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Brief for Prof. Leslie C. Griffin as Amica Curiae in Support of Appellant, Scott v. Pierce

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIAM ERNEST SCOTT,	§	
Plaintiff,	§	
	§	
	§	**CIVIL NO: 4:09-cv-03991**
	§	
v.	§	
	§	
BILL PIERCE, *et al*.,	§	
	§	
Defendants.	§	
	§	

AMICUS CURIAE'S POST-TRIAL BRIEF

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WILLIAM ERNEST SCOTT,	§	
Plaintiff,	§	
	§	
	§	**CIVIL NO: 4:09-cv-03991**
	§	
v.	§	
	§	
BILL PIERCE, *et al*.,	§	
	§	
Defendants.	§	
	§	

***AMICUS CURIAE*'S POST-TRIAL BRIEF**

State inmate William Ernest Scott (TDCJ #576705) filed a *pro se* civil rights complaint alleging violations of his religious freedom in the state prison's policy requiring an approved volunteer to supervise all religious activities by inmates. *See Docket Entry* (D.E.) 1. Scott seeks injunctive relief ordering the prison to allow him and other members of the Jehovah's Witnesses faith to meet without volunteers when they are not available. (D.E. 23 at 3). A bench trial was held in this case on August 9, 2011. (D.E. 39, 41). In accordance with this Court's order of November 1, 2011 (D.E. 47), defendants filed a post-trial brief on December 1, 2011. (D.E. 51). In accordance with this Court's order of November 1, 2011 (D.E. 47), plaintiff filed a brief in response to the defendants' post-trial brief on February

1, 2012. (D.E. 52). *Amicus curiae* Professor Leslie Griffin files this brief in accordance with this Court's order of November 1, 2011. (D.E. 47, 48).

I. STATEMENT OF THE CASE

William Ernest Scott (TDCJ #576705) is an inmate incarcerated with the Texas Department of Criminal Justice (TDCJ) at the Huntsville Unit in Huntsville, Texas. (D.E. 1). In December, 2009, Scott filed this suit against Director of Chaplaincy Bill Pierce, Warden Charles O'Rielly and Chaplain Larry Hunt alleging that "[r]estricting religious meetings has denied me religious freedom" (D.E. 1 at 3). In particular, Scott, a Jehovah's Witness, claimed that although other religious groups at the prison were allowed to conduct religious meetings without a volunteer present, Jehovah's Witnesses were not. (D.E. 1 at 4). Scott argued that the prison defendants must "ensure equal treatment for all religions regardless of their own religious beliefs." (D.E. 1 at 4). He then requested relief in the form of being allowed to meet without volunteers present in the same manner as other religious groups. (D.E. 1 at 4).

In response to this Court's Order for More Definite Statement (D.E. 5), Scott clarified that although Jehovah's Witnesses were not allowed to meet without a "free world" volunteer present (D.E. 6 at 2), Muslims and Jews were (D.E. 6 at 5). Scott alleged that Chaplain Hart told him that federal lawsuits allowed the different rules for different religions in terms of the volunteer policy. (D.E. 6 at 5).

In its original motion to dismiss, the state characterized Scott's lawsuit as "*presumably* pursuant to 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000-cc-1(a)(1)-(2)." (D.E. 9 at 1) (emphasis added). State defendants further argued that the case should be dismissed because the plaintiff had failed to establish that the government had "substantially burdened" his religious practice as required by RLUIPA. (D.E. 9 at 5, 6).

Plaintiff's motion for summary judgment argued that his Free Exercise Clause rights were violated (D.E. 11 at 1), and that the Jehovah's Witnesses should be treated "as other similarly situated groups." (D.E. 11 at 2).

This Court dismissed defendants Pierce and O'Rielly from the lawsuit for lack of the requisite personal involvement. (D.E. 17). The remaining defendant, Chaplain Larry Hart, moved for summary judgment on the grounds that neither the Free Exercise Clause nor RLUIPA was violated in Scott's case. (D.E. 19). The defendant acknowledged that although Plaintiff did not "clearly state…the exact law under which be brings suit," (D.E. 19 at 5) he presumed that Plaintiff "intended to bring suit pursuant to the RLUIPA and the *First Amendment*." (D.E. 19 at 5) (emphasis added). Defendant then argued that Scott's religion was not substantially burdened because the Jehovah's Witnesses met fairly frequently and were also "free to attend any other Christian service." (D.E. 19 at 10). Jehovah's

Witnesses were also allowed to pray in their cells when no volunteer was present. *Id.*

In response to the defendant's motion for summary judgment, Plaintiff asserted possible Equal Protection Clause, Texas Religious Freedom Restoration Act [TFRA] and First Amendment Freedom of Religion violations. (D.E. 22 at 1).

This Court denied the motions for summary judgment and ordered trial. (D.E. 23). A bench trial was held on August 9, 2011. (D.E. 39, 41). This Court's order of November 1, 2011 ordered post-trial briefing. (D.E. 47). Plaintiff's post-trial brief asserted that the prison's policy of compliance with the consent decree in *Brown v. Beto*, 4:74–CV–0069 (S.D.Tex.1977), (D.E. 19, Exh. E at 2), which allows Muslims to meet without a volunteer present while not allowing Jehovah's Witnesses to do the same, violates the Establishment Clause of the First Amendment. (D.E. 52 at 2).

II. THE ESTABLISHMENT CLAUSE APPLIES TO THIS LAWSUIT

The First Amendment to the U.S. Constitution contains two Religion Clauses, the Establishment Clause and the Free Exercise Clause: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I. The Establishment Clause applies to the states through the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296,

303 (1940). The Establishment Clause requires "the principle of denominational neutrality." *Larson v. Valente*, 456 U.S. 228, 246 (1982).

Neither this Court nor the parties have yet addressed the details of possible Establishment Clause violations in the prison's volunteer policy. The defendants "presumed" that Scott was making a free exercise and a RLUIPA argument. (D.E. 9 at 1). Scott referred to religious freedom and the First Amendment in his early pleadings. (D.E. 1). In his post-trial brief, plaintiff asserted that the prison's policy of allowing Muslims to meet without volunteers while not allowing Jehovah's Witnesses to do so violates the Establishment Clause. (D.E. 52 at 2).

Both the Establishment Clause and the Free Exercise Clause protect religious freedom. The Establishment Clause's prohibitions are "inextricably connected with the continuing vitality of the Free Exercise Clause." *Larson*, 456 U.S. at 245. "Free exercise thus can be guaranteed only when legislators … are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations." *Id.*

Because of the linkage of the Establishment Clause with religious freedom, this Court may consider the Establishment Clause implications of Scott's lawsuit. The filings of *pro se* litigants are reviewed under a less stringent standard than documents prepared by attorneys. *See Haines v. Kerner*, 404 U.S. 519, 520-21 (1972); *Bledsue v. Johnson*, 188 F.3d 250, 255 (5th Cir. 1999). Thus pleadings

filed by a *pro se* litigant are entitled to a liberal construction that affords all reasonable inferences that can be drawn from them. *See Haines*, 404 U.S. at 521; *Pena v. United States*, 122 F.3d 3, 4 (5th Cir. 1997) (citing *Nerren v. Livingston Police Dept.*, 86 F.3d 469, 472 & n. 16 (5th Cir. 1996)). A reasonable inference from a lawsuit alleging First Amendment discrimination is that the Establishment Clause was violated. Moreover, plaintiff explicitly referred to the Establishment Clause in his post-trial brief. (D.E. 52 at 2).

A. The Establishment Clause Requires Strict Scrutiny of Denominational Preferences.

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982); *see also Everson v. Board of Education*, 330 U.S. 1, 15 (1947) (no State may "pass laws which aid one religion" or that "prefer one religion over another."); *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) ("[t]he government must be neutral when it comes to competition between sects."); *School District of Abington Township v. Schempp*, 374 U.S. 203, 305 (1963) ("[t]he fullest realization of true religious liberty requires that government … effect no favoritism among sects … and that it work deterrence of no religious belief."). The Supreme Court has stated that the prohibition against preferential treatment of religion is "absolute." *Larson*, 456 U.S. at 255. By alleging that Muslim and Jewish prisoners

are preferred to Jehovah's Witnesses in the volunteer policy, prisoner Scott has alleged an Establishment Clause violation by the state.

Although the Supreme Court has identified various Establishment Clause tests that govern different settings, the rule of *Larson v. Valente* applies when a law discriminates among religions. *See Awad v. Ziriax,* No. 10-6273, 2012 WL 50636, at *11 (10th Cir. Jan. 10, 2012). *Larson* has been applied in the prison setting because "[w]hen an institution provides religious accommodations to inmates, it must do so in a neutral manner." *Rouser v. White*, 630 F.Supp.2d 1165, 1194 (E.D. Cal. 2009); *id.* at 1195 (the idea that *Larson* may apply in the prison context is supported by the Supreme Court's approval of strict scrutiny in RLUIPA cases); *see also Cutter v. Wilkinson*, 544 U.S. 709, 723-24 (2005) (Like the Establishment Clause, RLUIPA does not allow the state to "differentiate among bona fide faiths" or "single out a particular sect for special treatment.").

Larson requires strict scrutiny. Once the government has set a policy of denominational preference, "that rule must be invalidated unless it is justified by a compelling government interest, [citations omitted] and unless it is closely fitted to further that interest." *Larson*, 456 U.S. at 47; *Rouser*, 630 F.Supp.2d at 1195.

Therefore in order to sustain different treatment of Muslims and Jehovah's Witnesses, TDCJ's policy must be justified by a compelling government interest and closely fitted to further that interest. It is not clear that the government's

invocation of the consent decree in *Brown v. Beto,* 4:74–CV–0069 (S.D.Tex.1977), can meet the compelling interest test in Scott's case. Even if adherence to a consent decree is by definition compelling, moreover, the government's action is probably not closely fitted to that interest.

1. Consent decrees provide only a compelling interest to enforce the terms of the consent decree.

The state's apparent compelling interest in treating Muslim prisoners differently from Jehovah's Witnesses is the consent decree in *Brown v. Beto,* 4:74–CV–0069 (S.D.Tex.1977) (D.E. 19, Exh. E at 2). In *Brown*, Muslim prisoners filed a lawsuit alleging their religious freedom was violated by prison policies that allowed Protestants, Catholics and Jews to meet for worship while refusing similar meetings to Muslims. (*Brown* D.E. 1). The complaint alleged "prisoners of the Protestant, Catholic and Jewish Faiths [were] all accorded the right to worship according to their particular beliefs." (*Brown* D.E. 1 at 3). Brown and other Muslim prisoners alleged that although Christians and Jews had access to a nondenominational chapel, Muslims did not. Moreover, the state provided religious counselors for Protestants, Catholics and Jews but not for Muslims. *Id.*

The parties in *Brown v. Beto* entered into a consent decree. (D.E. 19, Exh. E at 2). Among the provisions of the decree was an agreement that:

> Whenever an ordained Islamic minister is unavailable at a particular time regularly scheduled for Islamic worship or study …, allow inmates professing adherence to the Religion of Islam to congregate under

> appropriate supervision for the purposes of worship, study in the Islamic faith, Sunday School and other religious functions and activities as set forth hereinabove and hereinafter, with a leader designated from their midst; provided, however, that such inmate leader shall have previously secured the approval of an appropriate official of the Texas Department of Corrections, and provided further, however, that the Texas Department of Corrections shall not unreasonably withhold or delay such approval. (D.E. 19, Exh. E at 4-5).

The decree also "[a]llow[ed] adherents to the Religion of Islam at each unit of the Texas Department of Corrections equal time for worship services and other religious activities each week as is enjoyed by adherents to the Catholic, Jewish and Protestant faiths, and specifically, allow adherents to the Religion of Islam at least two (2) full hours of time for worship services or other religious activities each week, rather than the one (1) hour previously permitted." (D.E. 19, Exh. E at 6).

"Compliance with a consent decree may certainly be a compelling interest." *Lomack v. City of Newark*, 463 F.3d 303, 310 (3rd Cir. 2006); *Cavalier ex rel. Cavalier v. Caddo Parish School Bd.*, 403 F.3d 246, 249 (5th Cir. 2005) (suggesting that a consent decree may provide a compelling interest although a lapsed consent decree does not). Obeying a consent decree may be viewed as a compelling interest for at least two reasons. "First, consent decrees are a kind of court order." *Citizens Concerned About Our Children v. Sch. Bd. of Broward County, Florida*, 193 F.3d 1285, 1293 (11th Cir. 1999). Like other court orders, consent decrees must be obeyed. Those who disobey consent decrees may be

punished by contempt. "A potential for contempt alone….could provide a compelling interest." *Id.* Therefore the state may have a compelling interest to obey the consent decree in *Brown v. Beto*.

In a case involving a consent decree in a race discrimination case, the Eleventh Circuit identified a second reason why the government's compliance with a consent decree may be a compelling interest. Because the consent decree in that case "rest[ed] on a foundation—redressing of past discrimination wrongs," *Citizens Concerned,* 193 F.3d at 1293, the court concluded that the government's compelling interest in redressing discrimination provided a second compelling interest to enforce the consent decree. Similarly, TDCJ may have a second compelling interest in enforcing the *Brown v. Beto* consent decree because it redressed religious discrimination against Muslim prisoners. (D.E. 19, Exh. E).

As in *Citizens Concerned*, TDCJ may have two compelling interests in complying with the consent decree. First, it is a court order subject to contempt hearings. Second, it is a legal document redressing religious discrimination against Muslims. Therefore, the state has compelling reasons to enforce the policy protecting Muslims embedded in the consent decree in *Brown v. Beto*.

The compelling interest, however, extends only to the terms of the consent decree; it does not mandate any particular treatment of non-Muslim, Jehovah's Witnesses prisoners as in this case. *See Police Ass'n of New Orleans Through*

Cannatella v. City of New Orleans, 100 F.3d 1159, 1169 (5th Cir. 1996) (consent decree "cannot be used to justify actions aside from those mandated by its own terms"); *see also Dean v. City of Shreveport*, 438 F.3d 448, 460 (5th Cir. 2006) (consent decrees are interpreted according to general principles of contract interpretation).

2. A consent decree does not provide a compelling interest to violate the Constitution or other law.

"Compliance with a consent decree may certainly be a compelling interest, [citations omitted] but only if the decree *mandates* the … policy at issue." *Lomack*, 463 F.3d at 310. The consent decree in *Brown* mandates certain policies regarding Muslims, including their right to meet without volunteers present and to meet a certain number of hours a week. (D.E. 19-5, Exh. E at 4-6). It cannot justify religious discrimination against other groups. In the racial discrimination and equal protection contexts, courts have ruled that a consent decree prohibiting racial discrimination does not convey a right to discriminate against non-parties to the litigation. *See Lomack, supra; Citizens Concerned, supra.* Similarly, enforcing the consent decree on behalf of religious freedom for Muslims does not justify the denial of equal religious freedom to Jehovah's Witnesses.

Enforcing a discriminatory policy not required by the consent decree cannot provide a compelling interest to the government. *See Police Ass'n of New Orleans*, 100 F.3d at 1169 (consent decree "cannot be used to justify actions aside from

those mandated by its own terms"); *Citizens Concerned*, 193 F.3d at 1293; *Lomack*, 463 F.3d at 310-11 ("any policy that exceeds the bare requirements of the order no longer closely fits the compelling interest because abandoning the policy is consistent with respecting the court, avoiding contempt liability, and righting the wrongs underlying the decree."). The consent decree in *Brown v. Beto* requires certain treatment of Muslim prisoners. It was entered into because of concerns that Protestants, Catholics and Jews were receiving preferential treatment to Muslims in the state prisons. Its terms do not require that prison authorities provide Jehovah's Witnesses with lesser rights, nor could the decree provide a justification for providing other religions with lesser rights (in this case the allegation that Jehovah's Witnesses prisoners were subjected to unequal volunteer policies), because a consent decree cannot lawfully require a party to undertake unlawful action. *See Lomack, supra; Citizens Concerned, supra.*

3. The government's enforcement of a consent decree must also be "closely fitted" to its compelling interest.

Larson strict scrutiny requires the government's program to be "closely fitted" to furthering its compelling interest. *Larson*, 456 U.S. at 47. In *Newby v. Quarterman*, 325 Fed.Appx. 345 (5th Cir. 2009), the Fifth Circuit applied strict scrutiny to TDCJ's volunteer policy in a case involving Buddhist prisoners who alleged they were not allowed to meet because there were no Buddhist volunteers. The court applied the "least restrictive means" prong of RLUIPA to conclude that

the "facts that Muslims regularly engage in communal worship without an approved religious volunteer is some evidence that the security and safety concerns identified by Texas can be addressed through less restrictive alternatives." *Newby*, 325 Fed.Appx. at 352; *see also Inzunza v. Moore*, No. 2:09-CV-0048, 2011 WL 1211434, at *2 (N.D.Tex. 2011) (identifying possible alternatives that Muslim groups are "under visual and audio supervision at all times and the services are audio taped."); *McKennie v. Texas Dept. of Criminal Justice*, No. A–09–CV–906–LY, 2012 WL 443948, at *5 (W.D. Tex. Feb. 10, 2012) (considering testimony that volunteer groups could be policed by roving officers, listening devices or video monitors).

Similarly, if Muslims regularly engage in communal worship without an approved religious volunteer present, there may be evidence that the government's rule against Jehovah's Witnesses' meetings is not "closely fitted" to the government's compelling interest in enforcing the consent decree. If there are alternative means of treating Muslim and Jehovah's Witnesses prisoners without favoritism, then the Establishment Clause demands them.

4. There is confusion in the record of this case about consent decrees.

Plaintiff Scott has argued that, like the Muslim prisoners subject to the consent decree in *Brown v. Beto*, he and his fellow Jehovah's Witnesses should be subject to the district court's ruling in *Hyde v. Texas Department of Criminal*

Justice, 948 F.Supp. 625 (S.D.Tex. 1996). Dale Hyde was a Jehovah's Witness prisoner who alleged that Witnesses were not allowed to meet without a volunteer present while Muslims were. *Id.* at 626. The district court ruled that Jehovah's Witnesses should be allowed to meet "on the same conditions as adherents to other similarly situated groups." *Id.*

The state is correct that *Hyde* did not provide a consent decree that obligated TDCJ to provide relief to all future Jehovah's Witnesses. *See* Proposed Conclusion of Law 17, D.E. 51 at 14 (*Hyde* "did not establish a TDCJ-wide consent decree for the Jehovah's Witnesses faith group."); Trial Transcript, D.E. 41 at 10 ("we argue that [*Hyde*] was not meant to be like *Brown v. Beto*. It was only supposed to apply to Mr. Hyde.").

However, the state is incorrect that *Hyde* has no relevance to Scott's case. The state remains obligated to obey the First Amendment even if no consent decree for Jehovah's Witnesses is in place. On the facts of Hyde's case about the volunteer policy, the court identified a violation of religious freedom against a Jehovah's Witness even though the consent decree was in effect for Muslims. Similarly, this Court may decide if Scott has proven violations of his own religious freedom. Plaintiff Scott enjoys the protection of the First Amendment even if there is no consent decree for Jehovah's Witnesses. *See Sundown v. Texas Dep't of Criminal Justice-Correctional*, No. H-07-1441, 2008 WL 1781065, at *1

(S.D.Tex. 2008) (although *Hyde* did not apply to petitioners, "the decision did apply the Constitution in a situation, making it persuasive in parallel situations.").

Scott, like Hyde, is entitled to "attend religious meetings of Jehovah's Witnesses on the same conditions as adherents to other similarly situated groups." (D.E. 51 at 16). Muslims and Jehovah's Witnesses are similarly situated to each other for purposes of the Establishment Clause because the government is not allowed to favor one religion over another.

B. Courts Have Disagreed Whether the Establishment Clause Always Requires Strict Scrutiny in the Prison Setting.

As this Court acknowledged in its Memorandum and Order denying summary judgment, (D.E. 23 at 8-10), the Supreme Court has recognized that in the prison setting courts must be more deferential to prison officials than they are to defendants in non-prison constitutional rights cases. *See Turner v. Safley*, 482 U.S. 78, 89 (1987) ("when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."). The Supreme Court has held that free exercise violations are subject to the "reasonably related to legitimate penological interests" rule of *Turner*. *Id.*

The Court has also held that other fundamental constitutional rights of prisoners may be subjected to the *Turner* test. In *Washington v. Harper,* 494 U.S. 210 (1990), for example, the Court applied *Turner* to a Due Process Clause challenge to a state prison's policy of providing drugs to mentally ill patients

without their consent. *See Washington v. Harper*, 494 U.S. at 223-34 (*Turner* applies "even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review.").

The Supreme Court has not held that *Turner* applies to the Establishment Clause. Federal and state courts have disagreed whether *Turner* and *Harper* apply to Establishment Clause challenges. *See Williams v. Lara*, 52 S.W.3d 171, 187-188 (Tex. 2001) ("an overwhelming majority of the courts that have considered an inmate's Establishment Clause challenge have declined to apply *Turner* in assessing the constitutionality of a prison's actions"); *id.* at 188, n. 11 (collecting cases applying and not applying *Turner* to the Establishment Clause).

The Texas Supreme Court's reasoning is representative of why some courts have limited *Turner* to Free Exercise Clause challenges and not applied it in the Establishment Clause setting. "An Establishment Clause inquiry focuses not on whether an inmate has a right to do something, but rather on whether the government should refrain from acting in a particular way. [citation omitted]. In that context, the unique circumstances of imprisonment are of lesser relevance, and the risk that a court will improperly second-guess a prison official's judgment concerning prison administration or security is less of a concern." *Id.* at 189; *see also Americans United For Separation of Church and State v. Prison Fellowship*

Ministries, 395 F.Supp.2d 805, 808 n. 4 (S.D.Iowa 2005) ("the Defendants request that the Court reconsider its ruling that *Turner* is inapplicable to Establishment Clause cases in the prison context. The Court will not do so unless presented with new, authoritative law which binds the Court on the matter.").

On the other hand, the cases that did not apply *Turner* to the Establishment Clause have largely involved government funding of prisons, or, as in *Williams*, state operation of a chaplain's program for prisoners. *Williams, supra; Americans United, supra.* If this Court should decide that Scott's case is about "a prisoner challenging a Department of Corrections directive," and not about the government's conduct in preferring one denomination to another, then the Establishment Clause analysis should be subjected to the rule of *Turner,* "which found that a prison regulation that impinges on an inmate's constitutional rights is nevertheless valid 'if it is reasonably related to legitimate penological interests.'" *Salahuddin v. Perez,* No. 99 Civ. 10431(LTS), 2006 WL 266574, at *9 (S.D.N.Y. 2006); *see also Pugh v. Goord*, 571 F.Supp.2d 477, 494 (S.D.N.Y. 2008).

In *Pugh v. Goord,* Shi'a Muslim inmates alleged that the state favored Sunni Muslims by sponsoring Sunni services for all Muslims. Even though the court applied the *Turner* standard, it refused to grant the state's motion for summary judgment because the plaintiff had provided evidence that other religious groups were accommodated and that alternative means of enforcing prison security existed

than combining all Muslims in one service. *Id.* at 496; *but see Salahuddin*, 2006 WL 266574, at *9 (finding no reasonable factfinder could challenge state's decision to place chaplains' programs in a single administrative office). Even under *Turner*, this Court must determine if the accommodations available to Muslims under the consent decree suggest alternative, more neutral means of accommodating Jehovah's Witnesses. *See, e.g., Inzunza,* 2011 WL 1211434, at *2 (Muslim "services and the inmates are under visual and audio supervision at all times and the services are audio taped."); *id*. at *6 ("each Muslim service is audio recorded"); *McKennie*, 2012 WL 443948, at *5 (considering testimony that volunteer groups could be policed by roving officers, listening devices or video monitors).

Among the factual issues about Establishment Clause neutrality that this Court needs to clarify under *Turner* are whether Muslims and Jehovah's Witnesses are treated equally under the last-minute cancellation policy, which allows the warden to substitute a staff member to supervise the prison service (D.E. 51 at 5); whether Sabbatarians' access to replacement staff is impacted by their Saturday worship (D.E. 19 at 9); and whether Muslims and Jews have access to more services than the Jehovah's Witnesses because they meet on Fridays as well as Saturdays (D.E. 6 at 5); *see also Scott v. Pierce*, No. H-09-3991, 2011 WL 445630,

at *1 (S.D. Tex. 2011) (Scott alleges Muslim groups meet two hours on Fridays *and* Saturdays without a volunteer present).

Turner also instructs district courts to inquire into "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90. In the Fifth Circuit, "[w]hen accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of correctional officials." *Freeman v. Texas Dept. of Criminal Justice*, 369 F.3d 854, 862 (5th Cir. 2004). The court has explained that RLUIPA "is not meant to elevate accommodation of religious observances over the institutional need to maintain good order, security, and discipline or to control costs." *Baranowski v. Hart*, 486 F.3d 112, 125 (5th Cir. 2007).

In this case, prison officials testified that awarding Scott relief would have a "significant ripple effect" on prison staff because all 59 faith preferences at the prison could be expected to demand religious meetings without volunteers present. (D.E. 28, Exh. F); (D.E. 51 at 23-24); *see also McKennie,* 2012 WL 443948, at *10 (granting McKennie an exemption to the religious-volunteer policy would open the door to other faith groups requesting similar exemptions.).

Unlike members of those other 59 faith preferences, however, Scott has alleged that Jehovah's Witnesses are not allowed to mingle with non-Witnesses in religious services because the "Bible commands us to be separate from other religions." (D.E. 6 at 4). Jehovah's Witnesses are only 1% of the prison population. (D.E. 28, Exh. G). In contrast, subsets of the much larger Protestant and Muslim groups meet together (D.E. 28, Exh. G), and therefore may not need 57 separate volunteers for their meetings. Under RLUIPA, prison officials must do more than speculate that the accommodation of a religious practice will lead to safety and security problems. *See, e.g., O'Bryan v. Bureau of Prisons,* 349 F.3d 399, 401 (7th Cir. 2003). In the Establishment Clause context, the state cannot speculate that every religious group at the prison is in the same situation as Scott in being precluded by his faith from combining in worship with non-Jehovah's Witnesses religious groups.

C. Establishment Clause Analysis Differs from RLUIPA's Standards.

Although there is overlap between a prisoner's claims under the Establishment Clause and RLUIPA, the focus of the two complaints is different. The Establishment Clause violation consists of favoritism of one religion over another; the RLUIPA violation consists of a substantial burden upon the prisoner's religious exercise.

RLUIPA provides that the government shall not impose a "substantial burden" on the prisoner's religious exercise. 42 U.S.C. § 2000-cc-1(a)(1)-(2). In reviewing and upholding TDCJ's volunteer policy, the Fifth Circuit has focused on what constitutes a substantial burden under the language of the statute. It has ruled that the question of whether a volunteer policy substantially burdens religious exercise is a factual question to be decided case-by-case. *See Mayfield v. Texas Dep't of Criminal Justice,* 529 F.3d 599, 614-15 (5th Cir. 2008) (facts support finding of substantial burden); *Newby v. Quarterman*, 325 Fed.Appx. 345 (5th Cir. 2009) (same); *but see Adkins v. Kaspar*, 393 F.3d 559 (5th Cir. 2004) (no substantial burden): *Odneal v. Pierce*, 324 Fed.Appx. 297 (5th Cir. 2009) (same); *Baranowski v. Hart*, 486 F.3d 112 (5th Cir. 2007) (same). Although the Fifth Circuit has validated the volunteer policy in some of these cases under RLUIPA, none of the Fifth Circuit's cases upholding the state prison's volunteer policy has assessed an Establishment Clause violation. *See id.*

A statutory violation of RLUIPA, which consists of a substantial burden on religion, is not the same as a constitutional violation of the Establishment Clause, which consists of preferring one religion to another. Plaintiff alleged that Muslims and Jews are treated differently at the Huntsville Unit. There appears to be conflicting evidence about the treatment of Muslims and Jehovah's Witnesses in the record. *See* Defendant Hart's Motion for Summary Judgment with Brief in

Support (D.E. 19 at 12) ("As for the Muslim faith group, Plaintiff is correct. The Muslim faith group is permitted to meet without a volunteer or chaplain present."); Defendant Hart's First Supplemented Motion for Summary Judgment with Brief in Support (D.E. 28 at 16) (same); Trial Transcript, D.E. 41 at 111 (testimony suggesting different rule is applied to Muslims); *but see* D.E. 28, Ex. D (custodian of records said no religious meetings of Muslims or Jews were held from December 1, 2008 to April 1, 2010). In ruling on an Establishment Clause violation, this Court must decide whether "the principle of denominational neutrality" was violated in the specific facts of the case. *Larson*, 456 U.S. at 246.

III. CONCLUSION

In accordance with this Court's order of November 1, 2011 (D.E. 47, 48), *amicus curiae* submits this brief and respectfully urges this Court to consider the Establishment Clause implications of William Scott's lawsuit.

Respectfully submitted, this 28th day of February, 2012.

/s/ Leslie C. Griffin

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NOTICE OF ELECTRONIC FILING

The undersigned, LESLIE C. GRIFFIN, ESQ., hereby certifies that on February 28, 2012, I electronically filed the foregoing ***Amicus Curiae*'s Post-Trial Brief** with the Clerk of Court in accordance with the Electronic Case Files System of the Southern District of Texas.

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CERTIFICATE OF SERVICE

The undersigned, LESLIE C. GRIFFIN, ESQ., hereby certifies that a true and correct copy of the foregoing ***Amicus Curiae*'s Post-Trial Brief** has been served by United States mail on this the 28th day of February, 2012, addressed as follows:

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