No. 19-6523

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RANDY BURKE,

Plaintiff-Appellant,

v.

HAROLD CLARKE, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Virginia
No. 7:16-cv-00365-PMS

PETITION FOR REHEARING

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PETITION FOR PANEL REHEARING

Pursuant to Federal Rule of Appellate Procedure 40 and Local Rule 40, Mr. Burke respectfully moves for panel rehearing. As explained below, the panel opinion overlooks "material factual [and] legal matter[s]," Local Rule 40(a)(i), making panel rehearing appropriate.[1]

The Panel Should Grant Rehearing on Mr. Burke's First Amendment Claim.

On January 14, 2021, this Court issued an unpublished opinion that reversed the district court's grant of summary judgment in favor of the Virginia Department of Corrections (VDOC) on a claim that Mr. Burke brought under the Religious Land Use and Institutionalized Persons Act (RLUIPA). The panel affirmed the grant of summary judgment in favor of VDOC on Mr. Burke's First Amendment and Equal Protection Clause claims.

In affirming the district court's First Amendment ruling, the panel opinion states that the "magistrate judge held that all of the defendants, including the Chief of Operations, were entitled to qualified immunity. Thus, by failing to argue against this ruling in his Opening Brief, [Mr.] Burke . . . waived arguments against qualified immunity for all defendants." Op. 16. Respectfully, Mr. Burke suggests that the panel overlooked a "material factual . . . matter" as to this point. Local Rule 40(a)(i).

[1] Mr. Burke only seeks rehearing as to the panel's resolution of his First Amendment claim.

Contrary to the panel opinion's statement, the magistrate judge did *not* hold that the defendants were entitled to qualified immunity. Rather, the magistrate judge ruled that Mr. Burke had not "provided the court with . . . evidence as to his sincerely held religious beliefs," and had not "offered evidence of any substantial burden on the free exercise of his religious beliefs . . . ." J.A. 502. Thus, the magistrate judge concluded "there [was] no genuine dispute of material fact and [therefore] summary judgment should be entered in defendants' favor on Burke's First Amendment and RLIUPA claims." *Id.* Qualified immunity does not appear in the magistrate judge's opinion and was not the basis for her ruling. *See* J.A. 491-503 (magistrate judge's opinion).[2]

Mr. Burke therefore asks that the panel revisit its statement that "[i]n his Reply Brief, Burke argues that the VDOC waived any argument as to qualified immunity. But this is backwards. The magistrate judge held that all of the defendants, including the Chief of Operations, were entitled to qualified immunity." Op. 16. Because qualified immunity was not the basis of magistrate judge's ruling, Mr. Burke asks that the panel omit or revise this portion of the opinion.

[2] As the panel opinion notes elsewhere, the only grant of qualified immunity below was by the district court judge to "the defendants (other than the Chief of Operations)" on Mr. Burke's "equal protection claim alleging that VDOC refused to provide religious meals, items, and group services to Rastafarians despite providing such accommodations to adherents of other religions." Op. 10. The district court judge denied summary judgment on Mr. Burke's RLUIPA and First Amendment claims. *See* J.A. 304-07.

In revising the opinion, Mr. Burke also asks that this Court reconsider its holding that VDOC preserved a qualified immunity defense on appeal. In VDOC's brief to this Court, VDOC Defendants did not argue they were entitled to qualified immunity. Rather, they equivocally stated that "the lack of any clearly established law at the time of the relevant conduct *would almost* certainly prevent Burke from overcoming [qualified immunity]." Appellees' Br. at 35 n.7 (emphasis added). Then, VDOC went on to *dissuade* this Court from reaching the issue of qualified immunity, stating, "The Court need not resolve that question here, however . . . ." *Id.* In light of the position VDOC took in its brief specifically imploring this Court not to resolve the qualified immunity question, Mr. Burke had no reason to address qualified immunity in his reply brief. It is for that reason that Mr. Burke asked this Court to find that VDOC waived any qualified immunity defense on appeal, and like VDOC, limited the discussion of qualified immunity to a two-sentence footnote. *See* Reply Br. at 7 n.2.

The panel decision notes that *Brown v. Nucor Corp*. cited a decision that found "an eight-sentence footnote" sufficient for preservation. Op. 17 (citing *Brown v. Nucor Corp.*, 785 F.3d 895, 919 (4th Cir. 2015)). Importantly, the decision cited by *Brown* made clear what is necessary for preservation under the Federal Rules of Appellate Procedure: "in assessing whether an issue is sufficiently argued to avoid waiver, we look at whether the opening brief contains the appellant's contentions as

well as citations to authorities and the record." *Williams v. Woodford*, 384 F.3d 567, 587 (9th Cir. 2004) (cited in *Brown*); *see also Belk, Inc. v. Meyer Corp., U.S.*, 679 F.3d 146, 153 n.6 (holding that failing to comply with the requirements of Fed. R. App. P. 28 results in waiver). VDOC did not cite a single case or make one argument about why it is entitled to qualified immunity. Indeed, VDOC did not even proclaim outright that it is entitled to qualified immunity. VDOC barely took a "passing shot at the issue" of qualified immunity; it certainly did not "develop [the] argument" in its brief. *See, e.g., Grayson O Co. v. Agadir, Int'l LLC*, 856 F.3d 307, 316 (4th Cir. 2017) (quotation marks omitted) (finding an assertion "without any argument or explanation that 'there are genuine issues of material fact as to the commercial strength' of its mark" was insufficient to preserve an argument). Mr. Burke therefore asks this Court to find that VDOC waived its qualified immunity defense on appeal, and avoid reaching the question as VDOC requested.

Given that the issue of qualified immunity on Mr. Burke's First Amendment claim was not passed upon below, and given that no party briefed this issue before this Court, Mr. Burke respectfully suggests that the better alternative in this case would be remand the issue back to the district court. Under these circumstances, this Court should "adhere [ ] to the principle that the district court should have the first opportunity to perform the applicable analysis." *Fusaro v. Cogan*, 903 F.3d 241, 265 (4th Cir. 2019).

This would be especially prudent given that the question of whether VDOC's grooming policy violated Mr. Burke's clearly established First Amendment rights turns on the reasonableness of the policy. *See O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) ("[W]e have determined that prison regulations alleged to infringe constitutional rights are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."). And whether a policy is "reasonable" turns on the application of the factors the Court set forth in *Turner v. Safley*, 482 U.S. 78, 89-91 (1987).

To successfully assert qualified immunity for Mr. Burke's First Amendment claim, *VDOC* must establish its grooming policy was reasonable under the *Turner* factors. *See, e.g.*, *Boles v. Neet*, 486 F.3d 1177, 1184 (10th Cir. 2007) ("The Supreme Court clearly established in *Turner* that prison regulations cannot arbitrarily and capriciously impinge on inmates' constitutional rights. . . . Therefore, [the official's] actions were reasonable and he is entitled to qualified immunity only if the regulation that he relied on was reasonably related to a legitimate penological interest."). As this Court explained, "a prisoner's free exercise rights may only be restricted by punitive measures to the extent that these measures are reasonably related to achieving a legitimate penological objective." *Lovelace v. Lee* 472 F.3d 174, 200

(4th Cir. 2006). Thus, the burden is on VDOC to prove the reasonableness of the grooming policy under *Turner* before qualified immunity can be granted.[3]

This Court's decision in *Wall v. Wade* further militates in favor of resolving the qualified immunity question *after* the application of the *Turner* factors. 741 F.3d 492, 502 (4th Cir. 2014) (resolving qualified immunity after analyzing the *Turner* factors). As the *Wall* Court said when denying qualified immunity, the prisoner's "right to participate in [his religious exercise] was clearly established, and when the defendants abridged this right without first satisfying *Turner*'s reasonableness test, they subjected themselves to the potential for liability." *Id.* at 503. The *Wall* Court went on to explain that "[a]n expectation of reasonableness in this context is not a high bar, and does not punish officials for bad guesses in gray areas. To the contrary, it offers only a minimal level of protection to inmates seeking to exercise their constitutionally protected rights." *Id.* (quotation marks and citation omitted).

[3] As far back as 1963 the Supreme Court opined that forcing someone "to choose between following the precepts of her religion and forfeiting benefits" burdens the free exercise of religion. *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). The Court has also made plain that "where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717 (1981).

Circuit precedent establishes that resolution of the *Turner* reasonableness test is often important to deciding the question of qualified immunity. Thus, as requested in Mr. Burke's opening brief, this Court should remand to the district court to allow it to apply the *Turner* factors in the first instance. *See* Appellant's Br. at 26. Then, as the Second Circuit explained: "Only if on remand the district court finds that [Mr. Burke's] constitutional rights were violated in light of the *Turner/O'Lone* factors, should it then entertain defendants' arguments that they are nevertheless entitled to qualified immunity." *Ford v. McGinnis*, 352 F.3d 582, 598 (2d Cir. 2003).

CONCLUSION

Mr. Burke respectfully requests that the panel grant rehearing.

Respectfully submitted,

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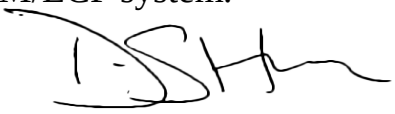
CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 40 and 32, counsel for appellant certifies that this petition for rehearing is printed in Times New Roman 14-point font, and including footnotes and images, contains no more than 3,900 words. According to the word-processing system used to prepare the brief, Microsoft Word, the relevant sections of the brief under Rule 32(f) contain 1,640 words.

Daniel S. Harawa (*Counsel of Record)*

CERTIFICATE OF SERVICE

I certify that on January 25, 2021, I electronically filed the foregoing petition with the Clerk of the Court of the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. All participants are registered CM/ECF users and will be served by the appellate CM/ECF system.



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