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Appendix A

In the [PUBLISH]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-10332

REVEREND STEPHEN JARRARD,

Plaintiff-Appellant,

OLLIE MORRIS,

Plaintiff.

versus

SHERIFF OF POLK COUNTY,

CHIEF DEPUTY AL SHARP,

Defendants-Appellees,

DEPUTY DUSTIN STROP,

Individually and in their official capacities,

Filed: September 16, 2024

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

OPINION OF THE COURT

Before ROSENBAUM, NEWSOM, and TJOFLAT, Circuit Judges. NEWSOM, Circuit Judge:

Stephen Jarrard is a member of the Church of Christ who successfully applied to participate in a county jail's volunteer ministry program, was later dismissed from that program, and still later unsuccessfully sought to be readmitted. He sued, claiming that his dismissal and exclusion violated his free-speech rights. The district court rejected Jarrard's First Amendment claims on summary judgment. We must decide (1) whether Jarrard's participation in the ministry program involved constitutionally protected speech, (2) whether two of the jail's policies for evaluating volunteer applications impermissibly vested decisionmakers with unbridled discretion, and (3) whether qualified immunity protects two jail officials from damages liability.

Because we hold that the two jail officials violated Jarrard's clearly established First Amendment rights, we reverse the district court's

decision granting summary judgment and remand the case to that court for further proceedings on Jarrard's claims.

I

A

This case's factual and procedural history is long and winding but, as it turns out, important. Lots of policies and amended policies, complaints and amended complaints. Bear with us.

For nearly two decades, Stephen Jarrard served as a volunteer minister at various jails and prisons around Georgia.[1] In that role, Jarrard has explained, he could "shar[e] . . . God's word and the Gospel" with inmates. In general, he would teach a three-month survey about an assortment of biblical topics, such as faith, repentance, and baptism. Typically, during the first few minutes of each meeting, Jarrard would field questions from inmates about the previous week's lesson or issues they had been exploring. Afterwards, Jarrard would lead discussions of pertinent Bible verses, answering inmates' questions along the way. Importantly here, Jarrard thought that he needed to "get as many folks baptized into Christ . . . before Jesus returns" as he could. He believes that baptism by immersion is necessary to salvation and that, without it, a person will be condemned to Hell.

Jarrard began volunteering at the Polk County Jail in 2012. At that time, all an interested

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1 Because the district court granted summary judgment against Jarrard, we recount the facts and all inferences in the light most favorable to him. *Sutton v. Wal-Mart Stores East, LP*, 64 F.4th 1166, 1168 (11th Cir. 2023).

person had to do to join the volunteer ministry program was to go to the Jail and "ask and put [his] name on [a] list." Although the list had as many as 140 people on it at one point, far fewer actually participated; the record indicates, in fact, that only about 10 volunteers ever showed up. To the best of Jarrard's recollection, the Jail approved his initial application in a matter of minutes.

Jarrard encountered difficulties pretty much from the get-go. One day several months into his tenure, he was paired with a Baptist minister who objected to his teachings about baptism. That minister asked if Jarrard was suggesting that one couldn't be saved without baptism, gave the inmates his own views on the subject, and then went to the cell door and asked the guards to let him out. The following week, the leader of the volunteer ministry team confronted Jarrard about the incident and told him that he could continue in the program only if he stopped teaching about baptism. When Jarrard refused, he was kicked out.

A few months later, Jarrard sought a meeting with Johnny Moats, who had recently been elected Polk County Sheriff. Jarrard and Moats discussed the incident involving the Baptist minister as well as their own respective religious beliefs. Moats disagreed with Jarrard's views on baptism, and the meeting concluded with Moats denying Jarrard's request to re-enter the volunteer ministry program, though Jarrard couldn't recall Moats giving a reason.

About two years later, Moats allowed Jarrard to return to the program, and Jarrard participated

for about a year with no issues. During that time, Jarrard performed two baptisms, seemingly without incident.

B

At the end of 2015, the Sheriff's Office temporarily suspended the ministry program. Then, in February 2016, Moats and Al Sharp, the facility's Chief Jailer, implemented a formal policy to govern the program and religious services at the Jail. The policy was codified in Jail Order Number 7.07, but for simplicity's sake— and because, as will become clear, the Jail promulgated so many such orders— we'll just call it "the First Policy." As relevant here, the First Policy stated that "[r]eligious rituals such as baptism and wedding ceremonies will not be conducted for inmates." First Policy 7.07.17. According to Jarrard, Sharp told inmates that the Jail wouldn't permit baptisms because (1) baptism wasn't "necessary" (presumably, to their salvation), and (2) they could therefore wait to get baptized after their release.[2] In conjunction with the First Policy's issuance, Sharp also told Jarrard that he had to stop teaching about baptism if he wanted to remain in the program.

Jarrard attended a training about the First Policy and, in January 2017, he applied to resume his ministry. The Jail denied the application without explanation, although Moats later asserted

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2 Moats confirmed this rationale in a letter to Jarrard's counsel at the start of this litigation: "Our stance is since the Polk County Jail is a short term detention center, baptism can wait until after release since it is not a requirement for salvation."

that Jarrard was barred "not because of his insistence on baptizing inmates, but because of his disruptive behavior toward other members of the jail ministry program [who] did not share his radical religious views" and because Moats and his staff believed that Jarrard had "some mental health issues."

After his application was denied, Jarrard began a regular one-man vigil outside the Jail to protest his exclusion. On a few occasions, Moats and Sharp stopped to talk with Jarrard. Jarrard said that the conversations were cordial but always revolved around baptism and the officials' theological disagreement with Jarrard's views on the subject.

C

Jarrard sued Moats and Sharp in federal court, seeking declaratory, injunctive, and monetary relief.[3] As relevant here, he alleged (1) that the Jail officials had retaliated against him for exercising his First Amendment rights by excluding him from the volunteer ministry program and (2) that the

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3 Deputy Dustin Strop was also a named defendant in the original complaint. As noted by the district court, defendant Strop's last name may actually be "Stroup." We'll follow the district court's lead and use the spelling in the case caption. The district court granted summary judgment to Strop on all counts against him, and Jarrard hasn't appealed that holding. Ollie Morris, a former inmate whose request to be baptized was denied, was originally a plaintiff alongside Jarrard, but he settled his claims against Moats and Sharp and is no longer in the case. Accordingly, we won't include any discussion of those two parties in the remainder of the opinion.

Jail's baptism ban itself violated the First Amendment.

Not long after Jarrard filed his complaint, Moats and Sharp implemented Jail Policy 5.23—the "Second Policy." The Second Policy provided that "[c]lergymen and religious advisors wishing to hold services or conduct programs in the jail" had to (1) "make written application to the Polk County Sheriff's Office with supporting documentation," (2) "attend a training session," and (3) "be approved by the Jail Administrator." Second Policy 5.23.II.F. The Second Policy didn't explain what an "application" should say or what "documentation" should accompany it, nor did it identify what criteria would inform the administrator's "approv[al]" determination or a timeline for that decision. Jarrard submitted an application under the Second Policy, but it was denied on the ground that he had "a history of being involved in contentious behavior and conflict" at other jails that he "did not fully disclose . . . in his application." [4]

Jarrard amended his complaint to address the denial of his application and, shortly thereafter, Moats and Sharp promulgated yet another policy—in particular, a revised Order Number 7.07. This "Third Policy" reiterated the ban on baptism and other religious rituals and amended the clergy-application requirements to include a "volunteer application" and a "background check[]." Third

4 Jarrard had noted in his application that he had been terminated or resigned from previous positions for "teaching inmates the purpose of baptism" and for "friction over an inmate baptism."

Policy 7.07.16, 7.07.18. But like its predecessor, the Third Policy didn't specify any criteria by which administrators would evaluate applications. Jarrard applied to be a volunteer under the Third Policy, but the Jail denied him again—this time on the grounds that he was "not compliant with 501(c)3 standards"[5] and had been "dismissed from Floyd County Sheriff's Office and Cobb County Sheriff's Office Jail Ministry Programs."

Jarrard amended his complaint yet again—in relevant part, to address the Third Policy and the Jail's denial of his most recent application. In this second amended complaint—which serves as the operative complaint on appeal—Jarrard (1) reiterated his retaliation claim and separately (2) alleged that the Second and Third Policies impermissibly gave Jail officials unbridled discretion in evaluating applications. Jarrard sought minimal and/or nominal damages and an injunction on both claims.

Following discovery, the parties filed cross-motions for summary judgment. For his part, Jarrard sought partial summary judgment and a permanent injunction on his claim that the Second and Third Policies vested Moats and Sharp with too much discretion. Moats and Sharp sought summary judgment on all claims.

Not long after the summary-judgment motions were filed, Moats and Sharp revised Jail Order 7.07 *again*—the "Fourth Policy." For the first

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5 Because 26 U.S.C. § 501(c)(3) applies to "organizations," not individuals, we'll assume that the Jail meant that *Jarrard's church* wasn't compliant.

time, the Fourth Policy specified reasons that an applicant's request to join the volunteer ministry program could be denied. They "includ[ed] but [were] not limited to" the following—"[f]ailure to completely fill out the application, falsifying the application, failure to attend training, background concerns, failure to supply appropriate credentials . . . or any other characteristic that raises a reasonable probability that the applicant will be unsuitable for the volunteer ministry program." Fourth Policy 7.07.17. The Fourth Policy further indicated that applications would be reviewed on a first-come, first-served basis and that an applicant would receive a response within 30 days. *Id.* 7.07.18.

Given the revision, Jarrard amended his complaint to withdraw his request for injunctive relief pertaining to the Second and Third Policies. He didn't withdraw or otherwise modify either (1) his retaliation claim or (2) his damages claims pertaining to the Second and Third Policies.[6]

D

The district court granted summary judgment to Moats and Sharp across the board.

The court rejected Jarrard's First Amendment retaliation claim on the ground that he couldn't show that he had engaged in "constitutionally protected" speech. In so holding, the court first held

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6 Although none of Jarrard's successive complaints expressly invoked 42 U.S.C. § 1983, the district court seems to have treated his claims for monetary damages as grounded in that statute, and Moats and Sharp haven't challenged that premise on appeal.

that in his role as a volunteer minister, Jarrard was effectively a "government employee" — and, accordingly, that his retaliation claim was subject to the balancing test articulated in *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), and its progeny.[7]

Applying that test, the court concluded (1) that Jarrard's ministry comprised "employee speech . . . not protected by the First Amendment," and (2) that even if his speech were that of a private citizen and not a government employee, it didn't address a "matter of public concern." For both reasons, the court held, Jarrard's claim failed the *Pickering* test, meaning that his speech was not "constitutionally protected." The court further concluded that even if the First Amendment protected Jarrard's speech, the law was insufficiently "clearly established" to override Moats and Sharp's assertion of qualified immunity.

With respect to Jarrard's challenges to the Second and Third Policies, the court acknowledged that they "arguably violated" Jarrard's First Amendment rights by giving "unbridled discretion" to those authorized to consider volunteer ministers' applications. Even so, the district court granted Moats and Sharp summary judgment on the ground that the law applicable to those challenges wasn't "clearly established," and that Moats and Sharp

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7 *Pickering*'s primary progeny includes *Connick v. Myers*, 461 U.S. 138 (1983), and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). For ease of reference, we will refer to the analytical framework that these cases created and applied as the "*Pickering*" test, analysis, etc.

were thus entitled to qualified immunity.[8]

This is Jarrard's appeal.[9]

II

On appeal, Jarrard contends that the district court erred in granting summary judgment against him on both (1) his claim that Moats and Sharp retaliated against him for his constitutionally protected speech and (2) his claim that the Second and Third Policies impermissibly granted Jail administrators too much discretion in evaluating applicants' requests to participate in the volunteer

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8 The district court opined in a footnote that Jarrard had abandoned his request for equitable relief against Moats and Sharp in their official capacities, either by withdrawing them or by not adequately reiterating them in the summary-judgment briefing. *Jarrard v. Moats*, No. 4:20-CV-2-MLB, 2022 WL 18586257, at *1 n.2 (N.D. Ga. Sept. 27, 2022). We disagree. As already explained, Jarrard withdrew his request for injunctive relief *with respect to his unbridled-discretion claim* after Moats and Sharp instituted the Fourth Policy. *See supra* at 9. But he never withdrew or otherwise modified *his retaliation claim*, with respect to which he has sought equitable relief from the start, and he vigorously litigated that claim at summary judgment. He didn't need to repeat expressly in his briefing that he wanted injunctive relief to keep that request alive.

9 We review a district court's summary-judgment decision de novo, "drawing all inferences in the light most favorable to the non-moving party." *Sutton*, 64 F.4th at 1168 (quotation marks and citation omitted). Summary judgment is appropriate only "where there are no genuine issues of material fact," *id.*, and where "the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

ministry program. We will address Jarrard's arguments in turn and will then separately evaluate the district court's determination that Moats and Sharp enjoy qualified immunity from suit.[10]

A

To make out a First Amendment retaliation claim, Jarrard has to show that "(1) [his] speech was constitutionally protected; (2) [he] suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) there was a causal relationship between the adverse

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10 At the outset, we reject Moats and Sharp's contention that the Eleventh Amendment bars even injunctive relief against them in their official capacities. The nub of their argument seems to be that although *Ex parte Young*, 209 U.S. 123 (1908), generally permits a federal court to order state-government officials to comply with federal law, it doesn't authorize the court to compel a state official to exercise his "discretion" in a particular manner—here, they say, by having to "deal with a given volunteer on a recurrent basis." Br. for Appellees at 39. But *Ex parte Young* itself clarified that "[a]n injunction to prevent [a state officer] from doing that which he has no legal right to do is not an interference with [his] discretion." 209 U.S. at 159. Indeed, in the employment context —which, while not precisely applicable here for reasons we'll explain in text, is analogous—we have held that reinstatement is a permissible remedy against which the Eleventh Amendment poses no obstacle. *See Lane v. Cent. Ala. Cmty. Coll.*, 772 F.3d 1349, 1351 (11th Cir. 2014). That is so because even an employee who "could have been discharged for any reason or for no reason at all, . . . may nonetheless be entitled to reinstatement if [he] was discharged for exercising [his] constitutional right to freedom of expression." *Rankin v. McPherson*, 483 U.S. 378, 383–84 (1987).

conduct and the protected speech." *Brannon v. Finkelstein*, 754 F.3d 1269, 1274 (11th Cir. 2014) (quotation marks and citation omitted). The district court here granted summary judgment to Moats and Sharp because it held that Jarrard's claim failed the first, "constitutionally protected" requirement. Importantly for our purposes, in holding that Jarrard's speech wasn't constitutionally protected, the court applied the *Pickering* test and concluded that Jarrard's claim failed it.[11]

We conclude, to the contrary, that on the particular facts of this case, *Pickering* doesn't provide the proper framework for determining whether Jarrard's speech was "constitutionally protected" and that, instead, Jarrard's claim should be evaluated under the "forum analysis" that traditionally governs speech-related claims. We further conclude that there is a genuine dispute of material fact about whether Moats and Sharp unconstitutionally barred Jarrard from the volunteer ministry program because they disagreed with his viewpoint concerning baptism. Accordingly, we will reverse the district court's determination that Jarrard's retaliation claim failed the threshold "constitutionally protected" prong and remand for that court to evaluate the adverse-conduct and causal-relationship prongs in the first instance.

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11 Under *Pickering*, "for a government employee's speech to have First Amendment protection, the employee must have (1) spoken as a citizen and (2) addressed matters of public concern." *Boyce v. Andrew*, 510 F.3d 1333, 1341 (11th Cir. 2007).

In general, speech restrictions in government-owned spaces are subject to what courts have come to call a "forum analysis." In *Perry Education Ass'n v. Perry Local Educators' Ass'n*, the Supreme Court specified three types of fora—in particular, what we've come to call "traditional public," "designated public," and "non-public"— and supplied standards governing what sorts of restrictions the government may constitutionally impose in each. *See* 460 U.S. 37, 45–49 (1983). A little more than a decade later, the Court added a fourth category: the "limited public forum." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). We needn't get into the details just yet; it's enough for now to say that forum analysis is the default means of evaluating speech restrictions.

Pickering and its progeny operate as an exception of sorts to the usual forum analysis in cases involving government employees. These employee-speech cases are subject to a different analysis because, as the *Pickering* Court explained, "the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general." 391 U.S. at 568. In particular, the Court said, when the state is acting as an employer—as opposed to a regulator more generally—it has a special interest in "promoting the efficiency of the public services it performs through its employees." *Id.*

Jarrard, of course, wasn't technically a Polk County employee—he wasn't, that is, on the payroll.

Even so, he doesn't deny, as a general matter, that *Pickering* may be validly applied even to some individuals who aren't traditional government employees. Accordingly, it's not enough to say, as the district court did, that "courts have extended the application of the *Pickering* analysis to cover more than just traditional public employees." The real and more granular question is whether, given the particulars of Polk County's volunteer ministry program and Jarrard's participation in it, he was a de facto employee for *Pickering* purposes. For the following reasons, we conclude that he was not.

First, and most importantly, *Pickering*'s logic doesn't comfortably apply to volunteer ministers like Jarrard. As just explained, the rationale that underlies *Pickering*'s rule giving the government a freer hand in regulating the speech of its employees than that of ordinary citizens is that it has an important interest in ensuring the "efficien[t]" delivery of "public services." *Pickering*, 391 U.S. at 568; *see also, e.g.*, *Connick v. Myers*, 461 U.S. 138, 150 (1983) ("The *Pickering* balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public."); *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006) ("Government employers, like private employers, need a significant degree of control over their employees' words and actions; without it, there would be little chance for the efficient provision of public services."). That rationale explains the circumstances in which the Supreme Court and this Court have extended *Pickering* beyond traditional employment

relationships. In applying the *Pickering* analysis to government contractors, for instance, the Supreme Court observed that "[t]he government needs to be free to terminate both employees and contractors for poor performance, to improve the efficiency, efficacy, and responsiveness of service to the public." *Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996). So too, in extending *Pickering* to an unpaid political appointee to a public advisory board, we emphasized the government's interest "in promoting the efficiency of the public services it performs." *McKinley v. Kaplan*, 262 F.3d 1146, 1149 & n.5 (11th Cir. 2001).[12]

12 In support of its decision to apply *Pickering* here, the district court pointed to our unpublished decision in *Rodin v. City of Coral Springs*, 229 F. App'x 849 (11th Cir. 2007). There, without analyzing the issue, we applied the *Pickering* framework to volunteer firefighters. *Rodin* doesn't move the needle here for two reasons. First, and most obviously, it's unpublished, and thus non-precedential. Second, and in any event, applying the *Pickering* analysis there made some sense, in that fire protection is a service that has traditionally, even if not exclusively, been provided by the government. *See, e.g.*, *Fla. Bros., Inc. v. Brooks*, 436 U.S. 149, 163 (1978) ("[T]here are a number of state and municipal functions . . . which have been administered with a greater degree of exclusivity by States and municipalities than has the function of so-called 'dispute resolution," including "such functions as education, fire and police protection, and tax collection."). And indeed, the underlying facts of *Rodin* made our assumption even more reasonable, in that the municipality there was in the process of converting its volunteer fire department into a "semi-professional one" comprising both volunteer and paid firefighters. 229 F. App'x at 850.

This delivery-of-government-services rationale doesn't readily apply to Jarrard's participation in a volunteer prison ministry. Perhaps most importantly, providing religious instruction and pastoral care to inmates—quite unlike, say, collecting and removing trash, or, for that matter, perhaps even providing chaplains to servicemembers—is not a public service that the government has traditionally provided. Nor could it be, for that matter, without risking a violation of the Establishment Clause, which "mandates governmental neutrality between religion and religion, and between religion and nonreligion." *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Moreover, and relatedly, in his position as a volunteer minister Jarrard didn't (and again, probably couldn't lawfully) advise Moats and Sharp or represent their interests with prisoners.[13]

Second, even setting aside *Pickering*'s logical underpinnings, Jarrard's participation in the ministry program doesn't bear any of the traditional hallmarks of employment. For starters, although by no means dispositive, it's relevant that Jarrard

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13 The out-of-circuit cases regarding volunteer government chaplains that the district court and Moats and Sharp cite don't change our thinking. While it's true that both *Mustapha v. Monken*, 2013 WL 3224440 (N.D. Ill. June 25, 2013), and *Mayfield v. City of Oakland*, 2007 WL 2261555 (N.D. Cal. Aug. 6, 2007), applied *Pickering* to volunteer government chaplains, neither case assessed whether that was the proper analytical framework but, rather, seemed to take it as a given.

wasn't paid (at least by the government) for the time he spent teaching and counseling inmates. Moreover, recall that all Jarrard initially had to do to join the ministry program in 2012 was put his name on a list; to the best of his recollection, the Jail approved his so-called "application" within minutes. And finally, quite unlike the typical job, the ministry program had no mandatory attendance policy—recall that no more than 10 of the 140-some-odd people on the sign-up list ever showed up. In no practical respect did Jarrard's participation in the ministry program resemble a traditional government "job."

In reaching its contrary conclusion, the district court emphasized that under the Second, Third, and Fourth Policies, applicants like Jarrard signed the same confidentiality agreements that employees signed, executed waivers of liability, and underwent criminal history checks. Especially when weighed against the countervailing considerations that we've discussed, we aren't persuaded that these requirements made Jarrard a de facto employee for *Pickering* purposes. For one thing, the government imposes similar conditions on family members and friends who visit inmates, but of course that doesn't make them employees. And for another, we can't ignore the fact that Jarrard didn't have to do any of these things when he initially signed up to be a volunteer minister in 2012. We don't think there is any firm basis for concluding that although Jarrard wasn't initially a de facto employee, he later became one.

* * *

Because we conclude that neither *Pickering*'s theoretical underpinnings nor the practical realities of Jarrard's situation support the application of the *Pickering* analysis, we hold that the district court erred in evaluating Jarrard's claim under that framework. The proper approach, we conclude, is the usual forum analysis, to which we now turn our attention.

2

As already explained, the Supreme Court has specified four different types of fora to govern analysis of speech restrictions— public, designated public, limited public, and non-public. The parties here vigorously dispute whether the Polk County Jail's volunteer ministry program was a limited public forum, *see* Br. of Appellant at 18–19, or a non-public forum, *see* Br. of Appellees at 11, 29– 30. We needn't resolve their dispute, because we find that a rule common to *all* forums resolves the question whether, for purposes of Jarrard's First Amendment retaliation claim, his speech was "constitutionally protected"—namely, that any regulation of speech based on the speaker's viewpoint is presumptively invalid and must, at the very least, satisfy strict scrutiny, *i.e.*, it "must be the least restrictive means of achieving a compelling state interest." *See McCullen v. Coakley*, 573 U.S. 464, 478 (2014) (traditional public); *see also Perry*, 460 U.S. at 46 (designated public); *Rosenberger*, 515 U.S. at 828–29 (limited public); *Perry*, 460 U.S. at 46 (observing that the government can regulate speech in a non-public forum "as long as the regulation . . . is reasonable and not an effort to suppress

expression merely because public officials oppose the speaker's view").[14]

So, did Moats and Sharp engage in viewpoint discrimination when they denied Jarrard's application? They insist that they didn't, for two reasons, neither of which we find persuasive. First, they assert that, as a matter of fact, they didn't deny Jarrard's application because of his views on baptism, but rather because he had been (and they feared would be again) disruptive. For instance, in denying Jarrard's application under the Second Policy, it noted that Jarrard had "a history of being involved in contentious behavior and conflict" and that he "did not fully disclose that history in his application." And its subsequent denial of Jarrard's application under the Third Policy mentioned his previous dismissal from two other jails' ministry programs. But given the procedural posture— recall that the district court granted Moats and Sharp summary judgment over Jarrard's opposition—we must construe the facts and make all reasonable inferences in Jarrard's favor. There is ample

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14 At times, the Supreme Court seems to have suggested that viewpoint-discriminatory speech restrictions are per se invalid. *See Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984) ("[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others."). At others, though, it has said that they are subject only (so to speak) to strict scrutiny. *See McCullen*, 573 U.S. at 478 (stating that if a state law discriminates on the basis of viewpoint, it must satisfy strict scrutiny). For present purposes, we'll assume that strict scrutiny applies.

evidence that, if credited, indicates that Moats and Sharp disagreed with Jarrard's views on baptism, and it is reasonable to infer that they denied his applications on the basis of that disagreement. For instance, Jarrard's first meeting with Moats involved a discussion of their competing perspectives about baptism—and at the conclusion of that meeting Moats denied Jarrard request to rejoin the volunteer ministry program. So too, during the period when Jarrard was holding regular vigils outside the Jail to protest his exclusion from the program, Moats and Sharp repeatedly stopped to discuss baptism with him. And it seems that (at the very least) Moats's and Sharp's views about baptism affected other policy decisions at the Jail—including the decision to ban baptisms altogether—so it's reasonable to infer that those views affected their evaluation of volunteer applications as well. At most, Moats and Sharp's assertion that they had a valid, non-viewpoint-discriminatory motive creates factual dispute—which, of course, counsels against summary judgment, not in its favor.

Second, and separately, Moats and Sharp contend that even if their denial of Jarrard's application was due to his beliefs about baptism, their denial of his application would constitute "an appropriate *content-based* restriction of messages that significantly agitate inmates," as opposed to a viewpoint-based restriction. Br. of Appellees at 32. In support of their position, Moats and Sharp assert that they would also take issue with the following teachings: "(1) 'persons who *are* baptized through full immersion *will* go to Hell'; (2) 'persons with a

tattoo(s) will go to Hell'; or (3) 'persons who take medications will go to Hell.'" *Id.* at 33. Moats and Sharp's examples, though, only undermine their position, inasmuch as they indicate that while they will permit discussions that don't mention Hell, or even of things that won't land one in Hell, they won't tolerate discussion of things that will result in damnation. That, it seems to us, is viewpoint discrimination, pure and simple.

At least for summary-judgment purposes, therefore, we conclude that Moats and Sharp engaged in viewpoint discrimination based on their disagreement with Jarrard's beliefs about baptism. We further conclude that their disapproval of his volunteer ministry application can't survive strict scrutiny. As already explained, Moats and Sharp assert that they denied Jarrard's applications for fear that his participation in the volunteer ministry program would "(1) tend to undercut inmate well-being and (2) unreasonably create problems for jail administrators." Even if we were to indulge those assertions despite the contrary evidence that Jarrard has put forward,[15] and even assuming that they constitute compelling governmental interests, denying Jarrard's application was not the least restrictive means of achieving those ends. As just one example, the Jail could have posted notices stating that Jarrard would be addressing a potentially contentious topic and let the inmates decide whether they wanted to attend; indeed, the

15 We note that Jarrard performed two baptisms during his time at the Jail, and there is no indication that either caused any disturbance.

Second Policy had contained a similar provision explaining that a deputy would escort from religious services any inmate not wishing to participate. Second Policy, 5.23.II.H. So too, they could have allowed other volunteer ministers to opt out of working with Jarrard so as to reduce the risk of contentious interactions. And to the extent that they were worried about security issues related to the performance of baptisms, they could have instituted precautions to minimize them. They could, for instance, have limited attendance at an inmate's baptism or required an inmate being baptized to be shackled throughout the process to reduce risk of escape. There is no indication that Moats and Sharp attempted to take any such (or other similar) steps.

* * *

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . religion." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). At least on the record as we must construe it, it seems that is what Moats and Sharp tried to do here by excluding Jarrard from the ministry program. Because that exclusion violated Jarrard's "constitutionally protected" speech, we hold that Jarrard has met his burden under the first prong of the test that governs his First Amendment retaliation claim. Accordingly, we reverse the district court's contrary ruling and remand to allow that court to consider the "adverse conduct" and "causal relationship" prongs in the first instance. *See Brannon*, 754 F.3d at 1274.

B

Jarrard separately argues that the Jail's Second and Third Policies violated the First Amendment because they provided no meaningful standards for the evaluation of volunteer ministry applications and thus impermissibly vested Jail administrators with "unbridled discretion." Although the district court found that the policies "arguably violated" the First Amendment, it nonetheless granted summary judgment to Moats and Sharp on the ground that the relevant law was insufficiently "clearly established" to overcome their qualified-immunity defense. For the reasons explained below, we hold that the Second and Third Policies did in fact violate the First Amendment. We'll address qualified immunity separately afterwards.

Under the First Amendment, a party can challenge a licensing rule on its face on the ground that it "vests unbridled discretion in a government official over whether to permit or deny expressive activity." *Tracy v. Florida Atl. Univ. Bd. of Trs.*, 980 F.3d 799, 809 (11th Cir. 2020) (quotation marks and citation omitted); *see also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755–56 (1988). This "unbridled discretion" doctrine is grounded in the notion that "[e]xcessive discretion . . . is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring." *Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1256 (11th Cir. 2004). To avoid those risks—and invalidation of its policy—a government entity must promulgate

"narrowly drawn, reasonable, and definite standards to guide the official [decisionmaker's] decision." *Tracy*, 980 F.3d at 809 (quotation marks and citation omitted). So, for example, we held in *Burk* that a permit policy unlawfully granted municipal decisionmakers unbridled discretion because it required an individual seeking to hold a public demonstration to execute an indemnification agreement "in a form satisfactory to the [city's] attorney," but without in any way explaining the term "satisfactory." 365 F.3d at 1256; *see also Young Israel of Tampa, Inc. v. Hillsborough Area Reg'l Transit Auth.*, 89 F.4th 1337, 1346–47 (11th Cir. 2024) (assuming without deciding that city's bus system's advertising space was a non-public forum and then holding that the city's advertising policy was unreasonable because it "fail[ed] to define key terms, lack[ed] any official guidance, and vest[ed] too much discretion in those charged with its application"). By contrast, in *Bloedorn v. Grube*, we held that a university policy regarding outside speakers' access and conduct adequately channeled administrators' decisionmaking because it limited—among other things—their discretion in determining the location and length of a speaker's presentation. 631 F.3d 1218, 1236–38 (11th Cir. 2011). In addition to these sorts of substantive standards, a government's policy should also include a "time limit within which [an official] must make a decision on a permit application." *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1222 (11th Cir. 2017).

"Our precedents recognize that the unbridled-discretion doctrine applies to prior restraints." *Id.*

And although the term "prior restraint" calls to mind government officials censoring newspapers and magazines, *see, e.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931), in fact it applies more broadly. We have explained the term in these words: "A prior restraint on expression exists when the government can deny access to a forum for expression before the expression occurs." *Barrett*, 872 F.3d at 1223 (quotation marks and citation omitted). In *Barrett*, for instance, we considered a policy that regulated whether and how citizens could obtain permission to speak during public-comment sessions of board-of-education meetings. We held that the policy, "although not formally a licensing or permitting scheme, [was] a prior restraint . . . because it *prevent*[*ed*] members of the public from speaking . . . unless they compl[ied] with the Policy's requirements." *Id.*

For similar reasons, the Jail's Second and Third Policies are subject to the unbridled-discretion doctrine. Both policies operated as prior restraints because they restricted would-be volunteer ministers from engaging in expression without government approval. Both needed, therefore, to entail "narrowly drawn, reasonable, and definite standards to guide" administrators' decisionmaking. *Tracy*, 980 F.3d at 809 (quotation marks and citation omitted). They did not.[16]

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16 To be clear, it is of no particular moment that the Second and Third Policies weren't technically permitting schemes. *See* Br. of Appellees at 31. As *Barrett* makes clear, what matters is not a policy's formal designation or title, but rather its practical operation.

The Second Policy's language pertaining to would-be-volunteer applications read as follows:

> Clergymen and religious advisors wishing to hold services or conduct programs in the jail must make written application to the Polk County Sheriff's Office with supporting documentation, attend a training session and then be approved by the Jail Administrator.

Second Policy 5.23.II.F. The Third Policy stated:

> The Polk County Sheriff's Office encourages clergy from the community to minister to the inmates. Clergymen and religious advisors wishing to hold services or conduct programs in the jail must submit a volunteer application. Members of the clergy allowed within the inner security perimeter or allowed contact visitation, must complete background checks, including the jail ministry program.

Third Policy 7.07.16. Neither policy even attempts to provide the substantive standards resembling those that we found sufficient in *Bloedorn*. Nor do they include a "time limit within which [an official] must make a decision on a permit application." *Barrett*, 872 F.3d at 1222.

Moats and Sharp respond that the Second and Third Policies imposed sufficiently rigorous approval standards because "the Sheriff's Office

used a detailed application form that provide[d] specific criteria for jail ministry volunteers." Br. of Appellees at 31. For example, under the Second Policy applicants had to provide contact information for their place of worship, a list of volunteer-related training and coursework in which they had participated, their volunteering history, and their general ministry plan. But the unbridled-discretion doctrine requires that a policy outline guidance for *decisionmakers*, not applicants. It may well be that an aspiring volunteer minister had to dot Is and cross Ts on his application, but nothing in either policy constrained the Jail administrators' decisions in reviewing his application. An applicant could check all the necessary boxes and yet, for reasons unknown, still have his application rejected. And that's a problem.[17]

Moats and Sharp further respond that Jarrard got a response regarding his 2020 application within two weeks and that the only reason he didn't get one regarding his latest application was because the ministry program had

17 To be sure, we noted in *Bloedorn* that in an unbridled-discretion challenge, "[w]e consider the actual policies and practices employed by the [institution], not just the policy's text." 631 F.3d at 1237 (citing *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (explaining, in evaluating an unbridled-discretion claim, that "we must consider the [government's] authoritative constructions of the ordinance, including its own implementation and interpretation of it" (alteration in original))). That is to say, even if the face of a policy seems to vest administrators with unbridled discretion, its implementation history might demonstrate otherwise. On the record before us, there is no such implementation-history evidence, so we take the policies at face value.

been suspended. *Id.* at 32. But again, they're missing the point. Even assuming that administrators returned Jarrard's 2020 application in a timely manner and had a good reason for not returning his more recent application, the problem remains: Nothing *required* administrators to respond, let alone in a timely fashion, to either application. Administrators could have sat on Jarrard's applications indefinitely without violating any rule embodied in either the Second or Third Policies. And again, that's a problem.

Because the Second and Third Policies contained neither any meaningful substantive guidance for Jail administrators' decisionmaking nor any timeline in which they had to respond, they violated the First Amendment's unbridled-discretion doctrine.

C

Having concluded, at least for summary-judgment purposes, that Jarrard's speech was constitutionally protected and that the Second and Third Policies violated the unbridled-discretion doctrine, we turn to consider the question whether Jarrard's damages claims against Moats and Sharp are barred by qualified immunity. We hold that they are not.

1

"Qualified immunity shields public officials from liability for civil damages when their conduct does not violate a constitutional right that was clearly established at the time of the challenged action." *Echols v. Lawton*, 913 F.3d 1313, 1319 (11th Cir. 2019) (quotation marks and citation omitted).

To enjoy qualified immunity's protection, "a government official must first establish that he was acting within the scope of his discretionary authority when the alleged wrongful act occurred." *Id.* (quotation marks and citation omitted). The burden then shifts to the plaintiff to show "(1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct." *Id.* (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). We can consider the merits and clearly-established prongs in either order, and "an official is entitled to qualified immunity if the plaintiff fails to establish either." *Piazza v. Jefferson Cnty.*, 923 F.3d 947, 951 (11th Cir. 2019).

All here agree that that Moats and Sharp were acting within their discretionary authority. And for reasons already explained, Moats and Sharp violated Jarrard's First Amendment rights (1) when they denied his applications for what the record as we must construe it indicates were viewpoint-discriminatory reasons, and (2) because the Second and Third Policies impermissibly vested administrators with unbridled discretion to approve or deny would-be volunteer ministers' applications. Accordingly, all that remains is to determine whether the law underlying Jarrard's claims was clearly established when these violations occurred. We conclude that it was, on both counts.

In determining whether a right was clearly established at the time an official acted, we ask "whether the contours of the right were sufficiently clear that every reasonable officer would have

understood that what he was doing violates that right." *Prosper v. Martin*, 989 F.3d 1242, 1251 (11th Cir. 2021) (citing *al-Kidd*, 563 U.S. at 741). In this circuit, a plaintiff can meet his burden in any of three ways. He can either (1) come forward with "case law with indistinguishable facts clearly establishing the constitutional right," (2) point to "a broad statement of principle within the Constitution, statute, or case law that clearly establishes a constitutional right," or (3) show that officials engaged in "conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law." *Id.*[18]

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18 It appears that our journey to these three now-familiar "buckets" began in *Hope v. Pelzer*, 240 F.3d 975 (11th Cir. 2001), *rev'd*, 536 U.S. 730 (2002). We held there that although "the policy and practice of cuffing an inmate to a hitching post or similar stationary object for a period of time that surpasses the necessity to quell a threat or restore order is a violation of the Eighth Amendment," qualified immunity shielded the defendant officers from liability because the plaintiff couldn't point to existing decisions that were "'materially similar' to the facts" of his case. *Id.* at 980–81. On review, the Supreme Court criticized the "materially similar" facts requirement as a "rigid gloss on the qualified immunity standard" that "[was] not consistent with [that Court's] cases." *Hope*, 536 U.S. at 739. Chastened, we articulated in short order additional means by which a plaintiff would show clearly established law. In *Mercado v. City of Orlando*, we acknowledged that while a plaintiff could still bear his burden by "show[ing] . . . a materially similar case" that would give notice to police, he could also show that "a broader, clearly established principle should control the novel facts in this situation" or that his case "fits within the exception of conduct

Needless to say, the first and third paths are narrow. Cases with genuinely "indistinguishable facts" are rare—and, in fact Jarrard doesn't even claim that any on-point, binding precedent would have put Moats and Sharp on notice that their conduct was unconstitutional. So too, circumstances in which we have found the third so-egregious-that-caselaw-is-unnecessary condition satisfied are few and far between. And that's not surprising, as a plaintiff trodding that path must show that a defendant's conduct "lies so obviously at the very core of what the [relevant constitutional provision] prohibits that the unlawfulness of the conduct was readily apparent to the official, notwithstanding the lack of case law." *Loftus v. Clark-Moore*, 690 F.3d 1200, 1205 (11th Cir. 2012) (alteration in original) (quotation marks and citation omitted). Our decision in *Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002), exemplifies the level of outrageousness that we have required. There, an officer arrested a woman for committing a traffic violation and then—after handcuffing and securing her—walked her around to the back of her car and slammed her head against the trunk. *Id.* at 1191. We held that "no reasonable officer could have believed" that such "grossly disproportionate force" was legal. *Id.* at 1199. However objectionable Moats and Sharp's conduct, it doesn't rise to that level.

The second broad-principle category encompasses situations in which our case law has sufficiently established a constitutional right that

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which so obviously violates that constitution that prior case law is unnecessary." 407 F.3d 1152, 1159 (11th Cir. 2005).

every reasonable officer would know his conduct was unlawful despite the fact that we hadn't yet applied the principle to the specific facts of his case. Our recent decision in *Acosta v. Miami-Dade County*, 97 F.4th 1233 (11th Cir. 2024), is illustrative. Looking to a handful of existing cases, we held that the law clearly established that an arresting officer may not use gratuitous force on a non-resisting suspect who no longer poses a threat to the officer's safety. *Id.* at 1242 (collecting cases). Notably, we didn't parse out whether any of those cases involved indistinguishable facts or circumstances. Rather, we found the principle clearly established because we had affirmed it in a variety of situations. *See id.* That was enough to put the officers on notice that tasing and kicking a non-resisting suspect who was lying unconscious on the ground was unlawful. *See id.* at 1237, 1241–42.

2

So, did Moats and Sharp violate clearly established law when they denied Jarrard's applications (1) based on what we must assume (again, given the existing record and procedural posture) was their disagreement with his views about baptism, and (2) by applying the criteria-less Second and Third Policies? We hold that they did. Both Jarrard's right to be free from viewpoint discrimination and his right not to be subject to decisionmakers' unbridled discretion were clearly established—in particular, both were firmly grounded in "broad statement[s] of principle" expressly articulated in governing caselaw. *Prosper*, 989 F.3d at 1251.

With respect to the former, we (following the Supreme Court's unambiguous lead) have repeatedly affirmed that "[e]ven in a non-public forum, the law is clearly established that the state cannot engage in viewpoint discrimination—that is, the government cannot discriminate in access to the forum on the basis of the government's opposition to the speaker's viewpoint." *Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005); *see also, e.g.*, *Perry*, 460 U.S. at 46. Accordingly, no matter what kind of forum the Polk County Jail was, Moats and Sharp were—had to have been—on notice that excluding Jarrard from the volunteer ministry program based on his views about baptism was unlawful. And yet, given the facts as we must construe them, that's exactly what they did. Qualified immunity, therefore, does not shield Moats and Sharp from damages liability on Jarrard's First Amendment retaliation claim.[19] We reverse the district court's contrary conclusion.[20]

19 Nor, of course, does qualified immunity shield Moats and Sharp from Jarrard's request for injunctive relief on his retaliation claim. See *Pearson v. Callahan*, 555 U.S. 223, 242-43, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) (observing that qualified immunity isn't available in "§ 1983 cases against individuals where injunctive relief is sought instead of or in addition to damages"). As already explained, see supra at 10 n.8, the district court erred when it concluded that Jarrard had abandoned his request for injunctive relief on the retaliation claim.

20 Judge Rosenbaum would grant Moats and Sharp qualified immunity on the ground that "they were not on clear notice that *Pickering*"—rather than the usual forum analysis —"did not govern their decision." Rosenbaum Op. at 1. Her arguments are interesting and characteristically well-considered. Respectfully, though, we disagree. For starters, we

So too, the law has long been clearly established that decisionmakers like Moats and Sharp may not exercise unbridled discretion in deciding who can (and can't) speak. Our cases predating the promulgation of the Second and Third Policies make abundantly clear that any permitting-like scheme must entail both (1) substantive criteria to guide and cabin the decisionmakers' discretion and (2) a timeline specifying how long those decisionmakers have to respond to applications. *See, e.g.*, *Burk*, 365 F.3d at 1256; *Bloedorn*, 631 F.3d at 1236–37; *Barrett*, 872 F.3d at 1222–23. Because the Second and Third Policies entailed neither safeguard, we hold that they violated Jarrard's

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don't think that a qualified-immunity doctrine that even pretends to real-world relevance can turn on whether line-level jail officials like Moats and Sharp had clear notice of a judge-created test called the "*Pickering* framework," *id*. at 1, 2, 6, or its application. Without casting any aspersions whatsoever, we rather doubt that Moats and Sharp have ever even heard of *Pickering* or the multistep balancing analysis that courts have fashioned around it—so surely neither of those can be the object of the notice required that modern qualified-immunity jurisprudence protects. Nor, for reasons we've tried to explain, could Moats and Sharp have reasonably thought, as a matter of fact, that Jarrard was a government employee—such that *Pickering* (whether or not they'd heard of it) would apply. When Jarrard initially joined the volunteer ministry program, all he had to do was put his name on a list. The jail never paid him. He had no set schedule. For that matter, there was no requirement (or even expectation) that he show up. To repeat: "In no practical respect did Jarrard's participation in the ministry program resemble a traditional government 'job.'" *Supra* at 17.

clearly established First Amendment rights.[21]

* * *

Because the law clearly established Jarrard's constitutional rights to be free from viewpoint discrimination and not to be subject to a permitting-like scheme that vested decisionmakers with unbridled discretion, we hold that the district court erred in granting summary judgment to Moats and Sharp. Accordingly, we reverse those parts of the district court's opinion.

We **REVERSE** the district court's decision and **REMAND** the case for further proceedings consistent with this opinion.

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21 Contrary to the district court's suggestion, we don't think that *Barrett* is off-point for the reason that it involved a limited public forum rather than a non-public forum. *Barrett* "identified viewpoint discrimination as a particular evil with which we were concerned" in adjudicating unbridled-discretion claims, 872 F.3d at 1226, and as we have already explained, viewpoint discrimination is unlawful even in non-public fora. We also highlighted in *Barrett* that we had previously applied the unbridled-discretion doctrine in the context of an airport, the quintessential non-public forum, because of the risk of latent viewpoint discrimination. *Id.* at 1225 (discussing *Atlanta J. & Const. v. City of Atlanta Dep't of Aviation*, 322 F.3d 1298 (11th Cir. 2003)).

ROSENBAUM, J., Dissenting in Part

ROSENBAUM, Circuit Judge, concurring in part and dissenting in part:

I join all but Part II-C-2 of the Majority Opinion. I write separately because I would affirm the part of the district court's order concluding that Defendants Sheriff Johnny Moats and Chief Deputy Al Sharp are entitled to qualified immunity. To reach its contrary conclusion, the Majority Opinion necessarily first finds that participants in the Polk County Jail volunteer ministry program, like Plaintiff Stephen Jarrard, do not act as government employees, so the framework that *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), establishes does not apply to him. That conclusion may well be correct. But by itself, it's not enough to overcome Moats and Sharp's qualified-immunity defense.

Even if the Majority Opinion is right that the *Pickering* framework doesn't apply here, it has identified no precedent that clearly established that a volunteer prison chaplain does not act as a government employee. Yet as the Majority Opinion acknowledges, other courts have applied the *Pickering* framework to volunteer prison chaplains. The upshot of this is that when Moats and Sharp declined to allow Jarrard to participate in the program, they were not on clear notice that *Pickering* did not govern their decision. And if *Pickering* did control, its framework did not clearly

establish that Moats and Sharp violated Jarrard's First Amendment rights.

The Majority Opinion fails to explain how Supreme Court or our precedent would have made it clear to every competent jail official that Jarrard wasn't a government employee and was thus not subject to the *Pickering* framework. I can't find precedent from the time of Moats and Sharp's actions that clearly establishes that, either. For this reason, I respectfully dissent.

I divide my discussion into two substantive parts. Section I explains why the law did not clearly establish that a volunteer jail chaplain in the program here did not act as a government employee and so was not subject to the *Pickering* framework. And Section II shows that, under *Pickering*, it was not clearly established that Moats and Sharp's decisions not to allow Jarrard to participate violated the First Amendment.

I.

The qualified-immunity doctrine seeks to balance "the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). To resolve this balance, the doctrine protects government officials engaged in discretionary functions and sued in their individual capacities unless they violate "clearly established federal statutory or constitutional rights of which a reasonable person would have known." *Keating v.*

City of Miami, 598 F.3d 753, 762 (11th Cir. 2010) (cleaned up).

The "clearly established" component has the effect of shielding from liability "all but the plainly incompetent or one who is knowingly violating the federal law." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (citation omitted).

A plaintiff may show that the law was clearly established at the time of the conduct in one of three ways: he "must point to either (1) 'case law with indistinguishable facts,' (2) 'a broad statement of principle within the Constitution, statute, or case law,' or (3) 'conduct so egregious that a constitutional right was clearly violated, even in the total absence of case law.'" *Crocker v. Beatty*, 995 F.3d 1232, 1240 (11th Cir. 2021) (quoting *Lewis v. City of West Palm Beach*, 561 F.3d 1288, 1291–92 (11th Cir. 2009).

And we judge whether the law was clearly established by looking to the law at the time of the official's act, not as the law has developed since that time. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In sum, "[i]f objective observers cannot predict—at the time the official acts—whether the act was lawful or not, and the answer must await full adjudication in a district court years in the future, the official deserves immunity from liability for civil damages." *Foy v. Holston*, 94 F.3d 1528, 1534 (11th Cir. 1996).

But to satisfy this burden, in our Circuit, a plaintiff must point "to binding decisions of the Supreme Court of the United States, this Court, [or]

the highest court of the relevant state" (here, Georgia). *Glasscox v. City of Argo*, 903 F.3d 1207, 1217 (11th Cir. 2018). Precedent from other jurisdictions cannot clearly establish the law in our Circuit. *Gilmore v. Ga. Dep't of Corr.*, 111 F.4th 1118, 1135-36 (11th Cir. 2024).

That's the case here. When Moats and Sharp declined to allow Jarrard to participate in the program, the law wasn't clear that their refusal violated his First Amendment rights. To begin with, Jarrard faced an uphill battle. We've said that "[i]t is particularly difficult to overcome the qualified immunity defense in the First Amendment context." *Gaines v. Wardynski*, 871 F.3d 1203, 1210 (11th Cir. 2017) (collecting cases). After all, First Amendment claims are usually intensely fact-specific.

So I turn to the specific problem here. A plaintiff who claims a violation of his First Amendment rights must show that his speech is "constitutionally protected." *Brannon v. Finkelstein*, 754 F.3d 1269, 1274 (11th Cir. 2014) (quoting *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1197 (11th Cir. 2011)). And to be sure, the First Amendment presumptively protects many areas of expression. *See United States v. Stevens*, 559 U.S. 460, 468 (2010).

But it does not presumptively protect a government employee's speech. *See Pickering*, 391 U.S. at 568. That's because the government "has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the

speech of the citizenry in general." *Id.*

So we apply a two-step framework that balances the state's interest in effective governance against its employees' interest in exercising their First Amendment rights. *See Alves v. Bd. of Regents*, 804 F.3d 1149, 1159–60 (11th Cir. 2015) (explaining the framework). Of course, we apply *Pickering* only if the plaintiff is a government employee. But as the Majority Opinion acknowledges, the definition of a government employee is not exactly clear-cut. *See* Maj. Op. at 14–15, 17–18.

Jarrard's damages claim succumbs to qualified immunity because he can point to neither "case law with indistinguishable facts" nor "a broad statement of principle within the Constitution, statute, or case law" that directs us to disregard *Pickering*'s framework.[1] *Perez v. Suszczynski*, 809 F.3d 1213, 1222 (11th Cir. 2016) (quoting *Lewis*, 561 F.3d at 1291–92). And because *Pickering* resolves whether speech is constitutionally protected in the first place, failure to dispel its application or prevail under its framework through clearly established law dooms both Jarrard's retaliation and unbridled-discretion claims.

No "broad statement of principle" identifies who is a government employee for purposes of *Pickering*. We have noted that "courts have

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1 No one suggests that the conduct here was "so egregious that a constitutional right was clearly violated, even in the total absence of case law," *Perez*, 809 F.3d at 1222. *See* Maj. Op. at 31 ("However objectionable Moats and Sharp's conduct, it doesn't rise to that level.").

extended the application of the *Pickering* analysis to cover more than just traditional public employees"—that is, more than "a traditional salaried public employee." *McKinley v. Kaplan*, 262 F.3d 1146, 1149 n.5 (11th Cir. 2001). But we have not offered a clear rule to help courts determine the outer bounds of *Pickering*'s exception. Rather, we have explained that *Pickering* cases are "intensely fact-specific and do not lend themselves to clear, bright-line rules." *Maggio v. Sipple*, 211 F.3d 1346, 1354 (11th Cir. 2000) (quoting *Martin v. Baugh*, 141 F.3d 1417, 1420 (11th Cir. 1998)).

Indeed, courts have applied the *Pickering* framework to plaintiffs who are not, in fact, employed by the government—including to government volunteers. Take *Versage v. Township of Clinton*, 984 F.2d 1359 (3d Cir. 1993). There, a member of a volunteer fire department alleged violations of his First Amendment rights when the city terminated his relationship with the fire department in retaliation for speech he had engaged in. *Id.* at 1364. The Third Circuit applied the *Pickering* framework to evaluate the volunteer's claim. *See id.* It reasoned that "similar First Amendment concerns [that apply in a government-employee situation] would apply in a volunteer context." *Id.*

Other courts have likewise applied the *Pickering* framework to volunteers' First Amendment claims. *See*, *e.g.*, *LeFande v. District of Columbia*, 841 F.3d 485, 488 (D.C. Cir. 2016) (applying *Pickering* to First Amendment claim of

Metropolitan Police Department Reserve Corps volunteer, an unpaid volunteer who assisted full-time officers of the Metropolitan Police Department in providing law-enforcement services); *Janusaitis v. Middlebury Vol. Fire Dep't*, 607 F.2d 17, 18, 25 (2d Cir. 1979) (applying *Pickering* to volunteer firefighter's First Amendment claim); *Goldstein v. Chestnut Ridge Vol. Fire Co.*, 218 F.3d 337, 339, 351–56 (4th Cir. 2000) (applying *Pickering* to volunteer firefighter's First Amendment claim); *Harnishfeger v. United States*, 943 F.3d 1105, 1109, 1113–19 (7th Cir. 2019) (applying *Pickering* to Volunteer in Service to America (VISTA) volunteer's First Amendment claim); *Shands v. City of Kennett*, 993 F.2d 1337, 1340, 1342–48 (8th Cir. 1993) (applying *Pickering* to First Amendment claims of volunteer firefighters); *Hyland v. Wonder*, 972 F.2d 1129, 1132, 1136–40 (9th Cir. 1992) (applying *Pickering* to probation-department volunteer's First Amendment claim).

And at least two district courts have applied *Pickering* to volunteer chaplains specifically. *See, e.g.*, *Mustapha v. Monken*, 2013 WL 3224440, at *1, *7–8 (N.D. Ill. June 25, 2013) (applying *Pickering* to a volunteer chaplain for the state police); *Mayfield v. City of Oakland*, 2007 WL 2261555, at *1, *4–6 (N.D. Cal. Aug. 6, 2007) (applying *Pickering* to volunteers for city's volunteer police chaplaincy program).

True, as the Majority Opinion notes, *see* Maj. Op. at 17 n.13, many of these cases took for granted that *Pickering* applied. But that doesn't help

Jarrard. If all these courts at least implicitly believe that *Pickering* governs the analysis when it comes to government volunteers, it's hard to see how it could have been clearly established that *Pickering* does not apply here.

The Majority Opinion says Jarrard couldn't have been a government employee because the point of the Jail's program was to provide religious instruction and pastoral care to prisoners—an area forbidden for the government. *Id.* at 16–17. And though that makes some sense, courts have applied *Pickering* to full-time government chaplains or ministers. *See, e.g.*, *Donahue v. Staunton*, 471 F.2d 475, 479 (7th Cir. 1972); *Baz v. Walters*, 782 F.2d 701, 708 (7th Cir. 1986); *Akridge v. Wilkinson*, 178 F. App'x 474, 476, 481 (6th Cir. 2006). So I don't see how the Majority Opinion's point in this respect clearly establishes that *Pickering* doesn't apply to government chaplains (salaried or voluntary).

Plus, the government provides the public service of running the jails. A big part of that is maintaining order and security. *See Bell v. Wolfish*, 441 U.S. 520, 547 (1979) (explaining jail "administrators . . . should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security"). Yet within those confines, jails also must allow prisoners to practice their religion. Because a jail's authority extends to both, it enjoys some discretion to strike the necessary balance between them. *See Pell v.*

Procunier, 417 U.S. 817, 822 (1974) ("[A] prison inmate retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system."). And at the very least, a sheriff or deputy sheriff could reasonably believe, within limits, that the jail's discretion reaches further than it does.

In the end, the Majority Opinion's determination that *Pickering* doesn't apply comes down to the weighing of what it describes as the "particulars of Polk County's volunteer ministry program and Jarrard's participation in it." Maj. Op. at 14–15. And that's the problem. As the Majority Opinion readily concedes, some facts suggest that Jarrard could be an employee. For instance, the Majority Opinion acknowledges that Jarrard and other applicants "signed the same confidentiality agreements that employees signed, executed waivers of liability, and underwent criminal history checks." *Id.* at 17–18. Not only that, but the program involved interacting with prisoners. So complying with security measures was not optional.

The point here is that, ultimately, it makes no difference to the "clearly established" analysis whether we weigh these "particulars of Polk County's volunteer ministry program and Jarrard's participation in it" to determine Jarrard was not an employee and therefore not subject to *Pickering*. All that matters is whether this answer was clearly established to Moats and Sharp at the time of their actions. And I just don't see how, given the legal

landscape I've described, we can say it was.[2] *See Wilson v. Layne*, 526 U.S. 603, 617–18 (1999) ("Given such an undeveloped state of the law, the officers in this case cannot have been 'expected to predict the future course of constitutional law.'" (quoting *Procunier v. Navarette*, 434 U.S. 555, 562 (1978)).

II.

Because Jarrard has not pointed to clearly established law that directs us to disregard Defendants' *Pickering* analysis, we must consider whether Jarrard can prevail under a clearly established application of *Pickering*. He can't.

A government employee must prevail under our two-step *Pickering* framework to establish a

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2 The Majority Opinion asserts that *Pickering* couldn't have muddied the waters on what the Majority Opinion says was clearly established law because the Majority Opinion "rather doubt[s] that Moats and Sharp have ever even heard of Pickering or the multistep balancing analysis that courts have fashioned around it." See Maj. Op. at 33 n.20. But the Supreme Court long ago "purged qualified immunity doctrine of its subjective components." *Mitchell v. Forsyth*, 472 U.S. 511, 517, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). In other words, binding Supreme Court precedent makes "the defendants' actual state of mind or knowledge of the law . . . irrelevant to whether the asserted conduct would have been legally reasonable." *Armstrong v. Daily*, 786 F.3d 529, 538 (7th Cir. 2015). So the question we must ask is not what Moats and Sharp knew about the governing law but whether the governing law clearly established that Jarrard was not a government employee so that the *Pickering* framework would not apply. And for the reasons that I've explained, and that the Majority Opinion fails to rebut, the answer is that the law was not clearly established.

First Amendment claim. At the first step, we undertake a "threshold inquiry": we consider whether the employee spoke "(1) as a citizen and (2) on a matter of public concern." *Alves*, 804 F.3d at 1160. If so, then we proceed to the second step. At that step, we ask "whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public" by balancing the "public and private interests articulated in *Pickering*." *Id.* at 1159–60 (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006)). If the employee prevails at both steps, then the First Amendment protects the employee's speech, and we proceed to the merits of his claim. *Moss v. City of Pembroke Pines*, 782 F.3d 613, 618 (11th Cir. 2015).

As I've noted, plaintiffs can struggle to pierce qualified immunity's shield when *Pickering* controls. First Amendment cases seldom produce "a broader, clearly established principle that should control the novel facts of the situation" or situations that "so obviously violate the constitution that prior case law is unnecessary." *Gaines*, 871 F.3d at 1209 (quoting *Terrell v. Smith*, 668 F.3d 1244, 1255–56 (11th Cir. 2012)). Plaintiffs usually must "produce a case in which speech materially similar to [theirs] in all *Pickering-Connick* respects was held protected." *Maggio*, 211 F.3d at 1354–35 (quoting *Martin*, 141 F.3d at 1420).

This case does not defy that pattern. Here, we can't say that no reasonable person could conclude that Jarrard didn't speak as a citizen (but as a

government employee) on a matter of public concern. *See* Maj. Op. at 31. And Jarrard identifies no case clearly establishing a broad principle that controls *Pickering*'s inquiry here. So Jarrard can win only by producing a "binding decision[] of the Supreme Court of the United States, this Court, [or] the highest court of the relevant state" (here, Georgia), *Glasscox*, 903 F.3d at 1217, with materially similar facts that establishes each of element of *Pickering*'s framework—(1)(a) that Jarrard spoke as a citizen; (1)(b) that he spoke on a manner of public concern; and (2) that the balance of interests weighs in his favor.

He did not do so. I begin with *Pickering*'s first step.

Jarrard argues that we can skip that step because free-exercise claims are not subject to *Pickering*'s threshold inquiry (whether he spoke as a citizen on a matter of public concern). But once again, even if that's so, Jarrard doesn't show that it's clearly established. The Supreme Court recently recognized that the question "whether the Free Exercise Clause may sometimes demand a different analysis at the first step of the *Pickering-Garcetti* framework" has not yet been answered. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 531 n.2 (2022). In other words, it is not clearly established that we can skip *Pickering*'s first step when the claim at issue involves religious speech, like Jarrard's does.

And neither of the Eleventh Circuit cases that Jarrard points to clearly establishes that

proposition, either.[3] In *Watts v. Florida International University*, 495 F.3d 1289, 1299 (11th Cir. 2007), we expressed "no view on the ultimate merits, or lack of merit," of the free-exercise claim—including on the applicability of *Pickering*'s first step. We concluded only that Watts adequately pled his sincere religious beliefs. *Id.* at 1294–99. So *Watts* does not help Jarrard.

And in *Walden v. Centers for Disease Control & Prevention*, 669 F.3d 1277, 1286 (11th Cir. 2012), we explained that *Pickering* governed Walden's free-exercise claim. That said, we didn't apply *Pickering* because Walden could not provide any evidence that the defendants burdened her sincerely held religious beliefs. *Id.*

Put simply, neither panel had reason to grapple with whether we can skip *Pickering*'s first step, so those cases do not clearly establish that we skip *Pickering*'s first step when a free-exercise claim is involved. *See Loggins v. Thomas*, 654 F.3d 1204, 1222 (11th Cir. 2011) (applying 28 U.S.C. § 2254(d)(1) and noting that implications and dicta cannot "clearly establish federal law").

Because Jarrard has not shown that it was clearly established that we skip the first step in the *Pickering* analysis when a free-exercise claim is involved, Jarrard must show that it was clearly established under both *Pickering* steps that Moats

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3 Jarrard also cites *Meriwether v. Hartop*, 992 F.3d 492, 504–17 (6th Cir. 2021), but that case cannot clearly establish the law in this Circuit for purposes of qualified immunity. *Gilmore*, 111 F.4th at 1135–36.

and Sharp could not decline Jarrard's application. But Jarrard fails to show under clearly established law that he spoke as a citizen on a matter of public concern. So I do not proceed to *Pickering*'s second step.

1. At the time of Moats and Sharp's actions, it was not clearly established that Jarrard spoke as a private citizen.

First, we ask whether Jarrard spoke as a private citizen or in his capacity as a government employee. Speech is not protected if it "owes its existence to a public employee's professional responsibilities" or was made "pursuant to" those responsibilities. *Garcetti*, 547 U.S. at 421; *see also Lane v. Franks*, 573 U.S. 228, 240 (2014) ("The critical question . . . is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."). The inquiry is practical. *Abdur-Rahman v. Walker*, 567 F.3d 1278, 1283 (11th Cir. 2009) (citing *Garcetti*, 547 U.S. at 424). Formal job descriptions are informative but do not control, *id.*; "[w]e have consistently discredited narrow, rigid descriptions of official duties urged upon us to support an inference that public employees spoke as private citizens," *id.* at 1284. Rather, we review the record as a whole to determine whether Jarrard spoke as a citizen or as a government employee. *See Garcetti*, 547 U.S. at 424–25.

And that poses a problem for Jarrard. Once again, we deal with a fact-bound inquiry. So Jarrard must identify a "case in which speech materially

similar to [his] was held" to be conducted as a citizen, *Maggio*, 211 F.3d at 1355, or which set forth a broad principle leading us to that conclusion, *Gains*, 871 F.3d at 1209. He has not done so.

For instance, Jarrard relies on [*sic*] and *Cambridge Christian School v. Florida High School Athletic Association* ("*Cambridge Christian I*"), 942 F.3d 1215, 1232 (11th Cir. 2019), and *Gundy v. City of Jacksonville*, 50 F.4th 60, 79 (11th Cir. 2022), to suggest that Jarrard did not speak as an employee. But both are irrelevant because we published them after Moats and Sharp denied Jarrard's application to resume his ministry in the Jail in 2017. So they could not have put Moats and Sharp on notice. *See Harlow*, 457 U.S. at 818.

And even considering those cases, they couldn't have put Moats and Sharp on notice that any religious speech Jarrard engaged in as part of the program necessarily would not have qualified as speech in Jarrard's capacity as a government employee under *Pickering*. Both *Cambridge Christian I* and *Gundy* addressed whether a non-employee's speech could be construed as government speech. *See Cambridge Christian I*, 942 F.3d at 1222 (private schools speaking over loudspeaker at state-operated football game); *Gundy*, 50 F.4th at 64 (legislative invocation given by an invited, guest speaker before the opening of a Jacksonville City Council meeting). Neither even mentioned *Pickering* or its framework. And neither asked whether the speaker acted under their official duties. Instead, we applied a separate test that balanced three factors

—"history, endorsement, and control"—to determine whether, based on totality of the circumstances, the non-employee's speech amounted to government speech. *Cambridge Christian I*, 942 F.3d at 1230, 1236; *Gundy*, 50 F.4th at 76. So these cases and the test they applied couldn't have clearly established how *Pickering* applies.

The most apt case Jarrard cites is *Hubbard v. Clayton County School District*, 756 F.3d 1264, 1268 (11th Cir. 2014). But it doesn't get him where he needs to be, either. There, we determined that Hubbard did not make the relevant statements "as an employee of the School District" because he was "on leave from the School District" and away from his school at the time he made the remarks. *Id.*at 1267.

He instead spoke, we said, "in his capacity as president of" the Georgia Association of Educators. *Id.* But unlike Hubbard, who clearly spoke outside his capacity as a government employee, Jarrard sought to make his statements while actively ministering in the government program. So *Hubbard* provided no guidance to Moats and Sharp and did not clearly establish that their actions violated Jarrard's rights.

That leaves Jarrard with only the broad claim that no reasonable person who observed Jarrard speak would believe he conveyed a religious message on the government's behalf. But our case law does not establish the principle "so clear[ly] and broad[ly] (and 'not tied to particularized facts')," *Gains*, 871 F.3d at 1209 (citation omitted), that

religious speech can never qualify as government speech. In fact, as recently as September 3, 2024, in our follow-up to *Cambridge Christian I*, we concluded that a 30-second religious address by a high school at the Florida High School Athletic Association's state football championship qualified as "government speech." *Cambridge Christian Sch. v. Fla. High Sch. Athletic Ass'n* ("*Cambridge Christian II*"), ___ F.4th ___, 2024 WL 4018866, at *20 (11th Cir. Sept. 3, 2024). Not only that, but the fact that the government may violate the Establishment Clause also shows that religious speech may be government speech. *See, e.g.*, *Engel v. Vitale*, 370 U.S. 421, 430 (1962). Plus, that government chaplains have official responsibilities they may speak under further shows that the government is capable of engaging in religious speech. *See Baz*, 782 F.2d at 709 (rejecting the argument that the V.A. violated "the First Amendment when it took steps to 'limit and restrict the manner in which the Plaintiff could pray with patients, preach, and also limited the content of his sermons'"). Put simply, these First Amendment questions are contextual. *See Garcetti*, 547 U.S. at 424 ("The proper inquiry is a practical one."); *Cambridge Christian I*, 942 F.3d at 1230 (balancing "history, endorsement, and control" factors). And when "case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Smith v. Mattox*, 127 F.3d 1416, 1419 (11th Cir. 1997) (citation omitted).

For these reasons, when Moats and Sharp

rejected Jarrard, it was not clearly established that any speech Jarrard would have engaged in as part of the Jail's program would not have been in his official capacity. So Moats and Sharp are entitled to qualified immunity.

2. At the time of Moats and Sharp's actions, it was not clearly established that Jarrard spoke on a matter of public concern.

Next, we ask whether Jarrard spoke on a matter of public concern. "Speech is considered to deal with a matter of public concern 'when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.'" *United States v. Fleury*, 20 F.4th 1353, 1364 (11th Cir. 2021) (quoting *Snyder v. Phelps*, 562 U.S. 443, 453 (2011)). In undertaking this inquiry, we consider the "content, form, and context" of a government employee's speech. *O'Laughlin v. Palm Beach County*, 30 F.4th 1045, 1051 (11th Cir. 2022). Content is "the most important factor." *Mitchell v. Hillsborough County*, 468 F.3d 1276, 1284 (11th Cir. 2006). But again, we review "the record as a whole." *Id.* at 1286.

Jarrard argues that religious speech is inherently of public concern, and, even if it isn't, the circumstances of Jarrard's ministry confirm that he spoke on a matter of public concern.[4] But yet again,

4 Defendants cite the district court's conclusion that Jarrard abandoned the argument in the district court. I disagree. Jarrard's "public concern" argument, though brief,

Jarrard cites no "binding decision[] of the Supreme Court of the United States, this Court, [or] the highest court of the relevant state" (here, Georgia), *Glasscox*, 903 F.3d at 1217, clearly establishing those propositions.

Jarrard rightfully points out that the "public concern requirement exists because that category of expression is at the core of the First Amendment's protections." *Grigley v. City of Atlanta*, 136 F.3d 752, 755 (11th Cir. 1998). But he offers no case that both binds us and applies that principle to religious speech. True, some of our sister circuits have held that religious speech is of inherent public concern. *E.g. Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011); *see also Brown v. Polk Cnty.*, 61 F.3d 650, 658 (8th Cir. 1995); *Adams v. Trs. of Univ. of N.C.-Wilmington*, 640 F.3d 550, 565 (4th Cir. 2011) (listing "religion" among "topics [that] plainly touched on issues of public, rather than private, concern"). But our sister circuits' opinions do not clearly establish law in the Eleventh Circuit. *Gilmore*, 111 F.4th at 1135–36.

And even if they could, it's not clear that a "robust consensus" of them, *District of Columbia v. Wesby*, 583 U.S. 48, 65 (2018), supports the

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was not "perfunctory" or "without supporting arguments." *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014). It gave Defendants sufficient notice and opportunity to respond. Jarrard also argued each element within the *Pickering* framework, so we can consider each component of it, even if Jarrard's district-court briefing as to one of them was limited.

proposition that religious speech inherently, rather than contextually, addresses a matter of public concern. For instance, Jarrard cites *Scarbrough v. Morgan County Board of Education*, 470 F.3d 250, 257 (6th Cir. 2006). But there, the Sixth Circuit concluded that Scarbrough's religious speech "touch[ed] on a matter of public concern, *given its content, form, and context*." *Id.* (emphasis added). Content was not dispositive.

Plus, other circuits have applied the usual, holistic analysis and concluded, despite the religious content of the speech at issue, that the plaintiff did not address a matter of public concern. *See Daniels v. City of Arlington*, 246 F.3d 500, 504 (5th Cir. 2001) ("Although personal religious conviction . . . obviously is a matter of great concern to many members of the public, in this case it simply is not a matter of 'public concern' as that term of art has been used in the constitutional sense."). In sum, no broad, general principle clearly establishes that Jarrard necessarily spoke on a matter of public concern simply because his speech involved religious matters.

So Jarrard had to produce a materially similar case to his that clearly established his religious speech was of public concern. *See Maggio*, 211 F.3d at 1354–55. He did not do so. None of the binding cases from 2017 or earlier that Jarrard cites addresses whether religious speech necessarily touches on a matter of public concern. *See, e.g.*, *Cook v. Gwinnett Cnty. Sch. Dist.*, 414 F.3d 1313, 1317 (11th Cir. 2005) (safety of children in school);

Peterson v. Atlanta Hous. Auth., 998 F.2d 904, 916 (11th Cir. 1993) (pre-leasing practices and maintenance problems in Atlanta Housing Authority buildings); *Rankin v. McPherson*, 483 U.S. 378, 386 (1987) (policies of the President's administration); *Grigley*, 136 F.3d at 753 (pursuing criminal charges). And none of them confronted speech in a jail or prison setting. *See, e.g.*, *Connick v. Myers*, 461 U.S. 138, 140 (1983) (district attorney's office); *Mitchell*, 468 F.3d at 1280 (county commissioner hearing).

The First Amendment questions that Jarrard's circumstances (religious speech to inmates) present are ultimately novel for this Court. So we cannot say that Moats and Sharp reasonably should have "predict[ed]—at the time [of] the[ir] official acts"— that Jarrard spoke on a matter of public concern without "await[ing] full adjudication" by us. *Foy*, 94 F.3d at 1534. And as a result, they are entitled to qualified immunity. *See id.*

* * *

At bottom, Moats and Sharp assert that Jarrard was a government employee whose speech fell within the scope of his employment as a government minister. In other words, they argue that Jarrard did not engage in any constitutionally protected speech. They may very well be wrong about that. But that's not the relevant question on a qualified-immunity inquiry. And neither Jarrard nor the Majority Opinion has pointed to any law that clearly established that as of 2017. So Moats and Sharp are entitled to qualified immunity. For

that reason, I would affirm the district court's grant of summary judgment in their favor on that issue.

Appendix B

In the

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-10332

REVEREND STEPHEN JARRARD,

Plaintiff-Appellant,

OLLIE MORRIS,

Plaintiff.

versus

SHERIFF OF POLK COUNTY,

CHIEF DEPUTY AL SHARP,

Defendants-Appellees,

DEPUTY DUSTIN STROP,

Individually and in their official capacities,

Filed: November 11, 2024

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

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before ROSENBAUM, NEWSOM, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

Appendix C

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ROME DIVISION

No. 4:20-cv-2-MLB

REVEREND STEPHEN JARRARD and OLLIE MITCHELL MORRIS,

Plaintiffs,

v.

SHERIFF JOHNNY MOATS, CHIEF DEPUTY AL SHARP, and DEPUTY DUSTIN STROP,[1]

Defendants.

Filed: September 27, 2022

OPINION & ORDER

Plaintiff Jarrard is a Christian evangelist. He previously worked as a volunteer minister at Polk County Jail. In that role, he repeatedly taught inmates that baptism by immersion is necessary for

1 Defendant Strop's last name may actually be "Stroup." See, e.g., Dkt. 63 at 5.) But the case caption in the complaint says otherwise. So the Court follows suit.

salvation. He left the jail in 2017 but, a few years later, reapplied for the same position. This time, Defendants Moats and Sharp (sheriff and chief jailer) denied his application. Plaintiff claims they did so "solely due to his teaching on baptism." (Dkt. 70 ¶ 54.)

Plaintiff Morris is a former inmate at the jail. During his incarceration, he asked to be baptized by immersion. But the jail had a written policy banning inmate baptism. So all three Defendants (including Defendant Strop, a jailer) denied Plaintiff's request.

Plaintiffs filed this three-count lawsuit as a result. Count 1 claims Defendants banned inmate baptism—and denied Plaintiff Morris's own request for baptism—in violation of the First Amendment. Count 2 asserts a First Amendment retaliation claim on the theory that Defendants denied Plaintiff Jarrard's minister application because they did not like his "teaching on baptism." Count 3 claims the jail's written policies violated the First Amendment because they gave Defendants "unbridled discretion" over who to appoint as volunteer ministers at the jail. Plaintiffs assert these claims against Defendants solely in their individual capacities. And Plaintiffs only seek damages.[2]

Defendants now move for summary judgment on all three counts. (Dkts. 57; 58.) Plaintiff Jarrard also moves for summary judgment on Count 3. (Dkt.

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2 Plaintiffs have largely abandoned their equitable and official-capacity claims by explicitly withdrawing them or by not asserting/defending them on summary judgment. To the extent any such claims remain, they are moot or meritless. (*See* Dkts. 34 at 14 n.6; 57-3 at 5 & n.3, 24-25; 58-2 at 16-17; 68 at 2; 69 at 16; 70-2 at 1; 73 at 1-2.)

56.) The Court grants summary judgment to Defendants on Counts 2-3 and denies summary judgment on Count 1.

I. Standard of Review

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

II. Count 1

Count 1 claims Defendants refused to let Plaintiff Morris get baptized by immersion while he was an inmate at Polk County Jail, in violation of his free exercise rights under the First Amendment. Defendants say qualified immunity bars this claim. The Court finds qualified immunity protects Defendant Strop but not Defendants Sharp and Moats.

"Qualified immunity protects government officials performing discretionary functions from suits in their individual capacities unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Gates v. Khokhar*, 884 F.3d 1290, 1296 (11th Cir. 2018). An official asserting this defense must show that he "engaged in a discretionary function when he performed the acts of which the plaintiff complains." *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1264 (11th Cir. 2004). The burden then "shifts to the plaintiff to show that the defendant is *not* entitled to qualified immunity." *Id.* This requires plaintiff to show "(1) the defendant violated a constitutional right, and (2) this right was clearly established at the time of the alleged violation." *Id.*

Plaintiff Morris does not—and could not—dispute that Defendants acted within their discretionary authority when they banned inmate baptism and denied Plaintiff's own request for baptism. *See Davila v. Marshall*, 649 F. App'x 977, 982 (11th Cir. 2016) (jail officials "act[ed] within their discretionary authority when they made decisions about [an inmate's] access to his religious items"). So, to avoid qualified immunity, Plaintiff must show Defendants violated clearly established law under the Free Exercise Clause of the First Amendment.[3] That provision "prohibits prison officials from imposing a substantial burden on the free exercise of an inmate's sincerely held religious belief unless their actions or restrictions are reasonably related to legitimate penological interests." *Sajous v. Withers*, 2018 U.S. Dist. LEXIS 20820, 2018 WL 10151942, at *6 (S.D. Fla. Jan. 16, 2018); *see Robbins v. Robertson*, 782 F. App'x 794, 801 (11th Cir. 2019); *Prison Legal News v. McDonough*, 200 F. App'x 873, 877 (11th Cir. 2006). The Court considers whether Defendants violated this rule and, if so, whether the violation was egregious enough to preclude qualified immunity.

A. Defendants Sharp and Moats

1. Sincerely Held Religious Belief

To prove a free exercise claim under the First Amendment, Plaintiff must first identify a "sincerely held religious belief." *Cambridge Christian Sch., Inc. v. Fla. High Sch. Athletic Ass'n, Inc.*, 942 F.3d 1215, 1247 (11th Cir. 2019). Plaintiff

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3 In addressing Count 1, the Court's use of the term "Plaintiff" refers to Plaintiff Morris. In addressing Counts 2 and 3, its use of the term refers to Plaintiff Jarrard.

has done that here. He testified that, when he was incarcerated at Polk County Jail, he believed baptism by immersion was necessary for salvation. He said he "want[s] to be saved" and, to do that, he must "believe[] and [be] baptized." (Dkt. 66 at 43-45.) He said baptism is "about eternal salvation." (*Id.* at 86.) He said he got baptized as soon as he left the jail and, when he did so, he "drastically changed," became "a child of God" and had his name "written in the Lamb's Book of Life." (*Id.* at 87, 89.) He said he disagrees with "preachers who took the view on baptism that it was not necessary for salvation." (*Id.* at 65.) He said "[b]aptism is a submersion," not a "sprinkling." (*Id.* at 53-54, 69.) And he said non-immersion baptism is a "trick" grounded in "twisted descriptions [of] what God said." (*Id.* at 53-54, 69.)

When pressed, Plaintiff did say he was unsure whether he would have gone to Hell had he "suddenly . . . dropped dead without being baptized" while incarcerated at Polk County Jail. (*Id.* at 44-45.) But, as he explained, that uncertainty was not because baptism was optional but because he was "trying" to get baptized and Defendants "wouldn't let [him]." (*Id.* at 45.) Under those unique circumstances, he simply noted "God's the judge," he could not say for sure what God would do, and all he could go on was "what the Bible says," which was "believe[] and [be] baptized." (*Id.* at 44-45.) Given the totality of Plaintiff's testimony, a jury could easily find that, when he asked to be baptized in Polk County Jail, he believed baptism by immersion was necessary for salvation. That counts as a sincerely held religious belief. *See Cambridge*

Christian Sch., 942 F.3d at 1247 ("What constitutes a 'sincerely held belief' is not a probing inquiry.").

2. Substantial Burden

The Court next considers whether Defendants "impose[d] a substantial burden on the ability of [Plaintiff] to conduct himself in accordance with his religious beliefs." *Davila v. Gladden*, 777 F.3d 1198, 1205 (11th Cir. 2015). "[T]o constitute a substantial burden, the governmental action must significantly hamper one's religious practice." *Id.* This does not require an "insuperable" burden. *Thai Meditation Ass'n of Alabama, Inc. v. City of Mobile, Alabama*, 980 F.3d 821, 830 (11th Cir. 2020). But it does require something more than "inconvenience" or "an incidental effect on religious exercise." *Hoever v. Belleis*, 703 F. App'x 908, 912 (11th Cir. 2017); *Davila*, 777 F.3d at 1205. The burden must be "akin to significant pressure which directly coerces the religious adherent to conform his or her behavior." *Thai Meditation*, 980 F.3d at 830.[4]

A jury could easily conclude that standard is met here. Defendants Sharp and Moats enacted a written policy outright *banning* baptism at the jail.

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4 Some of this language is "derived from precedents interpreting the Religious Land Use and Institutionalized Persons Act and the Religious Freedom Restoration Act." *Hoever*, 703 F. App'x at 912. The Eleventh Circuit has repeatedly "applied similar definitions of 'substantial burden' when assessing claims under [those statutes] and the Free Exercise Clause." *Robbins v. Robertson*, 782 F. App'x 794, 802 n.5 (11th Cir. 2019). Other circuits have done the same thing. *See, e.g., Khan v. Barela*, 808 F. App'x 602, 615 n.12 (10th Cir. 2020); *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019); *C.L. for Urb. Believers v. City of Chicago*, 342 F.3d 752, 760 (7th Cir. 2003).

(Dkts. 62 at 25; 70 ¶ 10.) And Plaintiff testified that each Defendant denied his own request for baptism. (Dkts. 66 at 11-12; 73-1 ¶¶ 11-13.) This "completely prevent[ed] [Plaintiff] from engaging in religiously mandated activity." *Hoever*, 703 F. App'x at 912. And, as the Court held at the pleading stage, that counts as a substantial burden. (Dkt. 34 at 18.)[5]

Defendants counter that Plaintiff was baptized when he was ten years old and, to the extent he wanted to be baptized again, he could simply wait until he got out of jail because "baptism [need not] be accomplished in any particular time frame." (Dkt. 58-2 at 8-10.) But Plaintiff testified his childhood baptism "wasn't valid" because it involved sprinkling rather than immersion and his "heart wasn't ready." (Dkt. 66 at 53-55.) He said he "didn't know Jesus," he "didn't know nothing about the Bible," and he only went ahead with it "for [his] grandmother." (*Id.*) So, on Plaintiff's view, his prior baptism did not preclude the theological need for

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5 Reading Plaintiff's deposition testimony as a whole, it is not entirely clear that Defendant Moats did deny Plaintiff's request for baptism. But the parties' Local Rule 56.1 filings suggest this is a disputed fact. (Dkt. 70 ¶ 15 (citing Plaintiff's testimony that he "reached out to Johnny Moats and Johnny Moats said no").) And no one meaningfully argues otherwise. So the Court leaves it to a jury to unravel. Moreover, even if Defendant Moats did not personally deny Plaintiff's baptism request, a jury could find him responsible on a theory of supervisory liability. *See Mathews v. Crosby*, 480 F.3d 1265, 1270 (11th Cir. 2007) ("Supervisory liability under § 1983 occurs when . . . . a supervisor's custom or policy results in deliberate indifference to constitutional rights" or when "the supervisor directed subordinates to act unlawfully or knew that subordinates would act unlawfully and failed to stop them from doing so").

another one. (*See id.* at 54.) That belief controls. *See Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 95 (11th Cir. 2007) ("It is not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants' interpretations of those creeds. . . . The test is sincerity.").

Defendants' baptism-can-wait argument also fails because, again, it is based on Defendants' own reading of the Bible rather than Plaintiff's beliefs. (*See* Dkt. 58-2 at 9 ("[H]ard to discern from the Bible's text is any requirement that baptism be accomplished in any particular time frame.").) And even assuming Plaintiff did believe "baptism [need not] be accomplished in any particular time frame," that would not be dispositive. An inmate's free exercise rights are not limited to "now-or-never" religious practices. Plaintiff was incarcerated for a considerable period (almost three years) and the religious practice he wanted to pursue was integral to his faith. Requiring him to hold off on a soul-saving practice for several years imposed a "substantial burden" on his religious exercise under any definition of that phrase. *See Davila*, 777 F.3d at 1205 ("[A] burden is substantial when it prevents the plaintiff from participating in an activity motivated by a sincerely held religious belief").

3. Defendants' Justification

The final consideration is whether Defendants Sharp's and Moats's actions—in banning inmate baptism and denying Plaintiff's own request for baptism—were "reasonably related to legitimate penological interests." *Pesci v. Budz*, 935 F.3d 1159, 1165 (11th Cir. 2019). This is known as

the *Turner* test. *See Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). To prove a free exercise violation, Plaintiff must show Defendants' actions were *not* reasonably related to any legitimate penological interests. *Overton v. Bazzetta*, 539 U.S. 126, 132, 123 S. Ct. 2162, 156 L. Ed. 2d 162 (2003). Plaintiff has made that showing.

There is substantial evidence that Defendants Sharp and Moats banned inmate baptism and denied Plaintiff's baptism request because they personally believe baptism is not necessary for salvation. Both Defendants testified they hold that theological view. (Dkts. 61 at 30; 73-1 ¶ 25.) Plaintiff testified that, after he asked to be baptized, Defendant Sharp told him and a group of other inmates that "as baptism was not required for their salvation, the facility would not provide that service." (Dkt. 66 at 20-25.) And, on the day of Plaintiff's release, Defendant Moats told Plaintiffs' attorney *in writing* (while under the specter of litigation) that he banned inmate baptism based on his own religious views:

> The Bible sets forth what a person must do to receive salvation, not any church denomination nor the court. "If you declare with your mouth, Jesus is Lord, and believe in your heart that God raised him from the dead, you will be saved" (Romans 10:9). Baptism is not mentioned here as a requirement to salvation. "He who believes and is baptized will be saved; but he who does not believe will be condemned" (Mark 16:16). In the case of

> baptism and salvation, the Bible is clear that salvation is by grace through faith in Jesus Christ, not by works of any kind, including baptism (Ephesians 2:8-9). Our stance is since the Polk County Jail is a short term detention center, baptism can wait until after release since it is not a requirement for salvation.

(Dkt. 53-3 at 1-2.) To the extent Defendants Sharp and Moats prevented Plaintiff from getting baptized simply because they believe baptism is theologically unnecessary, their conduct is unrelated to legitimate penological interests and violates the First Amendment.

Defendants Moats and Sharp do not claim their religious views constitute a legitimate government interest (which would be an absurd argument). Instead, they cite other reasons for banning baptism, specifically "jail security and the prevention of slips and falls." (Dkt. 58-2 at 10.) But a jury could easily find those reasons are pretextual. Defendant Moats's written explanation to Plaintiffs' attorney—which is the only contemporaneous evidence we have—focuses on theology, not safety or security. Defendants' after-the-fact testimony about safety and security is mostly vague or conclusory. And there are several reasons to question whether inmate baptism really poses the risks Defendants cite. For example, Defendant Sharp testified inmate baptisms would take no more than 5-10 minutes. (Dkt. 62 at 17.) Plaintiff Jarrard testified he previously baptized inmates at the jail without issue. (Dkt. 60 at 52; *see* Dkt. 61 at 56-57.) Sheriff's

Office records reveal only *one* slip-and-fall incident at the jail (dated October 2021), which flatly contradicts Defendants' testimony that the jail sees "lot[s] of slip-and-fall claims." (Dkts. 61 at 71; 62 at 17-18; 70-4; 70-5.) Inmates routinely navigate wet surfaces in the jail, including when they shower or wash police cars. (Dkts. 62 at 18; 70-6.) And other jails and prisons across the country, including some in Georgia, allow inmates to get baptized by immersion without any apparent issues. (Dkt. 72-1 ¶ 43.) Given the totality of this evidence, a jury could find Defendants were motivated by illegitimate interests (theology) rather than the legitimate interests (safety and security) on which they now rely. *See Holley v. Seminole Cnty. Sch. Dist.*, 755 F.2d 1492, 1505 (11th Cir. 1985) ("[I]ssues of motivation are generally improper for disposition on summary judgment."). That is fatal under *Turner*.[6]

6 Defendants do not argue litigation-based pretextual justifications can save conduct that would otherwise be unconstitutional under *Turner*. And the weight of authority does not support that view. *See Haze v. Harrison*, 961 F.3d 654, 659 n.3 (4th Cir. 2020) (rejecting alleged safety interest because "the record does not reflect that this was the actual reason" for defendants' conduct); *Salahuddin v. Goord*, 467 F.3d 263, 276-77 (2d Cir. 2006) ("Under both *Turner* and *O'Lone*, . . . prison officials must show that the disputed official conduct was motivated by a legitimate penological interest. Post hoc justifications with no record support will not suffice."); *Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) ("Prison officials are not entitled to the deference described in *Turner* . . . if their actions are not actually motivated by legitimate penological interests at the time they act."). Neither the Supreme Court nor the Eleventh Circuit has squarely decided the issue. But there is good reason to believe they would follow the majority view. *See Thornburgh v. Abbott*, 490 U.S. 401,

4. Cleary Established Law

Plaintiff has presented enough evidence to show a constitutional violation, namely, that Defendants Sharp and Moats banned inmate baptism and denied his baptism request in violation of the Free Exercise Clause. But, to get past summary judgment, Plaintiff must also show these Defendants violated clearly established law. To be clearly established, the law must be "so clear that, given the specific facts facing a particular officer, one must say that every reasonable official would have understood that what he is doing violates the Constitutional right at issue." *Gates*, 884 F.3d at 1302. "The critical inquiry is whether the law provided [officials] with fair warning that their conduct violated the [Constitution]." *Coffin v. Brandau*, 642 F.3d 999, 1013 (11th Cir. 2011). "Fair warning is most commonly provided by materially similar precedent." *Gates*, 884 F.3d at 1296. But "[a]uthoritative judicial decisions may [also] establish broad principles of law that are clearly applicable to the conduct at issue." *Id.* Or "it may be obvious from explicit statutory or constitutional statements that conduct is unconstitutional." *Id.* at 1296-97. "In all of these circumstances, qualified

415, 109 S. Ct. 1874, 104 L. Ed. 2d 459 (1989) (*Turner* requires courts to assess "the governmental *objective*" and "[t]he legitimacy of the Government's *purpose*" (emphasis added)); *Turner*, 482 U.S. at 98 (rejecting alleged security concerns because the government "pointed to nothing in the record suggesting that the [challenged] regulation was viewed as preventing such [concerns]"); *Pesci*, 935 F.3d at 1169-70 (noting, in the *Turner* context, that "a reviewing court must always be careful to make certain that prison administrators are not pretextually using alleged concerns in order to punish an inmate for his or her political or other views").

immunity will be denied only if the preexisting law by case law or otherwise makes it obvious that the defendant's acts violated the plaintiff's rights in the specific set of circumstances at issue." *Id.* at 1297. "[T]he unlawfulness of the conduct must be apparent from pre-existing law." *Coffin*, 642 F.3d at 1013.

Plaintiff has shown a violation of clearly established law under these standards. Although he cites no materially similar precedent, this is one of those rare cases where Defendants' conduct violated the First Amendment "as a matter of obvious clarity." *Coffin*, 642 F.3d at 1014. No reasonable officer could think it is lawful to ban inmate baptism, including for those who believe baptism is essential for salvation, simply because the officer personally holds a different religious view. Such a ban would obviously fail the *Turner* and "substantial burden" tests—both of which are clearly established in the caselaw—and would violate the Free Exercise Clause on its face. Defendants Sharp and Moats had no reason to doubt—and several reasons to credit—the sincerity and religiousness of Plaintiff's belief in baptism. (*See, e.g.*, Dkts. 61 at 32; 66 at 29; 66-3 at 1.) They knew that, by banning baptism and denying Plaintiff's request to be baptized, they were "completely prevent[ing]" Plaintiff and others from "engaging in religiously mandated activity." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004). And they went ahead anyway based solely on their own religious view that baptism is unnecessary. That was an obvious First Amendment violation. No reasonable

officer could conclude otherwise. So qualified immunity does not apply to these two Defendants.

B. Defendant Strop

Defendant Strop is a different story. Unlike the others, Defendant Strop was not involved in developing the jail's baptism ban. Nothing suggests he holds any religious views about baptism. (Dkt. 63 at 10 (testifying he is "agnostic" about religion).) He knows nothing about Defendant Moats's religious views. (Dkt. 63 at 11.) He never "personally looked at the role of baptisms in a particular faith." (*Id.* at 10.) And there is no evidence he believed—or should have believed—the jail's baptism ban was based on theology. He did deny Plaintiff's baptism request but, in doing so, he simply applied the jail's written policy and "communicat[ed] . . . decisions made by Mr. Sharp." (*Id.* at 11, 19-21.) Plaintiff has not shown Defendant Strop's actions were obviously unrelated to "legitimate penological interests" or otherwise unconstitutional under *Turner*. So Defendant Strop is entitled to qualified immunity. *See Cavin v. Heyns*, 2017 U.S. App. LEXIS 22582, 2017 WL 11621988, at *4 (6th Cir. Sept. 12, 2017) ("[Plaintiff] failed to overcome the defendants' claim of qualified immunity because he did not show that a balancing of the *Turner* factors clearly established that the prison officials were violating his constitutional right."); *Barnes v. Furman*, 629 F. App'x 52, 57 (2d Cir. 2015) ("When officials follow an established prison policy," they are entitled to qualified immunity if "a reasonable officer might have believed that the challenged order was lawful in light of legitimate penological interests supporting the directive").

C. Conclusion

Defendant Strop is entitled to summary judgment on Count 1. Defendants Sharp and Moats are not, because a jury could conclude they violated clearly established law under the First Amendment.[7]

III. Count 2

Plaintiff Jarrard asserts a First Amendment retaliation theory in Count 2. He claims Defendants denied his application to be a volunteer minister because, when he previously volunteered at the jail, he taught inmates that baptism by immersion is necessary for salvation. Defendants invoke qualified immunity as a defense to this claim. Plaintiff does not dispute that Defendants acted within their discretionary authority, so, to defeat qualified immunity, he must show Defendants violated clearly established law. He has not done that.[8]

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7 Defendants briefly argue that the Prison Litigation Reform Act "bars all but nominal and punitive damages." (Dkt. 72 at 7.) This argument goes to damages rather than liability. And Defendants give it short shrift in their papers. (Dkts. 58-2 at 16; 72 at 7.) So the Court declines to address it at this stage.

8 Count 2 also claims Defendants "fail[ed] to respond" to Plaintiff's most recent minister application in violation of the First Amendment. (Dkt. 53 ¶ 80.) But the Sheriff's Office closed its jail ministry program during the COVID-19 pandemic and only reopened the program earlier this year (at which point it did respond to Plaintiff's application). (Dkts. 56-3; 70 ¶ 62; 70-9.) That explains the delayed response. (Dkt. 70 ¶ 63.) And, even if a jury could read in a more sinister explanation, Plaintiff's "delayed-response" claim would still fail for the same reasons as his "denied-application" claim.

A. Legal Framework

As an initial matter, the parties dispute whether Count 2 is governed by the legal framework established in *Pickering v. Board of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) and its progeny (together, "*Pickering*").[9] So the Court begins with that threshold issue.

"To establish a First Amendment retaliation claim, a plaintiff must show that (1) [his] speech was constitutionally protected; (2) [he] suffered adverse conduct that would likely deter a person of ordinary firmness from engaging in such speech; and (3) there was a causal relationship between the adverse conduct and the protected speech." *Castle v. Appalachian Tech. Coll.*, 631 F.3d 1194, 1197 (11th Cir. 2011). *Pickering* fleshes out the meaning of the first element—constitutionally protected speech—where the speaker is a government employee. It says, "for a government employee's speech to have First Amendment protection, the employee must have (1) spoken as a citizen and (2) addressed matters of public concern." *Boyce v. Andrew*, 510 F.3d 1333, 1341-42 (11th Cir. 2007). This makes public employee speech less protected than private citizen speech. *See White v. Sch. Bd. Hillsborough Cnty., Fla.*, 2009 U.S. App. LEXIS 1532, 2009 WL 174944, at *2 (11th Cir. Jan. 27, 2009); *Bonds v. Milwaukee Cnty.*, 207 F.3d 969, 976-77 (7th Cir. 2000) ("[G]overnment [may] regulate the speech of

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9 *Pickering's* progeny includes—among other cases—*Connick v. Myers*, 461 U.S. 138, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983) and *Garcetti v. Ceballos*, 547 U.S. 410, 126 S. Ct. 1951, 164 L. Ed. 2d 689 (2006).

its employees in a manner that, outside the employer-employee relationship, would violate the First Amendment."). But that is warranted because "the state as employer has a special interest in regulating its employees' behavior in order to avoid the disruption of public functions." *McCabe v. Sharrett*, 12 F.3d 1558, 1568 (11th Cir. 1994).

Plaintiff argues *Pickering* does not apply here because he was "a volunteer rather than a paid employee." (Dkt. 70-2 at 7.) But "courts have extended the application of the *Pickering* analysis to cover more than just traditional public employees." *McKinley v. Kaplan*, 262 F.3d 1146, 1150 n.5 (11th Cir. 2001). The Supreme Court has extended it to government contractors. *See Bd. of Cnty. Comm'rs, Wabaunsee Cnty., Kan. v. Umbehr*, 518 U.S. 668, 673 (1996). The Eleventh Circuit has extended it to unpaid government appointees and other public sector volunteers. *See Rodin v. City of Coral Springs, Fla.*, 229 F. App'x 849, 852, 855 (11th Cir. 2007) (applying *Pickering* to "a volunteer firefighter, not a paid city employee"); *McKinley*, 262 F.3d at 1150 n.5 (applying *Pickering* to "an unpaid political appointee to a public advisory board" despite expressing reservations). And at least two courts have extended it specifically to volunteer government chaplains. *Mustapha v. Monken*, 2013 U.S. Dist. LEXIS 88775, 2013 WL 3224440, at *6 (N.D. Ill. June 25, 2013); *Mayfield v. City of Oakland*, 2007 U.S. Dist. LEXIS 59947, 2007 WL 2261555, at *4 (N.D. Cal. Aug. 6, 2007). So Plaintiff's status as a county volunteer does not exempt him from *Pickering*.

Plaintiff next argues that, even if some

government volunteers can trigger *Pickering*, his volunteer position (jail minister) does not do so because it is not sufficiently "employment-like." (Dkt. 71 at 10 n.2.) He cites no evidence or authority for this proposition. And it is not entirely clear what he means. But, even assuming some threshold level of "employment-likeness" were required, the record suggests that threshold is present here. The Sheriff's Office application form refers to jail ministry as "volunteer work." (Dkt. 60-1 at 1, 3; *see also* Dkt. 70 ¶ 43 (Plaintiff accepting this characterization).) It notes applicants can be "terminat[ed]" once "hired." (Dkt. 60-1 at 5.) It requires applicants to sign the same confidentiality agreement as employees. (*Id.* at 19.) And it requires applicants to sign other employment-like forms, including a waiver of liability and a criminal history check. (*Id.* at 18, 20.) The Sheriff's Office also "hired" a *lead* jail minister, gave him "staff," put him in charge of volunteer ministers, and gave him authority to terminate those ministers. (Dkts. 60 at 87, 155; 61 at 28; 62 at 19.) All of this sounds "employment-like." That other courts have applied *Pickering* to volunteer ministers further suggests there is no impediment to doing so here. *See Mustapha*, 2013 U.S. Dist. LEXIS 88775, 2013 WL 3224440, at *6; *Mayfield*, 2007 U.S. Dist. LEXIS 59947, 2007 WL 2261555, at *4.

Finally, Plaintiff claims that, even if *Pickering* applies to volunteer jail ministers, it does not apply to him because he was not actually a jail minister when Defendants retaliated against him—he was merely an *applicant* who was trying to become one. (Dkt. 71 at 10 n.2; *see* Dkt. 70-2 at 8-9.)

But "[t]he *Pickering* line of cases protects against . . . . [a] refusal to hire." *Goffer v. Marbury*, 956 F.2d 1045, 1049 n.1 (11th Cir. 1992); *see Worrell v. Henry*, 219 F.3d 1197, 1207 (10th Cir. 2000) ("This circuit has applied the *Pickering* balancing to hiring decisions. Other circuits have taken the same approach.").[10] So *Pickering* applies to job applicants like Plaintiff. Moreover, Plaintiff's theory is that Defendants refused to hire him in retaliation for what he previously told inmates *when he worked at the jail*. There is no real distinction between terminating an employee for his or her speech on the job (which is the paradigmatic *Pickering* scenario) and refusing to hire an employee for his or her speech on the job (which is what we have here). Plaintiff does not explain why *Pickering* applies to the former but not the latter. Nor could he. Both scenarios implicate the same rationale underlying

10 *See also De La Garza v. Brumby*, 2013 U.S. Dist. LEXIS 26675, 2013 WL 754260, at *4 n.4 (S.D. Tex. Feb. 27, 2013) ("[C]ourts have consistently applied [*Pickering*] to hiring cases, and . . . *Pickering* actually has its origins in refusal-to-hire cases."); *Joyce v. Block*, 2000 WL 34236016, at *3 (W.D. Wis. Aug. 9, 2000) ("[T]he *Connick-Pickering* test is used to determine whether the employer has the right to refuse to hire a prospective employee despite the protected speech."). Courts have also applied *Pickering* where the government refused to engage a third-party contractor. *See, e.g., Heritage Constructors, Inc. v. City of Greenwood, Ark.*, 545 F.3d 599, 601 (8th Cir. 2008) (applying *Pickering* to a contractor whose "previous relationship with the city ended four years before [the alleged retaliation]"); *Oscar Renda Contracting, Inc. v. City of Lubbock, Tex.,* 463 F.3d 378, 380, 382-83 (5th Cir. 2006) (applying *Pickering* to "a contractor whose bid has been rejected by a city in retaliation for the contractor's exercise of freedom of speech where the contractor had no pre-existing relationship with that city").

Pickering: "the state as employer has a special interest in regulating its employees' behavior in order to avoid the disruption of public functions." *McCabe*, 12 F.3d at 1568; *see Hubbard v. EPA*, 949 F.2d 453, 460, 292 U.S. App. D.C. 278 (D.C. Cir. 1992) (applying *Pickering* to a hiring decision and observing that different rules were not required "[m]erely because an employer is *hiring* rather than *firing*").

Plaintiff has not shown *Pickering* is inapplicable or that another framework should control. So the Court evaluates Count 2 under *Pickering*.

B. Citizen Speech

To establish a First Amendment claim under *Pickering*, a public employee must first show that the speech for which he claims he suffered retaliation was made "in his capacity as a [private] citizen." *Moss v. City of Pembroke Pines*, 782 F.3d 613, 618 (11th Cir. 2015); *see Williams v. City of Atlanta*, 618 F. App'x 957, 959 (11th Cir. 2015) ("As a threshold matter, the employee must also show that he spoke in his capacity as a citizen."). "If instead of speaking as a citizen he spoke as an employee in furtherance of his ordinary job duties, his speech was not protected by the First Amendment and his claim fails." *Olbek v. City of Wildwood, FL*, 850 F. App'x 714, 719 (11th Cir. 2021).

"Whether the plaintiff spoke as an employee is a practical inquiry and a few of the non-dispositive factors that [courts] consider are [the employee's] job description, whether the speech occurred at the workplace, and whether the speech

concerned the subject matter of the employee's job." *Id.* Ultimately, speech is not protected if it "owes its existence to the employee's professional responsibilities" or was "made in accordance with or in furtherance of [those] responsibilities." *Alves v. Bd. of Regents of the Univ. Sys. of Georgia*, 804 F.3d 1149, 1161-62 (11th Cir. 2015); *see id.* at 1161 ("[T]he controlling factor is whether the employee's statements or expressions were made pursuant to [his] official duties."). In applying this test, courts define an employee's responsibilities broadly rather than narrowly. This makes it more likely that an employee's statements will fall within those responsibilities and count as employee speech. *See Abdur-Rahman v. Walker*, 567 F.3d 1278, 1284 (11th Cir. 2009) ("We have consistently discredited narrow, rigid descriptions of official duties urged upon us to support an inference that public employees spoke as private citizens."); *see, e.g., Fernandez v. Sch. Bd. of Miami-Dade Cnty., Fla.*, 898 F.3d 1324, 1334 (11th Cir. 2018) (defining employees' duties to include "broad administrative responsibilities" and "fulfilling their roles as coordinators, psychologists, committee members, and supervisors").

Plaintiff's theory is that Defendants retaliated against him for teaching Polk County Jail inmates that baptism by immersion is necessary for salvation. (Dkt. 70 ¶ 54.) So, to succeed on his claim, Plaintiff must show he taught that theology as a private citizen rather than a volunteer jail minister. He has not made that showing. As a jail minister, Plaintiff was responsible for "preach[ing] and talk[ing] to the inmates about religion." (Dkt. 61 at

24). That is exactly what he did when he taught inmates about his religious views on baptism. His lessons "occurred at [Plaintiff's] workplace"—the jail where he volunteered. *Olbek*, 850 F. App'x at 719. And it is undisputed that Plaintiff conveyed his message "in the course of performing [his] job." *Alves*, 804 F.3d at 1164. Plaintiff's speech "cannot reasonably be divorced from [his ministry] responsibilities." *Id.* So his statements count as employee speech and are not protected by the First Amendment. *Id.*

Plaintiff claims religious speech can *never* be government employee speech under the First Amendment. (Dkt. 70-2 at 10.) But he cites no authority for that proposition. And it makes no sense. The government employs several chaplains. *See Benning v. Georgia*, 391 F.3d 1299, 1310 (11th Cir. 2004) ("State and federal funds provide government chaplains for Congress and state legislatures, the armed forces, and prisons."). That is allowed. *See Murphy v. Derwinski*, 990 F.2d 540, 547 (10th Cir. 1993) ("Government chaplaincy programs have been upheld in the face of Establishment Clause challenges."). A government chaplain's job, like any job, involves official duties. So, when a chaplain discusses religion "pursuant to [those] duties," he engages in employee speech under binding First Amendment law. *Garcetti*, 547 U.S. at 421. To the extent Plaintiff believes chaplains should be excluded from this rule as a matter of policy, that is an argument for Congress, not the Court.[11]

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11 Plaintiff's policy argument is dubious anyway. He thinks the government should not be able to regulate "religious

Plaintiff also argues his "relevant speech is broader than simply ministering to inmates." (Dkt. 70-2 at 10.) He says it includes "advocacy," a "protest outside the jail," "letters to the Sheriff," and "filing . . . this lawsuit." (*Id.* at 8, 10-11.) But, in his Rule 56.1 filings, Plaintiff admits he was retaliated against "solely due to his teaching on baptism and not for any other expression such as his protest in front of the jail." (Dkt. 70 ¶ 54.) That admission controls. *See* LR 56.1, NDGa. Besides, Defendants expelled Plaintiff from the jail in 2017 before most of his non-ministry speech occurred. And, read in Plaintiff's favor, the record suggests they did so specifically because he taught inmates about his view on baptism. (*See, e.g.*, Dkts. 60 at 37-43; 60-8; 73-1 ¶ 63.) When Defendants denied Plaintiff's minister application a few years later—which is the retaliatory action alleged in this case—nothing suggests their rationale for keeping him out of the jail had changed. (Dkt. 70 ¶ 54.)[12] Plaintiff himself testified that the reason for which he was "originally terminated"—his "teaching on baptism"—has been "at the heart of [this case] from the beginning" and was the sole reason Defendants denied his application. (Dkts. 60 at 124; 70 ¶ 54.) Plaintiff

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instruction." (Dkt. 70-2 at 10.) But, once you accept the government can hire people to deliver religious instruction, it is hard to say the government cannot exercise *any* control over that instruction.

12 Or, to put it more accurately, nothing suggests Defendants' rationale had changed *in a way that supports Plaintiff's claim*. To the extent Defendants were motivated by new rationales at all, the record suggests those rationales were legitimate, not retaliatory. (*See* Dkt. 70 ¶¶ 45-53.)

presented that "teaching" as a jail minister rather than a private citizen. So the speech is not protected, and his retaliation claim fails. *See Boyce*, 510 F.3d at 1343 ("If the government employee . . . was speaking as an employee, then there can be no First Amendment issue, and the constitutional inquiry ends.").

C. Public Concern

Even if Plaintiff had spoken as a private citizen, his retaliation claim would still fail because his speech addressed "matters of only personal interest" rather than "a matter of public concern." *Alves*, 804 F.3d at 1162. "The meaning of the term 'public concern' is not without ambiguity," and courts have not always been clear or consistent in how they approach the concept. *Kurtz v. Vickrey*, 855 F.2d 723, 726 (11th Cir. 1988). But a few principles are well-established. "Speech is considered to deal with a matter of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community, or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public." *United States v. Fleury*, 20 F.4th 1353, 1364 (11th Cir. 2021). "This determination depends on the content, form, and context of the speech as revealed by the whole record." *Booth v. Pasco Cnty., Fla.*, 757 F.3d 1198, 1214 (11th Cir. 2014). "But the most important factor is the content of the speech." *Gomez v. City of Doral*, 2022 U.S. App. LEXIS 85, 2022 WL 19201, at *6 (11th Cir. Jan. 3, 2022). "A court may also consider the employee's attempt to make [his] concerns public along with the

employee's motivation in speaking." *Alves*, 804 F.3d at 1162.

Plaintiff has not met his burden on the public-concern element because his argument is only one sentence long and includes no citations to evidence or authority.[13] "For an issue to be adequately raised in [a] brief, it must be . . . supported by arguments and citations to the record and to relevant authority." *Whitten v. Soc. Sec. Admin., Comm'r*, 778 F. App'x 791, 793 (11th Cir. 2019). Where a party does not "support [his] arguments with sufficient detail"—including with "citations to authority or significant discussion"—courts "consider these arguments abandoned and do not consider them." *Nat'l Mining Ass'n v. United Steel Workers*, 985 F.3d 1309, 1327 n.16 (11th Cir. 2021); *see Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012) ("A passing reference to an issue in a brief is not enough, and the failure to make arguments and cite authorities in support of an issue waives it."). This principle applies here, meaning Plaintiff effectively

13 Plaintiff's one-sentence argument reads: "Religious instruction for incarcerated individuals is generally a matter of public concern because of its importance for connecting inmates to the community upon their release, for tending to their spiritual well-being while detained, and for furthering their salvation in the afterlife." (Dkt. 70-2 at 10-11.) Plaintiff does make a separate attempt to show his *non-ministry* speech addressed matters of public concern. (*Id.* at 11.) But the Court has already concluded that speech is immaterial to his retaliation claim. And Plaintiff cites no evidence or authority in connection with that speech either. Notably, this same problem—a failure to cite evidence or authority—also afflicts Plaintiff's argument on the citizen-speech element. (*Id.* at 9-10.)

concedes his speech addressed matters of private interest rather than public interest.

But even if Plaintiff had properly sought to discharge his burden on the public-concern element, the Court does not believe he could have done so. Nothing suggests Plaintiff's personal view of baptism is "a subject of legitimate news interest" or "a matter of political, social, or other concern to the community" (content). *Fleury*, 20 F.4th at 1364; *see Daniels v. City of Arlington, Tex.*, 246 F.3d 500, 504 (5th Cir. 2001) ("[P]ersonal religious conviction . . . simply is not a matter of 'public concern.'"). Plaintiff conveyed his view "to a limited [pool of inmates] rather than the public at large" (form). *Booth*, 757 F.3d at 1215; *see Watts*, 495 F.3d at 1293 (no public concern where plaintiff "provided private counsel to a single patient within the confines of a counseling session"). And he did so inside the workplace, as part of his job, with the purpose of "get[ting] as many folks baptized into Christ as [he] can before Jesus returns" (context). (Dkt. 60-4 at 3); *see Fiedor v. Fla. Dep't of Fin. Servs.*, 440 F. Supp. 3d 1303, 1311 (N.D. Fla. 2020) (no public concern where plaintiff had "religious conversations . . . . in the workplace" in order to "counsel[]" and "help"). This is a world away from core public concerns like "corruption" and "the misuse of state funds." *O'Neal*, 2022 U.S. App. LEXIS 20493, 2022 WL 2921303, at *3; *BMI Salvage Corp. v. Manion*, 366 F. App'x 140, 144 (11th Cir. 2010); *Oladeinde v. City of Birmingham*, 230 F.3d at 1292. And Plaintiff makes no effort to show the concept of public concern stretches far enough to apply.

Given the totality of the record, the Court

finds Plaintiff's "communication of his personal religious views . . . is not speech addressing a legitimate public concern." *Daniels*, 246 F.3d at 504; *see Power v. Off. of Chatham Cnty. Pub. Def.*, 2018 U.S. Dist. LEXIS 132658, 2018 WL 3747460, at *7 (S.D. Ga. Aug. 6, 2018) (no public concern where plaintiff "merely expresse[d] a personal belief that, in [her] opinion, the bible condemns gay marriage and homosexuality"). This dooms Plaintiff's claim because "a public employee who does not speak as a citizen on a matter of public concern has no First Amendment cause of action based on his . . . employer's reaction to the speech." *Gilder-Lucas v. Elmore Cnty. Bd. of Educ.*, 186 F. App'x 885, 887 (11th Cir. 2006).

D. Clearly Established Law

Even if Plaintiff did speak as a private citizen on matters of public concern—meaning his speech was protected—Defendants could reasonably have concluded otherwise. So qualified immunity applies. Whether speech is protected under *Pickering* is an "intensely fact-specific legal determination[]," "require[s] ad hoc case-by-case" analysis, and is "not susceptible to bright-line rules." *Tucker v. Talladega City Sch.*, 171 F. App'x 289, 293 (11th Cir. 2006); *Goffer v. Marbury*, 956 F.2d 1045, 1050 (11th Cir. 1992). "The cases are, therefore, not good sources for rules of general application." *Goffer*, 956 F.2d at 1050. And "a defendant in a First Amendment suit will only rarely be on notice that his actions are unlawful." *Tucker*, 171 F. App'x at 293.

Defendants did not have that notice here. Plaintiff does not cite, and the Court has not found, any binding precedent involving materially similar

facts. And this is not one of those rare cases where, despite the absence of controlling authority, Plaintiff's speech was so obviously protected that no reasonable official could have concluded otherwise. *See Coffin*, 642 F.3d at 1015 ("[I]f case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant."). As explained above, several courts have applied *Pickering* to government volunteers (not just government employees) and hiring decisions (not just decisions about current employees). When a jail minister discusses religion with inmates at his jail, it is at least debatable that he is acting "pursuant to [his] official duties" such that his statements are not protected under *Pickering*. *Alves*, 804 F.3d at 1161; *see Malcolm v. City of Miami Police*, 574 F. App'x 881, 882 (11th Cir. 2014) ("[T]he federal violation must have been beyond debate at the time; otherwise qualified immunity applies."). And several courts have suggested *Pickering* does not protect expressions of personal religious belief because those expressions do not implicate matters of public concern. The Eleventh Circuit has not resolved any of these issues in Plaintiff's favor. And, even if other courts have, that only underscores the lack of clarity in this area and the need for qualified immunity. *See Wilson v. Layne*, 526 U.S. 603, 618, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999) ("If judges . . . disagree on a constitutional question, it is unfair to subject [officials] to money damages for picking the losing side of the controversy."); *Parrish v. Nikolits*, 86 F.3d 1088, 1094 (11th Cir. 1996) ("[P]laintiffs' argument that the law was clearly established . . . is

further undermined by the split of the circuits.").[14]

E. Conclusion

Defendants are entitled to summary judgment on Count 2 because Plaintiff has not shown they violated clearly established law when they denied his application to be a volunteer minister at the jail.[15]

IV. Count 3

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14 The Court is aware, for example, that some circuits have suggested religious expression does implicate matters of public concern. *See, e.g., Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954, 966 (9th Cir. 2011) ("[S]peech concerning religion is unquestionably of inherent public concern."); *Cochran v. City of Atlanta*, 150 F. Supp. 3d 1305, 1313 n.1 (N.D. Ga. 2015) ("The circuits are split as to whether speech is necessarily a comment on a matter of public concern when the content of the speech is religious expression.").

15 To the extent Count 2 asserts a *free exercise* retaliation claim, Plaintiff does not clearly (1) separate that claim from his *free speech* retaliation claim, (2) argue a different standard applies, (3) spell out that standard, or (4) explain why each element of that standard is met—and met obviously enough to avoid qualified immunity — based on specific citations to evidence and authority. Nor does Plaintiff respond directly to Defendants' assertion that *Pickering* "applies to speech or belief that happens to be religious." (Dkt. 57-3 at 7.) Courts often treat free-exercise and free-speech claims together. *See, e.g., LaCroix v. Town of Fort Myers Beach, Fla.*, 38 F.4th 941, 947 (11th Cir. 2022) ("[Plaintiff] references the Free Exercise and Free Speech Clauses in separate claims, but we treat them together."); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421, 213 L. Ed. 2d 755 (2022) (noting "the Free Exercise and Free Speech Clauses of the First Amendment . . . . work in tandem" and "the Free Speech Clause provides overlapping protection for expressive religious activities"). And the Eleventh Circuit has applied elements of *Pickering* to free exercise claims. *See Shahar v. Bowers*, 114 F.3d 1097, 1111 n.27 (11th Cir. 1997). But the Supreme Court has declined to

In Count 3, Plaintiff Jarrard claims the jail's written policies violated the First Amendment because they gave Defendants "unbridled discretion" over who to appoint as volunteer ministers at the jail. Defendants say qualified immunity bars this claim. Plaintiff does not dispute that Defendants acted within their discretionary authority when they enacted the challenged policies. So, to prevail, Plaintiff must show the policies were clearly unlawful. Plaintiff has not made that showing.

Over the years, the Polk County Sheriff Office has repeatedly revised its written policy governing the application and approval process for volunteer jail ministers. An early version of the policy was only a sentence long: "Clergymen and religious advisors wishing to hold services or conduct programs in the jail must make written application to the Polk County Sheriff's Office with supporting

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address "whether the Free Exercise Clause may sometimes demand a different analysis" when it comes to *Pickering's* threshold requirement for "private speech on a matter of public concern." *Kennedy*, 142 S. Ct. at 2425 n.2. That is, while the Free Speech Clause protects government employee speech only if the employee spoke as a private citizen on matters of public concern, "[i]t remains an open question . . . if a similar analysis can or should apply to free-exercise claims in light of the history and tradition of the Free Exercise Clause." *Id.* at 2433 (Thomas, J. concurring); *see Fiedor v. Fla. Dep't of Fin. Servs.*, 440 F. Supp. 3d 1303, 1311 (N.D. Fla. 2020) (suggesting "[t]he principles derived from *Pickering* for the Freedom of Speech Clause apply also to the Free Exercise Clause, but with a twist"). Plaintiff gets into none of this. And the Court declines to do it for him. *See Resol. Tr. Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("[T]he onus is upon the parties to formulate arguments."). Plaintiff has abandoned any claim for free exercise retaliation that is not otherwise barred by the Court's adjudication of his free speech claim.

documentation, attend a training session and then be approved by the Jail Administrator." (Dkt. 53-4 at 2.) A later version included more detail:

> The Polk County Sheriff's Office encourages Clergy from the community to minister to the inmates. Clergymen and religious advisors wishing to hold services or conduct programs in the jail must submit a volunteer application. Members of the clergy allowed within the inner security perimeter or allowed contact visitation, must complete background checks, including the jail ministry program.

(Dkt. 53-5 at 3.) Plaintiff applied to be a jail minister under both policies. And, both times, Defendants denied his request.

Plaintiff claims the policies were unconstitutional because they "provide[d] no standards for the exercise of any discretion, and no time limits for decision-making, thus allowing for arbitrary decisions or decisions based on the religious preferences of jail administrators." (Dkt. 53 ¶ 87.) This argument is based on the "unbridled-discretion doctrine," which makes it unlawful to "vest[] unbridled discretion in a government official over whether to permit or deny expressive activity" in a government forum. *Tracy v. Fla. Atl. Univ. Bd. of Trustees*, 980 F.3d 799, 809 (11th Cir. 2020). Such discretion "is constitutionally suspect because it creates the opportunity for undetectable censorship and signals a lack of narrow tailoring." *Burk v.*

Augusta-Richmond Cnty., 365 F.3d 1247, 1256 (11th Cir. 2004). To avoid this risk, the government must issue "narrowly drawn, reasonable, and definite standards to guide the official's decision." *Tracy*, 980 F.3d at 809. Those standards should include a "time limit within which [the official] must make a decision" on any application to speak in the forum. *Barrett v. Walker Cnty. Sch. Dist.*, 872 F.3d 1209, 1222 (11th Cir. 2017).

Defendants' jail policies arguably violated this rule. But the Court cannot say that violation was obvious enough to defeat qualified immunity. Neither the Supreme Court nor the Eleventh Circuit has ever applied the unbridled-discretion doctrine on facts like these. And it is not clear they would. "The unbridled discretion doctrine is usually reserved for permitting schemes" that "require individuals to obtain permission before engaging in speech activities." *LaCroix*, 38 F.4th at 953; *Tracy*, 980 F.3d at 809 ("The unbridled-discretion doctrine generally applies to licensing or permitting schemes."). What we have here does not comfortably fit that description. Instead, on at least one reasonable view of the facts, Defendants' policies are more akin to a set of *hiring* procedures. *See Freeman v. Sample*, 814 F. App'x 455, 462 n.1 (11th Cir. 2020) ("[T]he protection of qualified immunity extends to mistakes in judgment, whether the mistake is one of fact or one of law."). Plaintiff cites no authority for applying unbridled-discretion principles in that context. The most he claims is that "permitting cases provide a close fit." (Dkt. 70-2 at 21.) But, even if that were true, qualified immunity would still apply because "officials are not

obligated to be creative or imaginative in drawing analogies from previously decided cases." *Washington v. Rivera*, 939 F.3d 1239, 1245 (11th Cir. 2019). A reasonable official could believe the permitting/hiring distinction mattered. *Merricks v. Adkisson*, 785 F.3d 553, 559 (11th Cir. 2015) ("Minor variations in some facts . . . might be very important and, therefore, be able to make the circumstances facing an official materially different than the pre-existing precedents.").

Another thing that makes this case different is the venue. The challenged policies regulated admission into a jail, a uniquely sensitive nonpublic forum. *See McDonald v. City of Pompano Beach, Fla.*, 556 F. Supp. 3d 1334, 1352 (S.D. Fla. 2021) (noting jails are nonpublic forums). Plaintiff cites no controlling authority saying unbridled-discretion principles apply to that forum. He relies on *Barrett* but that case focused on "limited public fora," which the court expressly distinguished from "nonpublic fora." *See Barrett*, 872 F.3d at 1225-26. *Barrett* also clarified that, while earlier unbridled-discretion cases claimed to involve nonpublic forums, they actually involved limited public forums. *Id.* So *Barrett* does not conclusively resolve whether unbridled discretion principles apply to nonpublic forums at all, much less to jails specifically.

Although this is a thorny area of law, the outcome here is relatively straightforward. A reasonable official could think the unbridled-discretion doctrine does not apply to a jail's policies and procedures for appointing volunteer ministers. So Defendants did not violate clearly established law by enacting the policies here. Qualified

immunity bars Count 3.[16]

V. Conclusion

Plaintiff Jarrard's Motion for Partial Summary Judgment (Dkt. 56) is **DENIED**. Defendants' Motion for Summary Judgment as to Plaintiff Jarrard's Claims (Dkt. 57) is **GRANTED**. Defendants' Motion for Summary Judgment as to Plaintiff Morris's Claim (Dkt. 58) is **GRANTED IN PART** and **DENIED IN PART**. Count 1 can proceed against Defendants Sharp and Moats, but not against Defendant Strop. Counts 2-3 cannot proceed. The Court **DISMISSES** this action as to Defendant Strop.

The Court **ORDERS** this case to mediation. The parties may retain a private mediator at their own expense. Or they may ask the Court to appoint a magistrate judge to conduct the mediation. The parties are not required to pay for mediation by a magistrate judge.

The parties shall advise the Court of their mediation preference no later than 30 days after the date of this Order. If the parties elect to retain their own mediator, they shall identify the mediator no later than 45 days after the date of this Order. Mediation must occur within 90 days after the date of this Order. The parties must have present at the mediation a person with authority to settle this litigation. The parties shall file a report on the

16 Count 3 also claims the jail ministry application form "contains rules that are vague, overbroad, and amount to viewpoint discrimination, such as 'DON'T TAKE SIDES AGAINST AUTHORITY.'" (Dkt. 53 ¶ 88.) The Court dismissed this claim at the motion-to-dismiss stage. (Dkt. 34 at 34 n.11.) And the Court sees no reason to revisit that ruling now. Qualified immunity bars the claim.

outcome of their mediation no later than 7 days after the mediation concludes.

The Court **STAYS** this case pending mediation. The Court **DIRECTS** the Clerk to **ADMINISTRATIVELY CLOSE** this case during the period of the stay.

SO ORDERED this 27th day of September, 2022.

/s/ *Michael L. Brown*
MICHAEL L. BROWN
UNITED STATES DISTRICT JUDGE