

No. 22-1876

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In the United States Court of Appeals  
for the Seventh Circuit

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MOHAMED SOLAH MOHAMED A EMAD,  
Plaintiff-Appellant,

*v.*

DODGE COUNTY, ET AL.,  
Defendants-Appellees.

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Appeal from the United States District Court for  
the Eastern District of Wisconsin  
Honorable Lynn Adelman  
(19-cv-0598)

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**BRIEF *AMICUS CURIAE* OF  
THE BECKET FUND FOR RELIGIOUS LIBERTY**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, the Becket Fund for Religious Liberty has no parent corporation and no stock. Counsel for *amicus* are Francesca Matozzo and John Meiser of the Notre Dame Law School Religious Liberty Clinic, and Francesca Matozzo is the attorney appearing for *amicus* in this Court. *Amicus* did not participate in the district court.

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## INTEREST OF THE *AMICUS CURIAE*<sup>1</sup>

The Becket Fund for Religious Liberty is a nonprofit, nonpartisan law firm dedicated to protecting the free expression of all religious traditions. It has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the country and around the world.

Becket has long defended prisoners' exercise of religion, both as counsel and amicus. *See, e.g., Holt v. Hobbs*, 574 U.S. 352 (2015) (beard for Muslim prisoner; counsel for prisoner); *Rich v. Secretary*, 716 F.3d 525, 534 (11th Cir. 2013) (kosher diet for Jewish prisoner; counsel for prisoner); *Moussazadeh v. TDCJ*, 703 F.3d 781, 784 (5th Cir. 2012) (same; counsel for prisoner); *Benning v. Georgia*, 391 F.3d 1299, 1302 (11th Cir. 2004) (same; counsel for prisoner); *Holt v. Payne*, No. 22-1809 (8th Cir., amicus brief filed July 19, 2022) (congregate worship for Muslim prisoners). Specifically, Becket has filed briefs supporting prisoner access to clergy in the execution chamber. *See, e.g., Ramirez v. Collier*, 142 S. Ct. 1264, 1277, 1278–79 (2022); *Dunn v. Smith*, 141 S. Ct. 725 (2021); *Murphy v. Collier*, 139 S. Ct. 1475 (2019).

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<sup>1</sup> No counsel for a party authored any portion of this brief or made any monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief.

Becket submits this brief to bring to the Court's attention the longstanding history and tradition of congregate religious exercise in American prisons, which our Constitution protects from arbitrary government interference.

### SUMMARY OF ARGUMENT

Cases concerning the expression of constitutional rights in prison settings often pose difficult questions regarding the appropriate balance between the government's penological interests and the prisoner's fundamental freedoms. This case does not. Mohamed Salah Ahmed Emad did not ask the Dodge County Detention Facility (nor does he ask this Court) to locate the appropriate degree to which a prison must accommodate a novel or historically unusual religious exercise. Just the opposite, Emad asked for the simple freedom to engage in practices—including congregate religious worship and prayer outside of his cell—that have been recognized and allowed in prisons throughout our Nation's history. That the Constitution demands protection for those historically rooted practices has been clear since the adoption of the First Amendment itself.

The Supreme Court has recently emphasized that interpretation of the First Amendment's Religion Clauses—like other parts of the Bill of Rights—must be interpreted “by reference to historical practices and understandings” at the time of the Founding and throughout our nation's history. *Kennedy v.*

*Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022) (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)) (cleaned up); see also *N.Y. State Rifle & Pistol Ass’n v. Bruen*, 142 S. Ct. 2111, 2130 (2022); *Ramirez v. Collier*, 142 S. Ct. 1264, 1278–89 (2022). As demonstrated below, the historical evidence shows that religious exercise in American prisons was not merely confined to solitary, isolated prayer inside of one’s own cell. Rather, congregate worship (including worship outside of a prisoner’s cell) has been allowed, accommodated, and even promoted in prisons for centuries in the United States. And prisoners themselves have long taken an active role in defining and leading these religious exercises, even at times when they were otherwise subjected to solitary confinement.

This rich history and tradition of congregate religious exercise in American prisons show that practices like those which Emad sought to undertake lie at the heart of the Free Exercise Clause’s protections. Constitutional analysis must be guided by this tradition, and the County’s policies which contravene this longstanding practice must be subject to the most exacting scrutiny. This Court should therefore reverse the district court’s flawed decision below and recognize that, even in prison, Mr. Emad has a historically rooted and long-respected right to exercise his religious beliefs in the ways in which he sought to do in the Dodge County Detention Facility.

## ARGUMENT

### **I. There is a rich history and tradition of communal religious exercise—including prisoner-led worship—in American prisons.**

Since the earliest days of the Republic, religious exercise, including communal worship, has been a mainstay of life in American prisons. Indeed, this tradition began well before the Founding of the United States. By the 1740s, the “policy of religious toleration” in English prison was “referred to as a custom of long standing.” Andrea McKenzie, *Tyburn’s Martyrs* 179 (2007). That same tradition endured in the United States, even as the design and operations of prisons otherwise transformed over the years. From early American prisons, which centered largely on solitary confinement,<sup>2</sup> to today’s communal prison designs, prisons in the United States have regularly allowed and accommodated prisoners’ group religious exercise.

#### **A. For centuries, inmates in American prisons have joined together in communal religious exercise.**

Throughout our Nation’s history, prisoners have routinely been permitted—and even encouraged—to gather together for religious worship. For example, Thomas Eddy, inspector of New York’s official state prison and

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<sup>2</sup> During the Founding Era, solitary confinement was generally considered the best way to reform prisoners morally. Patrice Taddonio, *How the U.S. Became the World Leader in Solitary Confinement*, PBS (Apr. 17, 2017), <https://to.pbs.org/3WFWmgb>.

friend of Thomas Jefferson,<sup>3</sup> remarked in 1801 that prisoners there assembled every Sunday for divine worship in a room that could hold up to 600. Thomas Eddy, *An Account of the State Prison or Penitentiary House, in the City of New-York* 54–55 (1801). Even Auburn Prison, a model for early American prisons that relied heavily on solitary confinement, held “[p]ublic instruction” on the Sabbath and provided religious education classes. Gershom Powers, *A Brief Account of the Construction, Management, and Discipline of the New-York State Prison at Auburn* 18, 20–21 (1826); see also Jennifer Graber, *The Furnace of Affliction: Prisons and Religion in Antebellum America* 75, 93, 104 (2011).

Regular congregational religious services were held throughout the nineteenth century. During this time, the Massachusetts state prison conducted services “every day in the chapel, in the presence of all the prisoners.” N.Y. Prison Ass’n, *Ninth Report of the Prison Association of New-York* 53 (Apr. 1854), <http://bit.ly/3DRVsom>. At Sing Sing, prisoners regularly gathered for Sunday services in a chapel that could hold more than 900. *A Visit to Sing Sing*, 22 *New-York Evangelist* 122 (July 31, 1851); see also A.S.F., *A Sabbath in Prison!*, 26 *New-York Evangelist* 192 (Nov. 29, 1855) (account from a visiting chaplain in Sing Sing on preaching before 850 men with a twenty-person choir and robust congregational singing). In New York’s Clinton Prison,

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<sup>3</sup> See Letter to Thomas Jefferson from Thomas Eddy (Feb. 9, 1802), <https://bit.ly/3E6tzKs>.

congregate services took place on Sundays even as the prisoners were confined to their cells for individual religious instruction the rest of the day. Nathan F. Bruce, *Chaplain's Report* (Dec. 1, 1851), in *Fourth Annual Report of the Inspectors of State Prisons of the State of New-York* 295, 295 (Jan. 1, 1852). These same practices continued through the turn of the twentieth century. See, e.g., *Sunday in the Prison*, Trenton Times, June 7, 1883, at 5 (in Trenton, New Jersey, 350 prisoners gathered together for Sunday services); *Talked to Prisoners: Rev. Thomas Elgar Conducted Services at Workhouse*, Washington Post, Oct. 8, 1906, at 16 (in New York, 200 prisoners joined in a Sunday service); *Made 7200 Flowers for Prison Easter: Inmate at Charlestown Shows Artistic Skill, Catholic and Protestant Services Held in Prison Chapel*, Boston Daily Globe, Apr. 24, 1916, at 18 (recounting religious services for hundreds of Catholic and Protestant prisoners).

Communal religious exercise was not limited to weekly services. Indeed, there is a robust history of inmates gathering together to celebrate religious holidays as well. In Auburn Prison in 1879, prisoners gathered in the chapel for a Fourth of July celebration that included “selections from Scripture” and “fervent prayer.” *Fourth of July at Auburn Prison: Proceedings and Address of Horatio Seymour* 3–4 (1879). As told by a South Carolina newspaper, on “Christmas day all the prisoners [in the South Carolina State penitentiary] are free . . . [and] permitted the range of the wards . . . [Religious services] are

conducted by one of their number and the convicts join the hymns with great fervor.” Leon Green, *Christmas Behind Prison Walls*, *The State* (Columbia, S.C.), Dec. 13, 1908, at 7. Into the twentieth century, religious holidays found inmates “mingl[ing]” together in this way, “a motley crowd of vagabonds, petty thieves, and those held for more serious offenses.” *Making Merry in County Prison*, *Anaconda Standard* (Anaconda, Mont.), Dec. 25, 1922, at 2; *see also* Damon McCool, *Christmas in Prison*, *Eastern State Penitentiary*, <https://bit.ly/3DFhlHc> (the chaplain of Eastern State Penitentiary in Pennsylvania wrote in 1934 that 400 men were released for Christmas morning Mass, and “[n]o guards [were] present or . . . needed”); *Easter Services Light Lives of Dallas County Jail Inmates*, *Dallas Morning News*, Mar. 25, 1940 (§ 2), at 1 (“Murderers and rapists, safe crackers and thieves, some old and some young, stood in front of their cells with songbooks and Bibles in their hands” at Easter services in Dallas County Jail).

Although many of these services reflected the early Nation’s prevailing Protestant tradition, they were not limited only to that one faith tradition. *See, e.g.,* McKenzie, *supra*, at 179 (recounting accommodation of Catholic and Jewish religious practices in eighteenth century English prison). Well before Roman Catholics received full toleration in the United States, the New York Superintendent of Prisons saw providing Catholic Mass as a key component of his goal to “establish[] freedom of worship” in the state prisons. *Freedom of*

*Worship: Governor Cleveland Approves the Establishment of Catholic Services in the State Prisons*, Boston Daily Globe, Aug. 8, 1884, at 5. So too in the New Jersey State Prison in Trenton, where “[w]hen the Catholics [were] ready for mass the pulpit and altar [were] brought out from a cell,” while other inmates attended a Methodist service. Col. E. S. Jackson, *Prison Methods Contrasted*, Trenton Sunday Advertiser, Sept. 29, 1895, at 6. Jewish prisoners were likewise permitted to join together in religious celebration, even during periods of widespread antisemitism. In 1880, for example, Jewish prisoners at Sing Sing were given unleavened bread in celebration of Passover,<sup>4</sup> and in 1891, an early Jewish-American newspaper reported on the celebration of Passover by forty-five prisoners at a penitentiary in New York—including with wine, which was normally strictly prohibited. A. Benjamin, *Freedom in a Prison*, 47 American Hebrew (N.Y.C.) 13 (May 8, 1891).

This diversity of religious services continued as the United States’ growing Jewish population also saw a growth in Jewish religious exercise in prison. See, e.g., *Passover Celebration in Penal Institutions*, Jewish Advocate (Boston, Mass.), Mar. 29, 1912, at 2. Indeed, one early twentieth century account tells of the first Passover celebration in the prison at Leavenworth, Kansas, at which “[t]here was not a guard in sight” for the length of the

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<sup>4</sup> *Passover*, 6 American Hebrew (N.Y.C.) 117 (Apr. 13, 1881).

celebration, and the Jewish prisoners “kept one another in better order than a dozen guns could have done.” *Passover in Prison*, American Israelite (Cincinnati, Ohio), Apr. 15, 1915, at 4.

**B. Inmates historically have taken active roles in leading religious exercise in prison.**

There is also a rich history of prisoners themselves leading group religious activities. At the New York state prison’s Sunday services, a prisoner would “read[] a sermon and prayers, and the rest [would] join in singing psalms.” Eddy, *supra*, at 55. Likewise, in Massachusetts’ state prison, inmates served as teachers for the weekly Sunday school and formed a choir, which “officiate[d] at the Sunday service.” *Massachusetts, State Prison*, Washington Sentinel (Wash., D.C.), Nov. 23, 1854, at 3. And the *Boston Recorder* told of a prisoner in Georgia who held nightly worship services with nearly sixty other prisoners, where he would “read in the Bible, exhort, and sing, before prayer,” and was often “occupied for hours in answering questions on religious subjects” from his companions. *From the Georgia Penitentiary*, 16 Boston Recorder 178 (Nov. 9, 1831).

Prisoners regularly led spontaneous or less formal religious exercise as well. For example, a news account from the turn of the nineteenth century tells of inmates in a New York county prison who had recently joined together to honor the memory of a deceased prisoner by organizing a prayer service at

which “a sermon suitable to the occasion was delivered by one of the prisoners.” *The Spectator* (N.Y.C.), Mar. 12, 1800, at 3. Elsewhere, in Vermont, a prisoner related his happiness at joining with other prisoners in “prayer and praise” to God during his time in prison. John Reynolds, *Recollections of Windsor Prison* 112–13 (A. Wright 3d ed., 1839). And in Connecticut, a prisoner recounted that after a fellow inmate professed his newfound Christian faith one evening, his cellmates joined him in prayer, and soon this practice of group worship quickly spread to other rooms in the prison. *Revival in Newgate Prison*, 6 *New-Hampshire Repository* 38 (Mar. 8, 1824).

Even those prisoners convicted of the most serious crimes—including inmates on death row—were regularly permitted to lead religious exercise with other prisoners. As the Supreme Court recently observed, there is a “rich history” of religious exercise at the time of a prisoner’s execution. *Ramirez*, 142 S. Ct. at 1278; *see also* Brief *Amicus Curiae* of the Becket Fund for Religious Liberty in Support of Petitioner at 3–19, *Ramirez*, 142 S. Ct. 1264 (No. 21-5592) (recounting history of religious exercise at the time of execution). This tradition regularly included communal religious exercise by the prisoners themselves. In Richmond, Virginia, for example, a death row inmate was permitted to hold prayer meetings with his fellow inmates—and on the morning of his execution, twenty-five people gathered with him in prayer. *A Religious Hanging: With Preaching, Prayer-Meetings, and Even Passing*

*Around the Hat*, Daily Arkansas Gazette, Aug. 4, 1883, at 1. At the scaffold, the condemned man “made an address, advising all not to be led off into wickedness as he had been” and “thanked God that he had time to prepare himself [to die].” *Id.* Likewise, in Georgia, cellmates of a death row inmate remarked that their friend was “one of the most religious men they [had] ever seen,” and “almost every day” delivered a sermon to them. T.K. Jones, *Prisoners in Fulton Tower Conduct Prayer Services*, Atlanta Constitution, Dec. 20, 1928, at 19. Two cellmates would “join in the nightly prayer” with him and listen to his “preaching.” *Id.* And another death row inmate in Georgia was reported to have led a congregation in prayer and “made a short talk to his fellow prisoners” before his execution. *His Last Sunday: Peter Daniels Spent Yesterday in Singing and Prayer*, Atlanta Constitution, July 11, 1892, at 5.

**C. Prisons today regularly accommodate group prayer, including Jumu’ah.**

Today, accommodations for group religious practices like these are routine in American prisons. “By the mid-20th century, religion was recognized as an accepted program in virtually all U.S. prisons.” Nicole B. Godfrey, *Holding Federal Prison Officials Accountable: The Case for Recognizing a Damages Remedy for Federal Prisoners’ Free Exercise Claims*, 96 Neb. L. Rev. 924, 970 (2018) (internal quotation marks and citation omitted). And, as the

United States has become more diverse, prisons have correspondingly accommodated a great diversity of religious practices, including Jumu'ah.<sup>5</sup>

In the 1970s, an advisory commission of the Department of Justice published a report recommending that correctional facilities adopt policies that “make the maximum possible accommodation to religious beliefs and practices.” Nat'l Advisory Comm'n on Crim. Just. Standards & Goals, U.S. Dep't of Just., Corrections 64 (1973).<sup>6</sup> The report instructed that correctional “procedures should include religious history and practices of the individual, to maximize his opportunities to pursue the religious faith of his choice while confined.” *Id.* at 381. It also noted that religious practice aided prisoners' rehabilitation, acknowledging that “[c]orrections has a long history of gauging religious beliefs to determine whether an offender is ready to return to society.” *Id.* at 64. In the years shortly after, “[i]mprisoned practitioners of most religious groups [were] routinely allowed to hold group worship ceremonies.”

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<sup>5</sup> Jumu'ah is a congregational prayer that takes place midday Friday and is required for Muslim men. *See Jum'ah*, Encyclopedia Britannica (2020), <http://bit.ly/3tkRTCc>.

<sup>6</sup> This was published after a Supreme Court decision recognized the constitutional right of a Buddhist prisoner to have “a reasonable opportunity [to] purs[ue] his faith comparable to the other opportunity afforded fellow prisoners” of other religious. *Cruz v. Beto*, 405 U.S. 319, 322 (1972) (per curiam); *see also Cooper v. Pate*, 378 U.S. 546 (1964) (per curiam) (recognizing right of Muslim prisoner to have access to a Qur'an).

*The Religious Rights of the Incarcerated*, 125 U. Pa. L. Rev. 812, 829–30 (1977).

Several states adopted the Commission’s policy of “facilitat[ing] the practice of [religious] beliefs to the maximum extent possible.”<sup>7</sup> *Id.* at 63.

Prisons today implement policies to allow inmates of all faiths to take part in an array of religious services. Harry R. Dammer, *Religion in Prison*, in 3 Encyclopedia of Crime and Punishment 1377–78 (David Levinson ed., 2002); see also Brenda S. Riley, *Religious Accommodations in Prison: The States’ Policies v. the Circuit Courts* 179 app.A, 207–39 (Aug. 2019) (Ph.D. dissertation, Sam Houston State University). Prison chaplains regularly

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<sup>7</sup> See, e.g., Ala. L. Enft Plan. Agency, A Workbook on Standards and Goals: Corrections 30 (1976); Ariz. State Just. Plan. Agency, Standards and Goals for Arizona Corrections 13–14 (1977); Del. Agency to Reduce Crime, Criminal Justice Standards and Goals for the State of Delaware 180–81 (1976); Iowa Crime Comm’n, Iowa Criminal Justice Standards and Goals: Corrections 8–9 (1977); Governor’s Comm. on Crim. Admin. & Midwest Rsch. Inst., Standards and Goals for the Kansas Criminal Justice System Implementation Handbook: Corrections 82–83 (1976); Cmty. All., Standards and Goals for Maine’s Criminal Justice System 316–17 (1978) (promising inmate freedom of religion “to the same extent and subject to the same limitations as the public at large”); Governor’s L. & Ord. Comm’n, Goals and Standards for the Criminal Justice System in North Carolina 128 (1976); S.D. Crim. Just. Standards & Goals Project, Criminal Justice Standards & Goals for South Dakota 157–58 (1976); Va. Council on Crim. Just. & Va. State Crime Comm’n, Goals for Virginia’s Criminal Justice System 433–36 (1977); Wis. Council on Crim. Just., Final Report 195–96 (1977). Other states that did not adopt the “maximum extent” language also incorporated many of the Commission’s recommendations. See, e.g., N.Y. State Div. of Crim. Just. Servs., Draft Standards and Goals for the Criminal Justice System in New York State, at COR 32–33 (1977).

instruct prison officials about tenets and rituals of minority faiths and are aware of prisoners' religious requests. Dammer, *supra*. In a 2012 survey of prison chaplains, large majorities reported that a variety of prisoners' religious requests are regularly approved. See Pew Rsch. Ctr, *Religion in Prisons: A 50-State Survey of Prison Chaplains* 24 (2012).

Many state prison policies specifically provide accommodations for congregate worship.<sup>8</sup> These policies recognize a multitude of religions, and some even require space be made available for congregate worship.<sup>9</sup>

Many of these group prayer policies accommodate the same Muslim group worship that Dodge County denied Mr. Emad. Muslim Advoc., *Fulfilling the Promise of Free Exercise for All: Muslim Prisoner Accommodation in State Prisons* 19 (2019). The Federal Bureau of Prisons' guidelines since 2019 have recommended accommodating daily group prayer for Muslim

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<sup>8</sup> See, e.g., Haw. Dep't of Pub. Safety COR.12.05 (2017); Ky. Dep't of Corr. Pol'y 23.1.II(A)(1) (2018); Me. Dep't of Corr. Pol'y 24.3.III (2009); Mo. Dep't of Corr., Religious and Spiritual Support, <http://bit.ly/3NXRcYU> (last visited Nov. 4, 2022); N.M. Dep't of Corr. Pol'y CD-101300 (2022) ("Policy B"); Pa. Dep't of Corr. Pol'y DC-ADM 819 (2013); Utah Dep't of Corr. Pol'y AG50.1.01(B) (2022).

<sup>9</sup> See, e.g., Haw. Dep't of Pub. Safety COR.12.05.5.1(e)(2); Ky. Dep't of Corr. Pol'y 23.1.II(G)(2); N.M. Dep't of Corr. Pol'y CD-101300 ("Policy J").

inmates,<sup>10</sup> and several state handbooks recognize the significant communal aspect of the Muslim faith and accordingly instruct that daily group prayer is allowed where possible. Muslim Advoc., *supra*, at 20. For example, in Indiana state prisons, prisoners are permitted to “gather for religious discussion and/or prayer.” Ind. Dep’t Corr. Policy 01-03-101.XIII (2020). And in South Carolina prisons, “[i]nmates may be allowed to meet as a group for some of the daily prayers,” under the recognition that that “Jumu’ah[] requires a congregational meeting for all Muslims.” S.C. Dep’t Corr. PS-10.05, Handbook of Inmate Religious Practice 7.3, 7.7 (2015). South Carolina’s policy also specifies that “[a] reasonably quiet clean location is needed for a Muslim to pray” and that “[e]mployees will avoid walking in front of Muslims while prayer is being made.” S.C. Dep’t Corr. PS-10.05, Handbook of Inmate Religious Practice 7.6 (2015).

What is more, these policies of accommodation are not only common, they are also well known to *help*—not hinder—safety and security in prisons. See Byron R. Johnson, *How Religion Contributes to the Common Good, Positive Criminology, and Justice Reform*, 12 Religions 402, at 5–6 (2021). Studies have shown that the rehabilitative effect of religion in prisons contributes to

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<sup>10</sup> See Religious Beliefs and Practices Manual (Islam), Fed. Bureau of Prisons, available at *Doyle v. United States*, No. 18-6324, ECF 30-4, at 3 (6th Cir. filed July 30, 2019).

prisoner wellbeing and prison security. See Caterina Roman & John K. Roman, *Rehabilitation Through Spirituality and Faith*, Geo. Univ. Berkeley Ctr. for Religion, Peace, & World Affs. (Jan. 16, 2019), <https://bit.ly/3sCgiTr> (finding greater religiosity corresponded with “lower levels of criminal activity, reduced substance use/abuse, and improved well-being and mental health”); Sung Joon Jang et al., *Religion and Misconduct in “Angola” Prison: Conversion, Congregational Participation, Religiosity, and Self-Identities*, 35 *Just. Q.* 412, 418 (2018) (“Quantitative studies tend to show that an inmate’s religion is inversely related to misconduct in prison . . . .”); Grant Duwe et al., *Bible College Participation and Prison Misconduct: A Preliminary Analysis*, 54 *J. Offender Rehab.* 371, 386 (2015) (same); Brief of Professor Byron Johnson as *Amicus Curiae* in Support of Appellant at 10–13, *Walker v. Baldwin*, No. 22-2342 (7th Cir. Oct. 26, 2022) (discussing how religious practice improves behavior within prisons).

Unsurprisingly, prisons themselves have seen these benefits of embracing prisoners’ religious exercise. The Federal Bureau of Prisons has emphasized that “the provision of religious services in its institutions is important to the maintenance of security in the facility,” and that “in New Jersey, which has the largest inmate population of any BOP facility, the religious services department ‘absolutely plays an important role in maintaining security.’” Off. of the Inspector Gen., *A Review of the Federal*

*Bureau of Prisons' Selection of Muslim Religious Services Providers* (Apr. 2004), at 11; *see also* Michael B. Mushlin, *Rights of Prisoners* § 7:24 (5th ed. 2022) (citations omitted) (“[O]fficials have long acknowledged that regular religious services can actually enhance the security of an institution . . .”).

In short, prison systems today continue to recognize what has been known for centuries: that religious exercise produces “salutary effects on the minds and conduct of the prisoners” and promotes their “reformation.” Eddy, *supra*, at 55; *see* Powers, *supra*, at 19, 20, 21 (similar).

**II. Dodge County’s suppression of these historically and traditionally protected religious practices must be subject to the most exacting constitutional scrutiny.**

Dodge County’s severe restrictions on inmates’ communal religious exercise effectively prohibit long-accepted and long-protected historical religious practices for many religious believers like Emad. Those prohibitions must therefore be subjected to strict scrutiny under the Free Exercise Clause.

The Supreme Court has long recognized “the utility of historical practice in interpreting constitutional provisions.” *Financial Oversight & Mgmt. Bd. v. Aurelius Inv., LLC*, 140 S. Ct. 1649, 1659 (2020) (citing *M’Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 401 (1819)).<sup>11</sup> And in the last few decades, the Supreme

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<sup>11</sup> *See generally* Marc O. DeGirolami, *The Traditions of American Constitutional Law*, 95 Notre Dame L. Rev. 1123 (2020) (cataloguing the Supreme Court’s history and tradition approach to interpreting the Bill of

Court has repeatedly invoked historical practices as guideposts for deciding what modern-day practices are protected by the Constitution. History and tradition have informed the Court's interpretations of individual rights throughout the Constitution, including those protected under the Second, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments.<sup>12</sup>

The Supreme Court has particularly embraced a historical approach to interpreting the Religion Clauses of the First Amendment. Indeed, the Supreme Court has declared that the Establishment Clause “*must* be

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Rights); *see also* Marc O. DeGirolami, *Traditionalism Rising*, J. Contemp. Legal Issues (forthcoming 2022) (noting rise in this trend in most recent Supreme Court Term).

<sup>12</sup> *See, e.g., Bruen*, 142 S. Ct. at 2128 (interpreting the scope of the Second Amendment with reference to “history and tradition”); *Kahler v. Kansas*, 140 S. Ct. 1021, 1027 (2020) (“Our primary guide in applying [the Due Process Clause of the Fourteenth Amendment] standard is ‘historical practice.’”); *Bucklew v. Precythe*, 139 S. Ct. 1112, 1122 (2019) (examining “the original and historical understanding of the Eighth Amendment”); *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (Fourth Amendment “analysis is informed by historical understandings”); *Betterman v. Montana*, 136 S. Ct. 1609, 1614 (2016) (“Our reading [of the Sixth Amendment speedy trial right] comports with the historical understanding.”); *Kerry v. Din*, 576 U.S. 86, 92 (2015) (Due Process Clause of the Fifth Amendment analyzed in accordance with “historical understanding”); *Alleyne v. United States*, 570 U.S. 99, 112 (2013) (using “historical practice” to determine scope of Sixth Amendment’s Confrontation Clause); *Oregon v. Ice*, 555 U.S. 160, 164 (2009) (interpreting Sixth Amendment jury-trial right in light of “historical practice”); *Harmelin v. Michigan*, 501 U.S. 957, 985 (1991) (considering “historical guidelines and accepted practices . . . to determine which *modes* of punishment are ‘cruel and unusual’”); *Washington v. Glucksberg*, 521 U.S. 702, 725 (1997) (interpreting the Fourteenth Amendment Due Process Clause through “this Nation’s history and constitutional traditions”).

interpreted ‘by reference to historical practices and understandings.’” *Kennedy*, 142 S. Ct. at 2428 (quoting *Town of Greece*, 572 U.S. at 576 (emphasis added)). The same is true of the Free Exercise Clause, which likewise “cannot be understood or appreciated without knowing what happened before.” Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1421 (1990).

The Supreme Court has frequently looked to historical practices to determine the scope of the Free Exercise Clause’s protections. In recent cases involving church autonomy for example, the Court has interpreted the scope of both the Free Exercise Clause and the Establishment Clause by looking to the historical background against which “the First Amendment was adopted.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 182–84 (2012). Likewise, the Supreme Court examined the historical practices surrounding religious education when holding that the Religion Clauses prevent state interference with a religious school’s employment decisions regarding who teaches religion. *See Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049, 2061–62 (2020). Nor are these cases anomalous. The Court has consulted historical practices to interpret the Free Exercise Clause in other contexts as well. *See, e.g., Torcaso v. Watkins*, 367 U.S. 488, 489–96 (1961) (examining “the history behind the First Amendment” to determine that

a “historically . . . discredited policy” of imposing religious tests for public office unconstitutionally “invades the . . . freedom of belief and religion”).

Here, Dodge County banned Emad from engaging in religious practices that fit comfortably within our Nation’s history and tradition. Just as restrictions on the ability to engage in religious rituals or to gather for communal worship *outside* of prison must undergo strict scrutiny, so too must a restriction on these same freedoms that have been known and honored in prisons since the time of the Founding. *See Tandon v. Newsom*, 141 S. Ct. 1294 (2021); *Agudath Israel of Am. v. Cuomo*, 141 S. Ct. 889 (2020); *Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63 (2020).

This analysis does not disturb cases like *Turner v. Safley*, 482 U.S. 78 (1987), or *O’Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), neither of which reflects the Court’s consideration of a prison’s restriction of a free-exercise right grounded in centuries of American history and tradition. The Supreme Court’s recent emphasis on the importance of historical inquiry in constitutional interpretation, *cf. Bruen*, 142 S. Ct. at 2128, simply helps clarify these cases’ application. As the Court has since cautioned, “[a]ny test the Court adopts must acknowledge a practice that was accepted by the Framers and has withstood the critical scrutiny of time and political change.” *Town of Greece*, 572 U.S. at 577. Thus, *Turner* and *O’Lone* must not be understood or applied

in a way that would grant governments license to destroy practices that have, throughout our Nation's history, been respected and protected.

Indeed, nothing in those cases stands for the proposition that the Constitution affords governments special leeway to destroy deeply rooted and long-protected religious freedoms simply because they happen to take place in prison. In prison, just as outside of it, “[h]istory plays an especially important role in constitutional interpretation.” Michael W. McConnell, *Reflections on Hosanna-Tabor*, 35 Harv. J.L. & Pub. Pol’y 821, 827–28 (2012). Earlier this year, the Supreme Court recounted and relied on “the rich history of clerical prayer . . . dating back well before the founding of our Nation” and which “continued throughout our Nation’s history” in holding that a death row inmate must be permitted to hear clerical prayer at the time of his execution. *Ramirez*, 142 S. Ct. at 1278–89.<sup>13</sup> So, too, must Emad be permitted to engage in congregate religious exercise that enjoys a similarly deep and rich lineage. And to the extent that this Court has embraced an interpretation of *Turner* and *O’Lone* that would undermine that result, “it is time to look back and seek

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<sup>13</sup> To be sure, *Ramirez* was decided under the Religious Land Use and Institutionalized Persons Act, while Mr. Emad’s claim sounds in the First Amendment. However, the Court’s historical approach to evaluating restrictions on religious exercise in prison in *Ramirez* makes the constitutional analysis here an *a fortiori* conclusion. As described, historical religious practices inform the meaning and application of First Amendment itself and not simply statutes like RLUIPA which enforce these constitutional freedoms.

guidance from history” to bring the doctrine back into alignment. McConnell, *Reflections on Hosanna-Tabor*, *supra*, at 827–28.

Simply put: Dodge County prevented Emad from exercising his sincerely held religious beliefs and effectively banned practices that are deeply rooted in our Nation’s history and which have been allowed since the earliest days of American prisons. The First Amendment demands that such an infringement be subject to the most exacting scrutiny.

### CONCLUSION

This Court should reverse the decision below and grant Emad relief in accordance with the longstanding history and tradition of accommodating religious practices like his in prison.<sup>14</sup>

Dated: November 14, 2022

Respectfully submitted,

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<sup>14</sup> The Religious Liberty Clinic thanks students Katie Alexander, Nate Reyes, Olivia Rogers, and Sarah Stagg for their contributions to this brief.

**CERTIFICATE OF COMPLIANCE**

I hereby certify that this amicus brief complies with Federal Rule of Appellate Procedure 29(a)(5) and Seventh Circuit Rule 29 as it contains 5,176 words, excluding the portions exempted by Federal Rule of Appellate Procedure 32(f). The brief's typesize and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in 13-point Century Schoolbook, a proportionally spaced font.

Dated: November 14, 2022

/s/ Francesca Matozzo

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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing brief with the Clerk of Court for the United States Court of Appeals for the Seventh Circuit by using the Court's CM/ECF system. I further certify that service was accomplished on all parties via the Court's CM/ECF system.

Dated: November 14, 2022

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