases cited below, in which some courts have applied *Pickering* in limited circumstances that share certain resemblance to public employment. Opening Br. 13–14. As Jarrard previously detailed, those cases are inapposite and all involve quasi-employment relationships where individuals acted under the direction of government officials to perform governmental services that would otherwise be fulfilled by a traditional employee. Opening Br. 22–23. This hardly describes the ministry of a volunteer who participates in a community program to serve the religious needs of prisoners.

Ultimately, the defendants seem to suggest that *Pickering* must apply because this Court has not explicitly rejected it in this context. But with no real reason why *Pickering should* apply—and with the many reasons it should *not*—the fact that this

Court has not had occasion to say so should hardly surprise. The defendants' contrary suggestion ignores both the basic fact that *Pickering* is an *exception* to normal First Amendment analysis and the many warnings that *Pickering* should not be extended far outside its core context. *See Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 680 (1996); *CarePartners LLC v. Lashway*, 545 F.3d 867, 881–82 (9th Cir. 2008) (collecting cases). Indeed, the presumption should run in the opposite direction. *Cf. Matal v. Tam*, 582 U.S. 218, 235 (2017) (courts must exercise "great caution before extending . . . government-speech precedents"); Kozel, *supra* n.1, at 580 (extending *Pickering* "creates a risk that fundamental constitutional precepts . . . will lose their resonance").

C. Even if *Pickering* applies, Jarrard's religious ministry is constitutionally protected.

Further, Moats and Sharp fail to demonstrate how the First Amendment would allow them to discriminate against ministers with disfavored beliefs even if *Pickering* applied. Jarrard's ministry satisfies both the threshold inquiry and the balancing test that *Pickering* requires.

1. Jarrard's ministry satisfies *Pickering*'s "threshold inquiry" into constitutionally protected expression.

Jarrard's ministry satisfies *Pickering*'s threshold inquiry, which asks whether an employee's expression "implicate[s]" his First Amendment rights as a citizen.

Alves v. Bd. of Regents of the Univ. Sys. of Ga., 804 F.3d 1149, 1160 (11th Cir. 2015).

a. Jarrard's free-exercise claim is not subject to a threshold inquiry.

To start, the defendants do not dispute that *Pickering*'s threshold inquiry does not apply in cases involving the free exercise of religion—activity which necessarily retains constitutional protection, *see* Amicus Br. of McConnell, et al. 10–20. Indeed, this Court has declined to conduct any threshold inquiry when an employee was punished for his religious exercise. *See* Opening Br. 28–30; *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289 (11th Cir. 2007); *Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1286 (11th Cir. 2012), *abrogated on other grounds by EEOC v. Abercrombie & Fitch Stores, Inc.*, 575 U.S. 768 (2015). Other courts have, too. *See, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 504–17 (6th Cir. 2021); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2425 n.2 (2022) (questioning whether threshold inquiry applies to religious exercise).

Sharp and Moats challenge none of this. At most, they suggest that Jarrard's free exercise claim fails because he supposedly has no "right to religious exercise . . . inside a jail where he is not an inmate." Resp. Br. 25. That contention is beside the point. As discussed, the government may not deny a benefit or opportunity for an unconstitutional reason, even if the person has no entitlement to it. *See supra* p. 5; Opening Br. 16–17, 44 n.13 (citing cases). Even if ministers have

no freestanding right to counsel inmates, once officials invite volunteers to do so, they may not discriminate against disfavored religions when deciding who may participate. *See Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246, 2261 (2020) ("A State need not subsidize private education. But once [it does], it cannot disqualify some private schools solely because they are religious."); *Holloman*, 370 F.3d at 1280. The defendants' argument would also swallow *Pickering* whole: no one has the "right" to be hired by the government, yet the point of *Pickering* is that the government cannot condition employment on the surrender of constitutional freedoms. *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

The defendants ultimately urge this Court to ignore the issue, asserting that Jarrard abandoned his free exercise claim. Resp. Br. 24–25. He didn't. Jarrard pled a free exercise claim in his complaint, Doc. 53 ¶ 84, and defended it at both the motion-to-dismiss stage, Doc. 23 at 12, 16, and summary judgment, Doc. 70-2 at 24–25. Even if Jarrard *had* abandoned this claim, this Court may—and should—decide this important issue of law. *See infra* Part III.A.

b. Jarrard's religious expression clears *Pickering*'s threshold regardless.

Sharp and Moats would fare no better even if they were right that a threshold inquiry must be conducted.

i. Jarrard's messages about salvation were manifestly the views of a private citizen.

The first step of the inquiry—whether Jarrard's messages about salvation were the views of "a private citizen" or "amount[ed] to government speech attributable to the [Jail]," *Kennedy*, 142 S. Ct. at 2424—is not a close question.

In inviting religious leaders from any faith to facilitate the religious exercise of inmates, the Jail did not "create[]" a "message" of its own religious beliefs that ministers were to convey "on the [Jail's] behalf." *Id.* at 2423–24. No reasonable person would "closely identif[y]" Jarrard's religious messages with the Jail itself. *Cambridge Christian Sch.*, 942 F.3d at 1232 (quotation omitted); *see* Opening Br. 30–33. Nor is the "purpose" of the ministry program "to show who and what the [Jail] and its [officials] stand for." *Gundy v. City of Jacksonville*, 50 F.4th 60, 79 (11th Cir. 2022) (quotation omitted). As the district court observed, any argument that the Jail developed the program to express its own religious views would be "absurd." Doc. 75 at 12.

On appeal, Moats and Sharp effectively admit the point. They acknowledge that "jail ministry is a program *for inmates*." Resp. Br. 11 (emphasis added); *see* Doc. 53-5 at 3. They do not suggest that the program is for the County to disseminate a particular religious viewpoint, and they insist that they "do not care what [ministers] believe[] or teach[]." Resp. Br. 33. They do not dispute that the County *may not* constitutionally establish a program to give favor to its preferred religious

beliefs. *Larson v. Valente*, 456 U.S. 228, 244 (1982). They do not explain how a program which invites ministers from all faiths even *could* coherently express the government's singular interpretation of their varied and contradictory religions. *Cf. Matal*, 582 U.S. at 236. Nor do they grapple with the severe harms that would result if prison officials *were* invited to impose their own religious interpretations on people of all faiths. *See* Amicus Br. of RFI & JCRL 17–28.

In sum, Sharp and Moats have no response to the obvious point that no one—not the County, not Jarrard, not the inmates, not any reasonable observer—would have understood religious teaching by volunteer ministers to be "a government-created message" that the Jail "itself had commissioned" and which the minister "was expected to deliver." *Kennedy*, 142 S. Ct. at 2424 (quotation omitted). That answers the question: Jarrard expressed his beliefs as a private citizen. *See id.* at 2424–25; *Hubbard v. Clayton Cnty. Sch. Dist.*, 756 F.3d 1264, 1268 (11th Cir. 2014). Moats and Sharp resist this conclusion by reframing the issue as whether Jarrard spoke generally "as part of the work he signed up to perform at the Jail." Resp. Br. 16. It is difficult to imagine any expression by an employee that would escape that capacious rule—which certainly is not the law. *See Kennedy*, 142 S. Ct. at 2425 (rejecting view that *Pickering* governs "everything [employees] say in the workplace"); Opening Br. 30–33.

ii. Jarrard's religious teaching about salvation implicates matters of "public concern."

The second element of the threshold inquiry—whether the expression touches on a subject of "public concern"—is also easily satisfied. This asks whether the employee's expression relates only to workplace concerns or implicates matters of broader First Amendment significance. *See United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 465–66 (1995). Speech is protected if it relates to any "political, social, or other concern [of] the community," *Connick*, 461 U.S. at 146, *i.e.*, the type of expression "at the core of the First Amendment[,]" *Grigley v. City of Atlanta*, 136 F.3d 752, 755 (11th Cir. 1998). The distinction lies between discussion of "internal office affairs" and matters that sit higher in "the hierarchy of First Amendment values." *Connick*, 461 U.S. at 145 (quotation omitted).

The exercise of religion and the expression of beliefs about matters like the purpose of life and salvation undoubtedly fit this description. *See generally id.*; Opening Br. 33–38. Indeed, many courts have held that religious expression *necessarily* qualifies. Opening Br. 35–36 (citing cases); *see also* Amicus Br. of McConnell, et al. 20 ("[R]eligious expression is inherently a matter of public concern and thus always merits the fullest protection."). But even if some religious expression might not implicate subjects of public concern, Jarrard's ministry—in which he taught openly about matters like how people must live and prepare for death—certainly does. Opening Br. 36–38.

Sharp and Moats do not engage with these points. Resp. Br. 17–18. Instead, they briefly press two arguments that have been squarely rejected:

First, they suggest that Jarrard's ministry does not implicate a matter of public concern because the public may not care what Jarrard *personally* believes about questions of existence and salvation. Resp. Br. 18. That is not the standard. It does not matter whether the individual's personal *opinion* is of public concern; it is whether he addressed a *subject* of such concern. *See, e.g.*, *Rankin v. McPherson*, 483 U.S. 378, 386 (1987); Opening Br. 36–38.

Second, they assert that Jarrard's ministry cannot implicate a matter of "public concern" because he spoke "to inmates . . . in a highly restricted setting." Resp. Br. 17–18. This Court and the Supreme Court have squarely rejected that argument and protected employee speech in far more private settings. *See, e.g.*, *Rankin*, 483 U.S. at 386 n.11; *O'Laughlin v. Palm Beach Cnty.*, 30 F.4th 1045, 1052 (11th Cir. 2022); Opening Br. 36–37. Moats and Sharp are also simply wrong in their description of Jarrard's ministry, which he expressed openly to all interested inmates—an openness that the defendants have elsewhere lamented, *see* Doc. 61 at 40; Resp. Br. 5.

In sum, Moats and Sharp give no reason to reject the straightforward conclusion that Jarrard's ministry implicates a matter of public concern.

2. Defendants cannot show that they prevail on *Pickering*'s balancing test.

Because Jarrard's ministry clears the threshold inquiry, the government bears the burden "to prove that its interests as an employer outweigh" Jarrard's First Amendment rights and justifies the retaliation against him. *Kennedy*, 142 S. Ct. at 2425.

Moats and Sharp do not suggest that the government would have any valid interest in excluding Jarrard based on theological disagreement. Thus, in order to prevail on *Pickering* balancing, they must show that they stifled Jarrard's ministry because of some other valid interest. As detailed, that is a factual assertion that they cannot prove at this point. *Supra* Part I; Opening Br. 38–41. At this stage and on this record, that resolves the question.[2] *See Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1320 (11th Cir. 2005).

D. A jury could easily find in Jarrard's favor on the remaining elements of his claim.

Because it concluded that Jarrard's ministry enjoys no First Amendment protection, the district court did not evaluate the defendants' arguments against the

[2] Moats and Sharp fail to acknowledge that they bear the burden on this question, that the district court already found against them on it, or the difficult standard they must meet at summary judgment. Instead, they invite the court to simply defer to them on issues of "internal jail operations." Resp. Br. 20. Running a jail may be difficult, but a jury must decide whether Jarrard was actually excluded because of valid concerns of jailhouse administration.

two remaining elements of the retaliation claim. A jury could easily find in Jarrard's favor on both.

First, as detailed in Part I, a jury could reasonably find that the defendants' discrimination against Jarrard's religious views was "a substantial factor" in their decision to exclude his ministry. *Beckwith v. City of Daytona Beach Shores*, 58 F.3d 1554, 1564–65 (11th Cir. 1995).

Second, a jury could reasonably conclude that exclusion from the program is an adverse consequence "that would likely deter a person of ordinary firmness from engaging in [the protected] speech." *Brannon*, 754 F.3d at 1274 (quotation omitted). Moats and Sharp only summarily assert otherwise. Resp. Br. 22. As the district court recognized, "it is well-settled that the 'opportunity to serve as a volunteer constitutes the type of governmental benefit or privilege the deprivation of which can trigger First Amendment scrutiny.'" Doc. 34 at 39 (quoting *Hyland v. Wonder*, 972 F.2d 1129, 1135 (9th Cir. 1992)). Further, despite otherwise insisting that Jarrard should be treated like a government employee, Moats and Sharp ignore the long line of cases holding that the government may not retaliate against a job-seeker on a basis that infringes his First Amendment rights. *See Perry*, 408 U.S. at 597; *Rodriguez v. City of Doral*, 863 F.3d 1343, 1350 (11th Cir. 2017).

Moats and Sharp's argument also defies logic. Jarrard has been told that he cannot minister to prisoners because he failed to align his teachings with the Jail's

preferences. *Of course*, that would cause a person who wishes to participate to rethink what he says. *See Rosenberger*, 515 U.S. at 835 (viewpoint discrimination risks "chilling . . . individual thought and expression"). Indeed, that is the defendants' explicit goal: they told Jarrard that he could come back *if* he changed his messages about baptism. Doc. 60 at 37. Undoubtedly, censorship rules like this may affect what a person says in order to participate in a program he values.

At very least, this is an issue on which a jury could reasonably find in Jarrard's favor. *See, e.g.*, *Bennett v. Hendrix*, 423 F.3d 1247, 1255 (11th Cir. 2005) (whether conduct would chill First Amendment rights is a question for the jury); *Brannon*, 754 F.3d at 1275 (same).

III. Qualified immunity does not bar Jarrard's retaliation claim.

The defendants also fail to show how any reasonable officer could have believed he was entitled to exclude Jarrard because of his views on baptism. Qualified immunity would be entirely inappropriate for such blatantly unconstitutional discrimination.

A. Qualified immunity does not apply to Jarrard's request for injunctive relief.

Moats and Sharp do not dispute that qualified immunity applies only to claims for monetary damages. *See Pearson v. Callahan*, 555 U.S. 223, 242–43 (2009). Nor do they dispute that Jarrard sought—and never withdrew his request for—injunctive

relief on his retaliation claim. Instead, they attempt to defend the district court's error in ignoring that request; none of their defenses withstands closer consideration.

1. This Court can—and should—consider the issue.

The defendants assert—with no discussion or authority in support—that Jarrard abandoned his request for injunctive relief on the retaliation claim by failing to defend it at summary judgment. Resp. Br. 38. As detailed in his Opening Brief, Jarrard never dropped his request for injunctive relief on the retaliation claim. Opening Br. 41. Further, even if Jarrard failed to defend that request, this Court may consider it because it "raise[s] no new factual questions, . . . the record, viewed in the light appropriate on appeal from summary judgment, supports [Jarrard's] legal argument[,]" and "[a] refusal to consider [it] could result in a miscarriage of justice." *Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 990 (11th Cir. 1982); *accord Ramirez v. Sec'y, U.S. Dep't of Transp.*, 686 F.3d 1239, 1250 (11th Cir. 2012); *see also Blue Martini Kendall, LLC v. Miami Dade County*, 816 F.3d 1343, 1349 (11th Cir. 2016) (court more likely to consider issue in an appeal from summary judgment). The Court may thus consider this issue, and the interests of justice demand that it do so if the result would otherwise be to allow the continued enforcement of a blatantly unconstitutional policy against Jarrard. *Cf. Blue Martini Kendall*, 815 F.3d at 1349–50; *see also Roofing & Sheet Metal Servs.*,

689 F.2d at 990 (any "erroneous application of [law] is a miscarriage of justice in some degree").

2. There is no impediment to ordering injunctive relief.

Second, the defendants briefly offer three reasons why the court supposedly could not order injunctive relief in any event. Resp. Br. 39. Each is baseless.

Sharp's Retirement: They argue that the claim for injunctive relief against Sharp is moot because he has retired. On its own terms this does not support summary judgment because it still leaves the claim against Moats. Regardless, the claim against both officials stands. Jarrard's injunctive relief claims run against the defendants in their official capacities; when one retires, his successor is simply substituted in his place. *See* Fed. R. Civ. P. 25(d). Even if Sharp could no longer be ordered to take actions in his official capacity, his successor can. Sharp's argument relies on an inapposite case that concerns conduct personal to a former official, not his office. *See generally Spomer v. Littleton*, 414 U.S. 514 (1974).

Adequacy of Damages: Next, they argue that equitable relief is unavailable because damages are an "adequate remedy at law." Resp. Br. 38. This argument is squarely foreclosed. "The basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (quotation omitted). An injury is irreparable where "it cannot be undone

through monetary remedies." *Id.*; *see also* Wright & Miller, Fed. Prac. & Proc. Civ. § 2944 (3d ed.). Ongoing First Amendment violations are quintessentially irreparable because the "intangible nature" of "chilled free speech" cannot "be compensated for by monetary damages." *Ne. Fla. Chapter*, 896 F.2d at 1285. Injunctive relief is available to end the ongoing denial of Jarrard's First Amendment rights.

Discretionary Actions: Finally, they assert that they cannot be ordered to make a discretionary, "employment-type decision" by allowing Jarrard to return to the program. Resp. Br. 39. This objection requires the Court to accept the dubious premise that volunteer ministry is like employment—and is flawed in any event. Courts routinely order officials to perform discretionary actions—including reinstating employees—to remedy First Amendment violations. *See, e.g.*, *Rankin*, 483 U.S. at 383–84; *Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014); *Beckwith*, 58 F.3d at 1562.[3] Courts may likewise order injunctive relief to prohibit the government from denying a discretionary benefit for an unconstitutional reason. *See Perry*, 408 U.S. at 597 (even if "government may deny [a] benefit for

[3] Defendants' own authority confirms the same. *See* Resp. Br. 39 (citing *Montgomery v. Hugine*, 2019 WL 2601545, at *6 (N.D. Ala. June 25, 2019) ("equitable relief in the form of reinstatement of employment" is permissible)).

any number of reasons" it may not "on a basis that infringes . . . constitutionally protected interests").

Neither qualified immunity nor anything else bars Jarrard's request for injunctive relief on his retaliation claim.

B. Moats and Sharp are not entitled to qualified immunity on Jarrard's claim for damages.

Nor does qualified immunity shield the officers from Jarrard's claims for monetary relief. The key question is "whether the state of the law at the time of the incident gave [defendants] 'fair warning' that [their] conduct was unlawful." *Perez v. Suszczynski*, 809 F.3d 1213, 1222 (11th Cir. 2016) (quotation omitted). The answer here is plainly yes. Decades of precedent confirm that the First Amendment prohibits officials from retaliating against a person simply because they disagree with his religious expression. Opening Br. 43–46; *see also Holloman*, 370 F.3d at 1280.

Moats and Sharp do not contest that straightforward rule. Instead, they repeat generic observations that retaliation claims or qualified immunity involve fact-specific questions. Resp. Br. 36. But they do not dispute that Jarrard need not find a prior decision "with fundamentally similar or materially similar facts" where (as here) the unconstitutionality of an officer's action is a matter of "obvious clarity." *Coffin v. Brandau*, 642 F.3d 999, 1015 (11th Cir. 2011) (quotation omitted); *D.H.*

ex rel. Dawson v. Clayton Cnty. Sch. Dist., 830 F.3d 1306, 1318 (11th Cir. 2016); *see* Opening Br. 42–43.

Rather than engage with the obvious unconstitutionality of retaliating against a volunteer because of his religious beliefs, Moats and Sharp fight those facts. They argue that the law might allow officials to exclude a volunteer for disrupting a government program or being dishonest. Resp. Br. 37. But, as detailed, that question is beside the point because this Court cannot adopt the defendants' preferred view of the facts at summary judgment. Rather, the question is whether the evidence *when viewed in Jarrard's favor* could reasonably show a violation of clearly established law. *Morton v. Kirkwood*, 707 F.3d 1276, 1280 (11th Cir. 2013). That answer is plainly yes. *See supra* Part I; Opening Br. 42–46.

Finally, as detailed previously, the defendants' attempt to recharacterize volunteer ministry as government employment does not change this result—both because *Pickering* does not apply to the volunteer ministry program and because, even if *Pickering* applied, the government may not dictate how ministers interpret the Bible. *See supra* Parts II.B–C; Opening Br. 43–46. Indeed, even "the law of employee speech reflects a powerful commitment to viewpoint neutrality." Kozel, *supra* n.1, at 602. And any claimed ambiguity about *Pickering*'s contours does not affect the clarity of the end result: the government may not punish speakers based on theological differences. *Cf. Al-Amin v. Smith*, 511 F.3d 1317, 1335 (11th Cir.

2008) ("defendants have 'fair warning' when reasonable officials know that their precise conduct . . . is unlawful," even if they cannot "cite by chapter and verse all of the constitutional bases that make [it so]").

Under any reasonable framing of Jarrard's claim, the Constitution plainly prohibits the Jail from excluding him for being the "wrong" kind of Christian.

IV. The Jail's policies unconstitutionally give officials unbridled discretion to admit or deny ministers.

The First Amendment requires basic procedures and standards to guide an official's decision over whether to allow expressive activity. *Sentinel Commc'ns Co. v. Watts*, 936 F.2d 1189, 1199–1200 (11th Cir. 1991). This mandate ensures that the decision cannot be "based on the content or viewpoint of the speech being considered." *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 760 (1988). The County's policies governing access to the volunteer ministry program fall short of these demands.

A. The unbridled discretion standards apply to the ministry policies.

The Jail's ministry program is exactly the kind of expressive opportunity that cannot be left to unbridled government control. The County encourages members of the public to minister to inmates, but they must seek the Jail's permission first. This prior restraint on expression must be constrained. *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1223 (11th Cir. 2017).

Sharp and Moats respond by repeatedly asserting that this program is actually a "hiring procedure" that is not subject to the rules governing discretion in regulating a forum or similar permitting regime. Resp. Br. 26–31. As discussed above, this argument fails. *Supra* Part II; *see also* Opening Br. Parts I.B, III.A. Even the district court did not question whether the relevant policies "regulate[d] admission into" a "forum." Doc. 75 at 40.[4] Further, conceivably *any* government-controlled expressive opportunity could be described as a "hiring procedure" in this way, nullifying the rule altogether. This Court has cautioned that the category of prior restraints on speech "is not rigid," and applies broadly where a policy "prevents members of the public from speaking . . . unless they comply with the [p]olicy's requirements." *Barrett*, 872 F.3d at 1223 (emphasis omitted). That applies here.

B. The policies lack requisite guiding standards.

The Jail's policies fail to impose even the barest procedures to avoid the "particular evil" of viewpoint discrimination. *Barrett*, 872 F.3d at 1226. As Jarrard has explained, the Second and Third Policies utterly fail to constrain Jail officials' discretion over who may participate in the ministry program. Opening Br. 49–50; *see also City of Lakewood*, 486 U.S. at 769; *Barrett*, 872 F.3d at 1221–22. And

[4] The district court awarded qualified immunity because it mistakenly read *Barrett* to apply only to limited public fora. But *Barrett* did not disrupt the rule applying the unbridled-discretion doctrine to speech in nonpublic fora, too. Opening Br. 50–51.

neither prescribes a requisite timeline within which the official must make his decision. *See Barrett*, 872 F.3d at 1222.

Moats and Sharp's few responses are beside the point. First, they cite rules broadly governing volunteer ministers once admitted to the program—none of which constrain the official's discretion in approving or denying an application in the first place. Resp. Br. 31. Otherwise, they argue that standards do not matter because their denial of Jarrard's application was justified. Resp. Br. 31–32. Aside from being wrong on the facts, that assertion is irrelevant. The unbridled-discretion doctrine addresses the need for standards and policies themselves, not the validity of any particular decision. *See Barrett*, 872 F.3d at 1221–22.

C. Qualified immunity does not bar Jarrard's claim.

The clarity of these principles precludes any application of qualified immunity on Jarrard's policy claim. Opening Br. 50–52.

Moats and Sharp barely argue otherwise, once again erroneously resisting the application of any forum analysis. Resp. Br. 38. Yet again, that effort fails. *Supra* Parts II, III.A. No reasonable official could have believed that the Jail's policies could be free of the well-established constraints necessary to administer the ministry program.

CONCLUSION

The order granting summary judgment should be reversed.

Dated: September 1, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Fed. R. App. P. 32(a)(7)(B)(ii) because it contains 6,481 words, excluding the items exempted by Fed. R. App. P. 32(f). 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 it was prepared used Microsoft Office Word in 14-point Times New Roman.

Dated: September 1, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on September 1, 2023, I electronically filed the foregoing with the Clerk of Court of the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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