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

OPENING BRIEF FOR PLAINTIFF-APPELLANT

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 19-6523 Caption: Randy Burke v. Harold Clarke, et. al.

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(name of party/amicus)

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4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? YES ☑ NO
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If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

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If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐ YES ☑ NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/ Daniel S. Harawa Date: March 10, 2020

Counsel for: Appellant Randy Burke

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INTRODUCTION

The Virginia Department of Corrections (VDOC) had a grooming policy that required inmates to keep their hair cut short. If an inmate violated this policy, VDOC would place him in segregated housing, where he was held in solitary confinement and deprived of basic privileges afforded to inmates in general population. VDOC's grooming policy had no religious exemptions.

For over nineteen years, Randy Burke has been a steadfast adherent of the Rastafarian faith, which requires him to keep his hair in dreadlocks. When he was transferred into VDOC's custody, its grooming policy presented Mr. Burke with an impossible choice: cut his dreadlocks and violate his faith, or endure the punitive segregation of the Violators Housing Unit (VHU), where he would be restricted to his cell by himself for 21 hours a day and denied the same opportunities for work, education, and recreation afforded to general population inmates. Mr. Burke chose to follow his faith; VDOC's grooming policy punished him for it. Indeed, the grooming policy segregated all adherent Rastafarians like Mr. Burke into the VHU because their religion forbids them from cutting their hair.

The grooming policy was not the only way VDOC discriminated against Mr. Burke because of his Rastafarian faith. VDOC regularly denied Mr. Burke's requests for group Rastafarian religious services, faith items, and holy day meals, even though VDOC provided these accommodations for inmates of other faiths.

After repeatedly requesting equal treatment without success, Mr. Burke filed this action, challenging the VDOC grooming policy and its failure to provide Rastafarian inmates with the same accommodations that it provided to inmates of other religions as a violation of the Free Exercise Clause of the First Amendment, the Religious Land Use and Institutionalized Person Act (RLUIPA), and the Equal Protection Clause of the Fourteenth Amendment.

A few months ago, this Court held that VDOC's grooming policy "imposed a substantial burden on . . . religious exercise." *Greenhill v. Clarke*, 944 F.3d 243, 252 (4th Cir. 2019). Here, the district court judge concluded as much, denying VDOC's motion for summary judgment on Mr. Burke's free exercise and RLUIPA claims. But when VDOC moved for summary judgment again, the magistrate judge disregarded the district court judge's prior decision, overlooked the record, and held that Mr. Burke had not adequately demonstrated the sincerity of his religious beliefs or that his beliefs had been substantially burdened. Because Mr. Burke produced prima facie evidence showing VDOC's grooming policy substantially burdened his religious exercise, and because the magistrate judge's decision cannot be reconciled with *Greenhill*, this Court should reverse the grant of summary judgment on Mr. Burke's free exercise and RLUIPA claims.

This Court should also reverse the district court's grant of summary judgment on Mr. Burke's equal protection claims. Mr. Burke produced prima facie evidence

that the grooming policy segregated Rastafarian inmates because of their religious beliefs, and that VDOC did not provide Rastafarians the same basic accommodations it provided to other religions. Thus, Mr. Burke established that VDOC purposefully treated Rastafarian inmates differently from similarly situated inmates of other faiths. *See Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). ("To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination.").

Reversal is required.

JURISDICTIONAL STATEMENT

Mr. Burke brought this civil rights action under 42 U.S.C. § 1983 and 42 U.S.C. §§ 2000cc *et seq.* The district court had jurisdiction under 28 U.S.C. § 1331. The district court issued its final order disposing of Mr. Burke's case on March 26, 2019. Mr. Burke timely filed a notice of appeal on April 18, 2019. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

I. Whether VDOC substantially burdened Mr. Burke's religious rights in violation of the Free Exercise Clause and RLUIPA by placing Mr. Burke in segregated restrictive housing solely because he could not comply with VDOC's grooming policy without violating his Rastafarian beliefs?

II. Whether VDOC treated Mr. Burke differently from similarly situated prisoners in violation of the Equal Protection Clause by segregating Mr. Burke in restrictive housing solely because of his Rastafarian faith and by denying Mr. Burke opportunities for religious worship that were provided to inmates of other faiths?

STATEMENT OF THE CASE

Randy Burke is from the Virgin Islands and has been a devout Rastafarian for over nineteen years. JA15, 77.[1] As required by the Rastafarian Vow of the Nazarite, Mr. Burke keeps his hair in dreadlocks. JA15, 77, 283. Cutting his dreadlocks would break a core tenet of Mr. Burke's faith. JA44, 283.

Mr. Burke is currently serving time for a crime he committed while living in the Virgin Islands. JA15. He was transferred from the custody of the Virgin Islands Bureau of Corrections (VIBOC) to the custody of VDOC,[2] and is currently serving his sentence in Wallens Ridge State Prison in Big Stone Gap, Virginia. JA13.

Mr. Burke alleged that VDOC violated his right to the free exercise of his religion under RLUIPA and the Free Exercise Clause of the First Amendment through the application of VDOC Operating Procedure 864.1 (the "grooming policy"). JA23, 78. Under the policy, Mr. Burke had to cut his dreadlocks because the policy required inmates to keep their hair cut short. JA15. When Mr. Burke refused, he was placed in segregation in the VHU and stripped of privileges available to general population inmates. JA17. Mr. Burke also alleged that VDOC violated the Equal Protection Clause of the Fourteenth Amendment by treating adherent

[1] "JA" citations are to the joint appendix. The facts and allegations in this section are derived from Mr. Burke's verified complaint and affidavits that Mr. Burke submitted from fellow Rastafarian inmates.

[2] Mr. Burke was transferred to Virginia pursuant to a contract between VIBOC and VDOC. *See* JA194–216.

Rastafarians as second-class citizens, automatically segregating them into the VHU and denying them the opportunities for religious worship that VDOC provided to inmates of other faiths. JA21–22.

A. The Restrictive Conditions Faced By Mr. Burke in the VHU

When Mr. Burke was first transferred to Virginia, he was housed in Red Onion State Prison. JA15. Upon arrival at Red Onion, Mr. Burke was immediately placed in segregation for refusing to cut his dreadlocks. JA15. He remained in segregation for thirteen months before he was transferred to Wallens Ridge State Prison. JA17.

When Mr. Burke arrived at Wallens Ridge, he was given a choice: cut his deadlocks pursuant to the prison's grooming policy—violating a basic tenet of his faith—or be placed in the segregated Violators Housing Unit. JA17. Mr. Burke refused to break his faith, so VDOC put him in the VHU. JA17, 44.

In the VHU, Mr. Burke suffered a host of restrictions and prohibitions that inmates in general population did not face. Prisoners outside the VHU were given as many as thirteen hours of communal daily recreation. JA85. Because he was housed in the VHU, Mr. Burke was confined to his cell for 21 hours a day and he was only allowed one hour of daily outside recreation, during which he was confined in a cage. JA85, 102, 287.

In the VHU, Mr. Burke was in a cell by himself, and the lights remained on at all hours. JA85. The only television in the VHU had two channels, which was always

set to the Christian channel and could not be changed. JA85, 101–02, 348. Mr. Burke could not even socialize with others during mealtime—he had to eat all of his meals in his cell by himself. JA163.

In addition to the day-to-day restrictions that Mr. Burke faced in the VHU, he was also unable to access various opportunities afforded to inmates in general population. Because he was in the VHU, Mr. Burke was denied jobs in both the kitchen and the laundry. JA17, 50–51, 60, 85, 297. He could not attend in-person educational programs; he could only partake in "Distance Learning," viewing classes on a closed-circuit TV alone in his cell. JA163. And Mr. Burke was only allowed $10 a week to spend at the commissary, while inmates outside the VHU could spend up to $50. JA101–02, 287. In short, "the conditions . . . [in] the VHU impose[d] atypical and significant hardship . . . in relation to any ordinary incidents of prison life conditions." JA287.

B. The Discriminatory Denial of Opportunities for Rastafarian Religious Worship

VDOC also denied Mr. Burke the ability to fully practice his religion. For example, Mr. Burke sought group religious services conducted by a high priest. JA17. Christian and Muslim inmates in the prison could attend group religious services led by a chaplain or imam. JA18, 97–98, 141. But except for a short period of time, VDOC did not allow group religious services for Rastafarians. JA17, 335. Indeed, Mr. Burke learned that past requests for group Rastafarian services were

"automatically denied." JA17, 59. And even when the services were briefly allowed, "all [the] Rastafarians received . . . was an empty room with no Rastafarian religious service items [and] no Levi and high priest to instruct the service." JA17, 283. Mr. Burke requested a spiritual leader at this "makeshift service," but prison officials rejected his request, claiming they could not locate a volunteer to lead the services. JA99–100. When the "makeshift" Rastafarian group service was discontinued, prison officials told Mr. Burke that he could practice his religion alone in his cell. JA110–11, 123.

Beyond access to a faith leader and group services, Mr. Burke requested the basic materials for him and other Rastafarians to practice their religion.[3] JA15. He requested the religious items necessary for Rastafarian worship: red, yellow, and green prayer rugs and knit hats, drums, Holy Piby Bibles, incense, Lion of Judah flags, and posters of King Haile Selassie. JA31. The prison chaplain denied Mr. Burke's request, responding, "Can't. Don't have any of this." JA31. When Mr. Burke wrote the chaplain again, he received the same stonewalling: "Those items I do not have. All items I have are donated." JA32. His subsequent requests were disposed of as "repetitive." JA33–36.

[3] VDOC Operating Procedure 841.3(IV)(A)(6)(i) mandated that when a spiritual leader cannot be located for an inmate's religious service, "the [prison] Chaplain . . . **shall** then assist the offender with obtaining religious texts, study materials, etc. for his/her religion . . . ." JA129 (emphasis added).

By contrast, inmates of other religions were given access to spiritual items so they could fully practice their faith. VDOC approved various religious items for purchase at the commissary. Inmates could buy amulets and necklaces with Crucifixes, Stars of David, and Sikh Prayer Medallions. JA395. Muslim inmates could purchase religious head coverings and scarves such as Kufis and Kufiyas, and oils and rugs for prayer and worship. JA 37–38, 395–96. Jewish inmates could buy Yarmulkes and prayer shawls. JA395–96. Buddhist inmates could purchase incense. JA396. And Native American inmates could purchase drums for spiritual services. JA397. VDOC even offered tarot cards, Thor's Hammer Medallions, and Wiccan Sea Salt for purchase. JA395–-96. However, not a single Rastafarian faith object was sold at commissary. JA18, 37–38, 82, 395–96. Mr. Burke complained of this differential treatment in one of his grievances, asking: "why do[] the Muslims have kufi cap, prayer rugs, and prayer oil on the property menu for [Wallens Ridge]," when Rastafarians do not? JA43.

Rastafarians were also treated differently than inmates of other religions when it came to group meals and dietary considerations on religious holidays. VDOC Operating Procedure 841.3 (the "religious practices policies") specifically addressed religious services and holy day meals for Muslim, Christian, and Jewish inmates. JA134–35. Rastafarians were not entitled to any accommodations under the policy. Muslim inmates were given celebratory meals on Ramadan and Jewish inmates were

provided special meals for Purim. JA31, 85, 142–46. Rastafarians, by comparison, were denied celebratory meals on the holy days of July 23 and November 2—King Haile Selassie's birthday and coronation, respectively. JA64–65, 144–45, 280–81, 379–80. As one Rastafarian inmate noted: "Only Muslim [] and Jewish Holy meals are offered, prison officials do not accommodate [] other religions." JA85.

Additionally, VDOC authorized several group meals "separate[] from other General Population offenders" for various faith groups on their religious holidays, while allowing no such meal for Rastafarians on their two major faith holidays. JA142–46, 377–81. VDOC authorized separate group meals for Moorish Science Temple inmates on Drew Ali's Birthday, for Nation of Islam inmates on Savior's Day, for Humanist inmates on the National Day of Reason, for Buddhist inmates on Vesak (Buddha Day), for both Asatru and Native Americans inmates on the Summer and Winter Solstices, and for Wicca and Druidry-Celtic inmates on Samhain. JA142–46. But for Rastafarians, on King Haile Selassie's birthday and coronation, pursuant to prison policy, "no group meal [was] required." JA144–45. As Mr. Burke complained: "VDOC [did] not recognize the Rastafarian religion and therefore they fail[ed] to assist [Rastafarians] in [their] religious items and holy day meals." JA43.

C. VDOC's Grooming Policy

VDOC required all inmates to conform to a set of grooming standards.[4] JA158–164. Among other requirements, the grooming policy forbade "[s]tyles such as braids, plaits, dreadlocks, cornrows, ponytails, buns, mohawks, partially shaved heads, [and] designs cut into the hair . . . ." JA160. VDOC alleged that this requirement "prevent[ed] the exchange of contraband between offenders and facilitate[d] the identification of offenders by security staff." JA159, 337.

VDOC actively singled out Rastafarians for compliance with the grooming policy. In a list maintained by VDOC of religions approved to practice in Virginia prisons, only Rastafarianism had the express condition "must follow DOC grooming standards" attached to it. JA393. This is despite the fact that many other religions also require adherents to grow long hair or beards that may come into conflict with the grooming policy. And there is nothing in the record that supports VDOC singling out Rastafarians in this way. VDOC did not provide any evidence showing Rastafarian inmates posed a greater security risk. Nowhere in the record is there any evidence of Rastafarian inmates concealing contraband in their hair. Nor are there

[4] The version of the grooming policy challenged in this suit took effect on August 1, 2016. All citations to the policy are to that version, at JA158–64. The previous April 1, 2016 version can be found at JA153–57, and the April 1, 2013 version (which was in effect when Mr. Burke was transferred into the custody of VDOC) can be found at JA148–52.

documented incidents of identification issues with Rastafarian inmates because of their dreadlocks.

Violators of the grooming policy were segregated in the VHU, where they were deprived of a range of benefits to "encourage compliance" with the policy. JA161.[5] VDOC alleged that this segregation and deprivation of privileges was an "evidence based approach to . . . [r]einforce respect for operating procedure by ensuring there are consequences for willfully disobeying the rules and regulations." JA161–62. However, VDOC did not provide evidence that segregation in solitary confinement along with a severe restriction of privileges for inmates who could not comply with the grooming policy due to their religious beliefs achieved such goals.

All adherent Rastafarians were automatically segregated to the VHU because their religion forbade them from cutting their dreadlocks.[6] As Mr. Burke alleged, the grooming policy "was created in a manner to discriminate [against] Rastafarians . . . [as the] VHU [was] the only unit [where] Rastafarians could be housed . . . ."

[5] The August 2016 version of the grooming policy introduced a two-tiered incentive program within the VHU. JA163, 334. While Phase II inmates were granted slightly more privileges than Phase I inmates, the burdens imposed on VHU inmates in either phase were substantially the same when compared to inmates outside the VHU. *See* JA163–64, 348.

[6] Several other Rastafarian inmates were also sent to the VHU with Mr. Burke. *See* JA59–67, 81–90.

JA283. Indeed, the district court found that the VHU was home to "inmates who have a religious objection to cutting their dreadlocks." JA296.

In June 2019, after Mr. Burke filed this suit, VDOC substantially amended its grooming policy to no longer prohibit dreadlocks. Under the revised policy, inmates with long hair must now only pull their hair back or wear a shower cap for a "short hair simulation" photograph so prison officials could more easily identify inmates if they cut their hair. *See* VDOC Operating Procedure 864.1 (effective June 1, 2019), at https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-864-1.pdf.[7]

D. Procedural History

Mr. Burke filed a *pro se* complaint on August 4, 2016, against Harold Clarke, Director of VDOC, and other VDOC officials (collectively, "VDOC"). JA10–30. In his complaint, Mr. Burke raised two primary claims as relevant here. First, he alleged that VDOC's application of the grooming policy to him, and the subsequent segregation and denial of services, violated RLUIPA and the Free Exercise Clause of the First Amendment. JA23. Second, he alleged that VDOC's refusal to provide him with religious service items when it provided such items to inmates of other faiths, violated the Equal Protection Clause. JA19, 22.[8]

[7] This Court has recently taken notice of this policy change. *See Greenhill v. Clarke*, 944 F.3d 243, 253 (4th Cir. 2019).

[8] Mr. Burke also alleged due process violations, that VDOC deprived him of access to the courts, and various state law claims. JA20.

On May 13, 2017, VDOC first moved for summary judgment. Regarding Mr. Burke's RLUIPA and free exercise claims, VDOC alleged that their policies and practices did not substantially burden Mr. Burke's exercise of his faith. JA175. As to the equal protection claim, VDOC argued that the claim must fail because Mr. Burke was not similarly situated to inmates outside of the VHU. JA176.

Senior District Court Judge Jackson L. Kiser granted summary judgment in part and denied summary judgment in part. JA294. He denied summary judgement on the RLUIPA and free exercise claims. JA304–05, 07. He assumed Mr. Burke's religious beliefs were sincere and held that the prison's policies as described by Mr. Burke constituted a "substantial burden" on his religious beliefs. JA305–06 & n.8. Judge Kiser granted summary judgment in part on Mr. Burke's equal protection claim, agreeing with VDOC that inmates in the VHU and inmates in general population were not similarly situated. JA307–08. However, Judge Kiser denied summary judgment on Mr. Burke's equal protection claim insofar as it was premised on VDOC not providing religious meals to Rastafarians given that prison policy expressly provided religious meals to inmates of other faiths. JA308–09.[9] Judge Kiser then, pursuant to a local standing order, directed VDOC to file a successive

[9] The district court order only permitted this claim to survive summary judgment as alleged against Chief of Operations David Robinson, finding that Mr. Burke did not allege sufficient individual action on the part of the other defendants. JA306–07.

motion for summary judgment "supported by affidavit(s) that addresses, inter alia, any state law claim . . . ." JA309.

On July 17, 2018, VDOC filed its second motion for summary judgment.[10] JA311–33 (memorandum of law). The majority of VDOC's motion was dedicated to rearguing that summary judgment should be granted on Mr. Burke's remaining RLUIPA, First Amendment, and Equal Protection Clause claims even though Judge Kiser had just denied summary judgment on those very claims. *See* JA320–30. VDOC spent just one paragraph of its 22-page memorandum addressing the state law claims as Judge Kiser had ordered. JA331–32.

Magistrate Judge Pamela Meade Sargent presided over this second motion for summary judgment. JA503. Judge Sargent granted VDOC's motion and dismissed the remaining claims. First, contrary to Judge Kiser's holding, Judge Sargent held that Mr. Burke's First Amendment and RLUIPA claims were due to be dismissed because Mr. Burke "ha[d] failed to show that the defendants' acts substantially burdened his religious practice." JA501. Judge Sargent also thought that summary judgment was warranted because Mr. Burke "ha[d] provided the court with no

[10] The second motion for summary judgement came with two affidavits attached. The first was of Assistant Warden J. Combs, in which he outlined the differences between Phase I and II of the VHU, and described the distance learning program. JA335–37. The second was Chief of Operations Robinson's, in which he claimed that the religious calendar in evidence was a statement only of what was currently available, not a denial of accommodation. JA429.

evidence as to his sincerely held religious beliefs," JA502, when VDOC had never questioned the sincerity of Mr. Burke's religious beliefs. Even though Judge Kiser had denied summary judgment on Mr. Burke's equal protection claim based on how Rastafarian inmates were treated in comparison to inmates of other faiths, Judge Sargent still held that Mr. Burke "ha[d] failed to show that he ha[d] been treated differently than similarly situated inmates." JA501.

This appeal followed. JA506.

SUMMARY OF ARGUMENT

VDOC's grooming policy put Mr. Burke to an impossible choice: cut his dreadlocks and violate his religion or face the punitive conditions of the VHU. The grooming policy "force[d] [him] to choose between following the precepts of [his] religion and forfeiting governmental benefits, on the one hand, and abandoning the precepts of [his] religion on the other hand." *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019) (quoting *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006)).

When denying VDOC's first motion for summary judgment, the district court judge correctly concluded that the grooming policy imposed a substantial burden on Mr. Burke's sincere Rastafarian religious practice. But when ruling on VDOC's second motion for summary judgment, the magistrate judge, in essence, overruled the district court judge and held Mr. Burke had not demonstrated a sincere religious belief or that his beliefs had been substantially burdened—overlooking Mr. Burke's nineteen years of religious practice and his multi-year endurance of the punitive conditions of the VHU to uphold his Rastafarian faith. This was erroneous. Applying this Court's recent decision in *Greenhill v. Clarke*, 944 F.3d 243 (4th Cir. 2019)—where this Court held that the same VDOC grooming policy substantially burdened an inmate's religious exercise—and the Supreme Court's decision in *Holt v. Hobbs*, 574 U.S. 352, 135 S. Ct. 853 (2015)—where the Court held that a similar grooming policy substantially burdened an inmate's religious exercise—Mr. Burke adequately

demonstrated that the grooming policy imposed a substantial burden on his religious exercise under the First Amendment and RLUIPA.

Moreover, the automatic segregation of Rastafarians like Mr. Burke into the punitive conditions of the VHU simply because they adhered to the basic tenets of their faith also violated the Equal Protection Clause of the Fourteenth Amendment. The grooming policy punished Rastafarians. While other inmates could cut their hair as required by the grooming policy and receive all the benefits general population allowed, adherent Rastafarians could not cut their hair without violating their faith—and so were exiled to the punitive Violators Housing Unit. This segregation was a "denial . . . of the equal protection guaranteed by the Fourteenth Amendment." *Bell v. State of Md.*, 378 U.S. 226, 260 (1964) (Douglas, J., concurring in part).

The discriminatory grooming policy was not the only way that VDOC affixed upon Rastafarian inmates a "badge of second-class citizenship." *Id*. In the prison more broadly, Rastafarians were regularly denied the opportunities for religious worship afforded to inmates of other religions. As the district court judge correctly held, VDOC's unexplained failure to treat different religions similarly amounted to a violation of clearly established law. The magistrate judge disregarded this holding and concluded that Mr. Burke never specifically requested religious services, faith items, or holy day meals. But the record proves this false. Mr. Burke made numerous requests for the same religious opportunities as inmates of other faiths, and each time

was denied. Because VDOC failed to justify its differential treatment of Rastafarian inmates, this Court must reverse the grant of summary judgment on Mr. Burke's equal protection claims.

This Court recently observed that "VDOC might find that providing robust support for inmates' genuine religious exercise would actually enhance prison security and rehabilitation." *Greenhill*, 944 F.3d at 254. Rather than support Mr. Burke's exercise of his Rastafarian faith, VDOC has punished him for his faith and denied him the basic implements of worship that it provided for other religions. Mr. Burke produced prima facie evidence that VDOC violated his rights under the Free Exercise Clause, the Equal Protection Clause, and RLUIPA.

STANDARD OF REVIEW

This Court reviews a grant of summary judgment *de novo*. *Carter v. Fleming*, 879 F.3d 132, 139 (4th Cir. 2018). Summary judgment is inappropriate unless "the movant shows there is no genuine dispute as to any material fact." Fed. R. Civ. P. 56(a). When conducting its review, this Court must view the facts and draw all inferences in the light most favorable to Mr. Burke. *Jehovah v. Clarke*, 798 F.3d 169, 176 (4th Cir. 2015). "Lastly, in addressing [Mr. Burke's] claims, [this Court is] obliged to liberally construe the allegations of his pro se verified Complaint." *Williamson v. Stirling*, 912 F.3d 154, 169 (4th Cir. 2018) (citing *Erickson v. Pardus*, 551 U.S. 89, 94 (2007)).

ARGUMENT

I. Mr. Burke Established that VDOC's Grooming Policy Substantially Burdened His Exercise of Sincerely Held Religious Beliefs in Violation of the Free Exercise Clause and RLUIPA.

Mr. Burke alleged that VDOC's grooming policy substantially burdened the exercise of his sincerely held religious beliefs. In his verified complaint, Mr. Burke explained under penalty of perjury that he is a devout Rastafarian, and that a core tenet of his religion requires him to wear his hair in dreadlocks. VDOC's grooming policy, however, required all inmates to keep their hair cut short and specifically prohibited dreadlocks. When Mr. Burke refused to comply with VDOC's grooming policy because it would violate his faith, he was placed in the VHU, where he was held in segregated solitary confinement and denied access to services and privileges available to inmates in general population.

Mr. Burke produced prima facie evidence that VDOC violated his rights under RLUIPA and the Free Exercise Clause. To make out both claims, Mr. Burke had to show "that (1) he [held] a sincere religious belief; and (2) a prison practice or policy place[d] a substantial burden on his ability to practice his religion." *Carter*, 879 F.3d at 139; *see also Lovelace v. Lee*, 472 F.3d 174, 198 n.8 (4th Cir. 2006) ("RLUIPA incorporates the 'substantial' burden test used in First Amendment inquiries . . . .").

As the district court judge held below, Mr. Burke met his burden. Despite the district court judge's decision, the magistrate judge held that Mr. Burke failed to

produce evidence necessary to satisfy either prong of the test. As explained below, the magistrate judge's about-face was wrong and requires reversal.

A. Mr. Burke Established that His Rastafarian Beliefs are Sincerely Held.

Mr. Burke introduced sufficient evidence to show that his religious beliefs were sincere. In his verified complaint, Mr. Burke explained that he took the Rastafarian Vow of the Nazarite over 19 years ago and, since then, Rastafarianism has been his "religion and way of life." JA15. Mr. Burke elaborated that he wore his hair in dreadlocks and refused to cut his hair because of his religious beliefs. *Id.* And the record demonstrates that Mr. Burke's religious beliefs were sincere, because when he was faced with the choice of being placed in segregation (with the resulting loss of rights) or cutting his hair, Mr. Burke chose segregation. *Id.* Below, VDOC did not contest the sincerity of Mr. Burke's beliefs. And in fact, VDOC's own policies recognize Rastafarianism as an accepted religion. JA393.

Although VDOC never contested the sincerity of Mr. Burke's beliefs, the magistrate judge held that Mr. Burke had "provided the court with no evidence as to his sincerely held religious beliefs, other than to state he is of the Rastafarian faith." JA502. However, Mr. Burke's assertions in his verified complaint *were* evidence of his sincerely held religious beliefs, as this Court has explained that "a verified complaint is the equivalent of an opposing affidavit for summary judgment purpose, when the allegations contained therein are based on personal knowledge." *Williams*

v. Griffin, 952 F.2d 820, 823 (4th Cir. 1991) (emphasis omitted). Moreover, the magistrate judge's decision ignored the fact that Mr. Burke had refused for years to cut his hair because of his faith, choosing instead to face segregation, solitary confinement, and severe rights deprivations, both at Red Onion and Wallens Ridge prisons. *See* JA10–30. The magistrate judge ignored Mr. Burke's repeated requests for religious items and services spanning years. The magistrate judge's holding that Mr. Burke failed to sufficiently demonstrate that his religious beliefs were sincere was arbitrary and incorrect.

B. Mr. Burke Established that VDOC's Grooming Policy Substantially Burdened His Religious Exercise Because He Could Not Comply with the Policy While Adhering to His Faith.

Mr. Burke also introduced sufficient evidence to show that VDOC's grooming policy substantially burdened his sincerely held beliefs. A substantial burden "is one that puts substantial pressure on an adherent to modify his behavior and to violate his beliefs or one that forces a person to choose between following the precepts of her religion and forfeiting governmental benefits, on the one hand, and abandoning the precepts of her religion on the other hand." *Greenhill*, 944 F.3d at 250 (quoting *Lovelace*, 472 F.3d at 187); *see also Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015). This Court has made clear that "removing privileges in an effort to compel compliance . . . qualifies as a substantial burden." *Couch v. Jabe*, 679 F.3d 197, 200–01 (4th Cir. 2012) (construing *Warsoldier v. Woodford*, 418 F.3d 989, 995–96 (9th Cir. 2005)).

"[W]hether a 'substantial burden' exists [is] a question of law subject to de novo review." *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 93 (1st Cir. 2013).

Mr. Burke attested in his verified complaint that he was placed in the VHU solely because he refused to cut his hair as required by VDOC's grooming policy, an act that would violate his faith. JA15. VHU amounted to solitary confinement. Mr. Burke was restricted to his cell by himself for 21 hours of the day, JA287; he was denied access to in-person educational programs, *see* JA163; his yard time was reduced to one hour in a cage, JA102; his commissary was restricted to one-fifth of the amount available for inmates in general population, JA101–102, 287; he was denied group religious services, JA17; and his ability to work was all but eliminated. *Id.* Mr. Burke explained that he suffered all of this simply because he insisted on growing his hair as required by his religion. JA44.

VDOC transparently acknowledged that the VHU was specifically designed to force inmates into complying with its grooming policy. According to VDOC, the VHU incentivized inmates "to comply with the grooming standards" by restricting any violator's opportunity for "participation in services and programs." JA161. VDOC's goal in placing inmates in the VHU was to compel them to comply with the grooming policy to "increase quality of life." *Id.* This type of incentive system was exactly the type of substantial burden that this Court recognized in *Greenhill*

and *Couch*: by putting Mr. Burke in the VHU, VDOC put "substantial pressure" on Mr. Burke "to modify his behavior and to violate his beliefs." *Greenhill*, 944 F.3d at 250. VDOC's "removing [of] privileges in effort to compel compliance . . . qualifies as a substantial burden." *Couch*, 679 F.3d at 200–01 (construing *Warsoldier*, 418 F.3d at 995–96); s*ee also Lovelace*, 472 F.3d at 187–89 (holding, *inter alia*, that the denial of group religious services was a substantial burden on inmate's religious exercise).

Greenhill is instructive. Mr. Greenhill argued that VDOC's grooming policy placed a substantial burden on his religious rights because it required inmates to keep their beards short; he asserted that his religion required him to maintain a four-inch beard. 944 F.3d at 246–47. When Mr. Greenhill chose to grow out his beard as his religion required, VDOC placed him in restrictive housing for his noncompliance. *Id.* at 252. This Court held that the grooming policy "substantially burdened [Mr. Greenhill's] religious practice of maintaining a four-inch beard," because "non-compliance with the policy foreclose[d] the privilege of returning to a general population environment." *Id.*

The Supreme Court's decision is *Holt* is equally on point. Mr. Holt, "an Arkansas inmate and devout Muslim," wished to "grow a ½-inch beard in accordance with his religious beliefs." 135 S. Ct. at 859. The prison, however, had a grooming policy requiring inmates to be clean-shaven, and when Mr. Holt requested

an exemption from the policy, he was told that he could abide by the policy or "choose to disobey [and] suffer the consequences." *Id.* at 861. The Supreme Court held that Mr. Holt "easily satisfied" his burden of showing that the grooming policy substantially burdened his religious beliefs. *Id.* at 862–63. The Court reasoned that if Mr. Holt "contravene[d] [the grooming] policy and gr[ew] his beard, he [would] face serious disciplinary action. Because the grooming policy put[] petitioner to this choice, it substantially burden[ed] his religious exercise." *Id.* at 862.

The substantial burden on religious exercise this Court found in *Greenhill* and the Supreme Court found in *Holt* is the same substantial burden that Mr. Burke faced here. Mr. Burke was put to the same choice as Mr. Greenhill and Mr. Holt: comply with the prison's grooming policy and violate his sincerely held religious beliefs, or face the consequences. Like in *Greenhill* and *Holt*, VDOC's grooming policy "put substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 718 (1981).

Despite the clear teachings of *Greenhill* and *Holt*, and despite the district court judge's holding that Mr. Burke had "describe[d] a substantial burden on his religious exercise," JA306, the magistrate judge built on her arbitrary finding that Mr. Burke did not prove his religious beliefs were sincere to summarily conclude Mr. Burke had also "offered no evidence of any substantial burden on the free exercise of his religious beliefs, other than to make conclusory allegations in his Complaint."

JA502. Yet Mr. Burke offered the same evidence that this Court found sufficient in *Greenhill* and that the Supreme Court found "easily satisfied" the petitioner's burden in *Holt*. The magistrate judge's holding was erroneous.

C. This Court Must Reverse and Remand for the District Court to Apply the *Turner* and RLUIPA Tests.

Once a plaintiff establishes that a prison policy places a substantial burden on his sincerely held religious beliefs, the burden shifts to the institution to justify the burden. *Greenhill*, 944 F.3d at 250 (citing *Lovelace*, 472 F.3d at 189). For a free exercise claim, "[a] prison regulation that abridges inmates' constitutional rights is valid if it is reasonably related to legitimate penological interests." *Lovelace*, 472 F.3d at 199 (internal quotations omitted). This Court applies the *Turner* test, asking: (1) whether the prison rule bears a "valid, rational connection to a legitimate governmental interest"; (2) "whether alternative means are open to inmates to exercise the asserted right"; (3) "what impact an accommodation of the right would have on guards and inmates and prison resources"; and (4) "whether there are ready alternatives to the regulation." *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (quoting *Turner v. Safley*, 482 U.S. 78, 89–91 (1987)); *see also Lovelace*, 472 F.3d at 200 (applying the test). This Court has made clear that "bare assertion[s] of a legitimate interest without further explanation [are] superficial and insufficient" to support a restriction of constitutional rights. *Couch*, 679 F.3d at 201 (citing *Lovelace*, 472 F.3d at 190).

Congress passed RLUIPA to be more protective of religious rights than the First Amendment. *See Lovelace*, 472 F.3d at 186. Thus, a RLUIPA claim is subject to "a strict scrutiny standard." *Greenhill*, 944 F.3d at 250. When a prison policy substantially burdens an inmate's religious exercise, the prison must show that (1) the policy is "in furtherance of a compelling government interest," and (2) that the policy is "the *least restrictive* means of furthering that compelling government interest." *Id.* (citation omitted). The "least-restrictive-means standard . . . requires the government to show that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting party." *Jehovah*, 798 F.3d at 177.

Below, neither the district judge nor the magistrate judge applied either the *Turner* factors or the RLUIPA standard. In denying summary judgment, the district court implicitly found that the government failed to satisfy either standard. The magistrate judge did not apply either standard because she erroneously held that Mr. Burke did not prove that his religious beliefs were sincere or that VDOC's policy substantially burdened his beliefs. JA502. Therefore, this Court should reverse and remand for further proceedings so that the district court can perform these required analyses. *See, e.g.*, *Greenhill*, 944 F.3d at 252 ("Therefore, we also vacate the district court's judgment with respect to the grooming policy and remand to complete the RLUIPA analysis and determine whether the versions of the grooming policy

challenged by Greenhill reflect the least restrictive means to achieve a compelling government interest.").

Indeed, on the record as it currently stands, it is unlikely that VDOC will be able to satisfy either the free exercise or RLUIPA standard. In its summary judgment papers, VDOC claimed three penological interests justified its grooming policy requiring short haircuts—a policy with which Mr. Burke could not comply without violating his religious beliefs: (1) long hair could be used to conceal contraband; (2) long hair could be used to disguise an inmate; (3) long hair could pose a health risk to other inmates. JA71.

But VDOC offered no evidence or testimony in support of these justifications, and this Court has made clear that "bare assertion[s] of a legitimate interest without further explanation [are] superficial and insufficient" to support a constriction of constitutional rights. *Couch*, 679 F.3d at 201 (citing *Lovelace*, 472 F.3d at 190). Moreover, last year, VDOC rescinded the grooming policy and replaced it with a much less restrictive policy,[11] and as this Court opined in *Greenhill*, "VDOC's 2019 version [of the grooming policy], which imposes fewer requirements and penalties, suggests that the [earlier] versions challenged [here] may not have been reasonably related to legitimate penological interests." *Greenhill*, 944 F.3d at 253. Finally, *Holt*

[11] VDOC Operating Procedure 864.1 (effective June 1, 2019), at https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-864-1.pdf

strongly suggests that VDOC will not be able to satisfy the RLUIPA least-restrictive-means standard, as there, in finding a similar grooming policy violated RLUIPA, the Supreme Court was "unpersuaded" by the very same arguments that VDOC made below. *See Holt*, 135 S. Ct. at 865.

In sum, the magistrate judge erroneously concluded that Mr. Burke did not adduce sufficient evidence to show that VDOC's grooming policy substantially burdened his right to exercise his sincerely held religious beliefs. This Court should reverse and remand for further proceedings.

II. Mr. Burke Established that VDOC's Grooming Policy and Discriminatory Denial of Rastafarian Religious Practice Violated the Equal Protection Clause.

The Equal Protection Clause of the Fourteenth Amendment prohibits the government from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The clause "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439 (1985). Even when a state policy is "facially neutral, its administration or enforcement can effect an unequal application by favoring one class of persons and disfavoring another." *Sylvia Dev. Corp. v. Calvert Cty., Md.*, 48 F.3d 810, 818–19 (4th Cir. 1995). "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination. Once this

showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Morrison*, 239 F.3d at 654.

Ordinarily, state classifications of similarly situated persons based on race or religion trigger strict scrutiny. *Giarratano v. Johnson*, 521 F.3d 298, 303 (4th Cir. 2008) (citing *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)). In the prison context, however, a "prison regulation [that] impinges on inmates' constitutional rights . . . is valid if it is reasonably related to legitimate penological interests and not an exaggerated response to a particular concern." *Morrison v. Garraghty*, 239 F.3d 648, 655 (4th Cir. 2001) (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). This standard does not erase the concerns underlying the use of suspect classifications such as race or religion. *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002). "Such [classifications] are [still] 'seldom relevant to the achievement of any legitimate state interest' and, therefore, 'are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others.'" *Morrison*, 239 F.3d at 654 (quoting *City of Cleburne*, 473 U.S. at 440).

If an inmate shows that the state is purposefully treating him differently from similarly situated inmates on the basis of religion, a court must consider the four-factor *Turner* test. *Morrison*, 239 F.3d at 655 (citing *Turner*, 482 U.S. at 89–90). "A policy will not be sustained where the logical connection between the [policy] and

the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 655–56.

A. Mr. Burke Established that VDOC Treated Rastafarians Differently From Similarly Situated Prisoners on the Basis of Religion By Exiling Adherent Rastafarians to the VHU.

"An individual is similarly situated to others for equal protection purposes when a prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated. Exact correlation is neither likely nor necessary, but the cases must be fair congeners. In other words, apples should be compared to apples." *Davis v. Coakley*, 802 F.3d 128, 133 (1st Cir. 2015) (internal quotations omitted) (citing *Barrington Cove Ltd. P'ship v. Rhode Island Hous. & Mortgage Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001)).

All prisoners in VDOC were similarly situated upon their arrival at Wallens Ridge because they were all subject to the grooming policy. There were no special exemptions, exceptions, or accommodations for any prisoners for any reason on the face of the policy—all had to comply regardless of race, religion, or security level. This rendered all inmates in the prison similarly situated when the grooming policy was first applied to them.

But "even though a state [policy] is facially neutral, its administration or enforcement can effect an unequal application by favoring one class of persons and disfavoring another." *Sylvia Dev. Corp.*, 48 F.3d at 818–19. Such an unequal

application happened automatically with the grooming policy because of the religious beliefs of each prisoner. For the Catholic inmate, compliance was easy. Cutting his hair to the required length did not violate his religion, so he proceeded to general population without restriction. For Rastafarians like Mr. Burke, compliance was impossible. Cutting his dreadlocks would violate his religion, so by refusing, he was segregated to the VHU where he suffered restricted privileges and was denied opportunities afforded to inmates outside the VHU. VDOC's grooming policy forced similarly situated prisoners down starkly different roads solely because of what their religion allowed.

Indeed, the Catholic prisoner outside the VHU faced no restrictions from the grooming policy. He could spend half his day outside of his cell. He was granted up to $50 a week to spend at the commissary. He could attend educational classes in person alongside his peers and receive the full benefits of classroom interaction. He could work a job in the kitchen or laundry and receive other vocational training. Because his religion was not in tension with the grooming policy, he could obtain as many benefits and privileges as the VDOC allowed at his security level.

Meanwhile, Mr. Burke was restricted from enjoying the same privileges and benefits as the Catholic prisoner solely because his religion does not allow him to cut his hair. In the VHU, Mr. Burke was confined to his cell for 21 hours a day. JA287. The lights were on at all times. JA85. The only form of entertainment was a

single television set to a Christian channel that could not be changed. JA85, 101–02, 325. Mr. Burke was allowed only $10 a week to spend at commissary. JA101–02, 163. His five hours of allotted weekly outside recreation took place in a cage, and he was not allowed access to the gym or other recreational opportunities. JA85, 102, 163. If Mr. Burke wanted to take an educational class, he was forced to enroll in "distance learning," and had to watch the classes on a closed-circuit television alone in his cell. JA163. He was forbidden from working a kitchen or laundry job and was prohibited from attending vocational training. JA17, 85. Mr. Burke suffered these conditions simply because his religion requires him to wear dreadlocks.

The district court erroneously concluded that these disparities in conditions did not rise to the level of an equal protection violation. In the district court's view, prisoners in the VHU were not similarly situated with prisoners outside the VHU because the latter group complied with the grooming policy while the former did not. JA308. But that distinction misses the point. Mr. Burke and other Rastafarians suffered different and more severe conditions in the VHU from their general population counterparts *because of the grooming policy*, which effectively categorized prisoners on the basis of religion. But-for the Rastafarian belief that he must keep his hair in dreadlocks, Mr. Burke would not have been relegated to the VHU. He would have received all of the benefits that flow from being in general population, including more recreation time, a higher spending limit at commissary,

in-classroom educational experiences with his peers, and a job in the kitchen or the laundry. But because Mr. Burke is Rastafarian, he was not eligible for any of those things. In short, application of the grooming policy *led to* the differential treatment because of religion.

Distilled to its essence, the district court's theory was that a generally applicable policy that results in differential treatment cannot support an equal protection claim because once individuals are treated differently by the policy, they are no longer similarly situated. This is contrary to Fourth Circuit case law. *Sylvia Dev. Corp.*, 48 F.3d at 818–19 ("Even though a state law is facially neutral, its administration or enforcement can effect an unequal application by favoring one class of persons and disfavoring another."). Under established equal protection precedent, courts must decide whether similarly situated individuals are treated differently, not whether individuals are treated so differently as to render them dissimilar.

Moreover, this is not a simple question of compliance or non-compliance, as the district court characterized. Mr. Burke *could not* comply with the grooming policy because his religion forbade it. Meanwhile, the Catholic prisoner could easily comply with the grooming policy because his religion allowed it. Thus, if you were Rastafarian and could not cut your dreadlocks because you adhere to your faith, you were forced to suffer the restrictions and solitary confinement of the VHU; if you

were Catholic, you received all the privileges and benefits VDOC allows. That is differential treatment on the basis of religion.

Viewing the evidence and drawing all inferences in Mr. Burke's favor, the record demonstrates that the differential treatment of Rastafarians by VDOC was intentional. On the official list of religions approved to practice within VDOC, the state singled out only one religion—Rastafarianism—for compliance with the grooming policy. *See* JA393. This condition was not attached to any other religion, even though many other religions also require adherents to grow long hair or beards. Rastafarianism was the only religion VDOC identified as having to explicitly follow the grooming policy.[12]

[12] Indeed, as evinced in prior litigation, at least one VDOC official believed that the VHU was reserved exclusively for the segregation of Rastafarians. *See Greenhill v. Clarke*, 2018 WL 4512074, at *4 n.6 (W.D. Va. Sept. 19, 2018), v*acated and remanded*, 944 F.3d 243 (4th Cir. 2019). *See also* Opening Brief of Plaintiff-Appellant, at 12, Greenhill v. Clarke, No. 18-7300 (4th Cir. Jan. 14, 2019) ("Unit Manager Larry Collins told Mr. Greenhill [a Muslim inmate]: 'The VHU is for Rastafarians and you ain't no damn Rastafarian.'").

Religions Approved to Operate in DOC Facilities

The following religious groups have been approved to meet in DOC facilities:

African Hebrew-Israelite
Asatru/Odinism
Buddhists
Christian Science
Church of Jesus Christ of Latter Day Saints/Mormons
Coptic Church
Druidry-Celtic
Eckankar
Greek Orthodox/Eastern Orthodox
Hare Krishna
Hindu
Humanism (Religious and Secular) (added 8/10/16)
Integral Yoga
Islam (Sunni Muslims, Shiite Muslims, World Community of Islam)
Jehovah's Witnesses
Jewish
Messianic Jews
Moorish Science Temple of America
Natsarim Israel
Nation of Islam *
Native American
Philadelphia Church of God
Protestants

- Baptists
- Church of Christ/United Church of Christ
- Episcopalians/Anglican
- Lutherans
- Mennonites
- Methodists
- Pentecostal (also known as Holiness, Apostolic, Charismatic, etc.)
- Presbyterians
- Quakers/Society of Friends
- Seventh Day Adventists

Rastafarians (must follow DOC grooming standards)
Roman Catholics
Santeria
Shetaut Neter/Neterianism
Temple of the Way-Out (of sin) Church
Wicca
Yahwists (House of Yahweh)

*Note- the following sects are not approved:
Five Percent Nation (Five Percenters)
Lost and Found Nation of Islam

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Finally, as explained earlier, Mr. Burke produced adequate evidence showing that the grooming policy substantially burdened the exercise of his religion in violation of RLUIPA and the Free Exercise Clause. It would be perverse to adopt the district court's conclusion that the grooming policy could nevertheless render VHU and non-VHU prisoners dissimilar for equal protection purposes. Because the grooming policy is illegal and unconstitutional, it cannot be the reason that Mr. Burke is dissimilar from prisoners outside the VHU, when it is the only reason why he was in the VHU. Accordingly, the district court erred when it granted summary judgment for VDOC on Mr. Burke's first equal protection claim.

B. Mr. Burke Established that Rastafarians Were Denied Opportunities for Religious Worship Afforded to Inmates of Other Faiths.

Mr. Burke was also treated differently than similarly situated inmates of other religions when VDOC denied Rastafarian inmates the opportunities for religious exercise that it afforded to inmates of other religions.

A glance at VDOC's policy on religious practice shows that accommodations for religious services, prayers, and special holiday meals were afforded to Muslim, Jewish, and Christian inmates. *See* JA134–35. But the policy makes no mention of Rastafarians. On the Master Religious Calendar, VDOC authorized special group meals served "separately from all other General Population offenders" for several religious faith groups on their holidays. *See* JA142–46. However, Rastafarians were not given this same authorization for group meals on their holy days. Indeed, the

prison's calendar expressly noted that on the Rastafarian holy days, "no group meal [is] required." JA 144–45.

What's more, Rastafarians were not afforded group religious services like Muslim and Christian inmates or a faith leader to guide their religious walk. JA17–18, 97–98, 141, 335. They could not even *purchase* Rastafarian religious items from commissary like inmates of other religions could. *See, e.g.*, JA18, 37–38, 395–97. This is despite Mr. Burke repeatedly asking for such items and services to be made available so that he could fully practice his faith. JA31–36.

When denying summary judgment, the district court judge correctly noted that this differential treatment between Rastafarians and inmates of other religions was "a violation of clearly established law." JA308. Yet the magistrate judge, when going back and granting summary judgment, held that VDOC "presented undisputed evidence that Burke did not request that any specific religious items be added to those approved for purchase by offenders, and he did not specifically request that any particular holy day meal/feast be offered for Rastafarians." JA503.

A review of the record reveals that Mr. Burke did indeed, on multiple occasions, request specific religious items and specific holy day meals. *See*, *e.g.*, JA31–36, 117. Mr. Burke also filed numerous complaints, grievances, and appeals regarding the denial of group religious services for Rastafarians. *See* JA40–43, 97–100, 109–112, 123. Mr. Burke sufficiently demonstrated that Rastafarian inmates

were systematically denied the same opportunities for religious worship afforded to inmates of other religions, and that he repeatedly asked the prison to rectify this discriminatory treatment. The magistrate judge's conclusion otherwise was clearly erroneous.

C. This Court Must Reverse and Remand for the District Court to Apply the *Turner* Test.

Because the district court erroneously concluded that Mr. Burke was not similarly situated to inmates in general population and therefore could not prove an equal protection violation based on his segregation in the VHU, the district court did not decide whether the grooming policy was arbitrary or irrational. Just as this Court should remand for the district court to conduct this inquiry for Mr. Burke's free exercise claim, it should remand for the district court to conduct this analysis for Mr. Burke's equal protection claim.

For the other aspect of Mr. Burke's equal protection claim, the district court judge already held that the disparate treatment of Rastafarian inmates compared to the treatment of inmates of other faiths was "a violation of clearly established law." JA308. The magistrate judge's reversal of the district court judge was premised on her erroneous belief that Mr. Burke did not request any specific religious items or particular holy day meals and that he had "offered no evidence that he was being treated any differently than any other offender . . . ." JA503. But below, VDOC did not contest Mr. Burke's claim that it provided fewer accommodations to Rastafarian

inmates than it provided to inmates of other religions. Nor did VDOC contend that it would not be feasible to provide Rastafarians the same accommodations that it provided inmates of other religions.

Instead, VDOC simply argued below that "levels of offender participation and availability of facility resources and religious leaders do not permit separate services for every possible form of worship at every facility." JA330. Taking this assertion as true, that says nothing about whether VDOC is specifically able to accommodate the Rastafarian population in the prison. In fact, VDOC policies require group religious services to be held once a week for a religious group with at least five members, declaring that "no recognized religious group with the minimum number of adherents should be denied at least one service and one study session per week." JA363. And through the affidavits of other inmates, Mr. Burke has shown that there are at least five Rastafarian adherents at Wallens Ridge, including himself. *See* JA59–67, 77–90. VDOC has not provided any reason why it would be overly burdensome to follow its own policy.

Moreover, VDOC has not justified the differential treatment of Rastafarians when it comes to the provision of special meals on religious holidays. VDOC merely claimed that "[o]f the numerous religions recognized by VDOC, some religons [sic] are provided a special holiday meal on designated holy days, while many others [are] not." JA331. VDOC has not provided any explanation for why so many religions are

allowed group meals "separately from all other General Population offenders" on their respective holidays, while Rastafarian group meals are not even authorized. *See* JA142–46.

Finally, VDOC did not provide a single justification for stocking for sale in the commissary implements of faith for other religions, but not for Rastafarians. Its defense to this was that Mr. Burke failed to fill out the correct forms requesting such items. JA331. But this defense falls flat when the record demonstrates that Mr. Burke filed numerous grievances before filing this suit and was rebuffed by prison officials at every turn, not because he filled out the wrong form, but because, in the words of the prison chaplain, the prison did not "have any of this." JA31.

"Since [VDOC has] not offered any interest that they claim justified" its differential treatment of Mr. Burke because of his religion, VDOC has "not shown entitlement to summary judgment." *Carter*, 879 F.3d at 141. This Court must reverse the magistrate judge's grant of summary judgment of Mr. Burke's equal protection claim premised on VDOC's failure to accommodate Rastafarians similar to how it accommodates other religions.

CONCLUSION

This Court should reverse the district court's summary judgment orders and remand for further proceedings.

Respectfully submitted,

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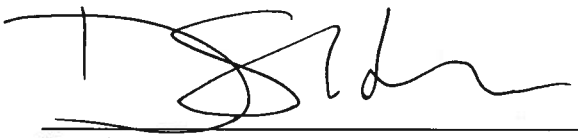
REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal and Local Rules of Appellate Procedure, Mr. Burke respectfully requests that oral argument be granted in this case. The factual and legal issues presented in this case are sufficiently important and complex that oral argument would aid this Court in its decisional process.

CERTIFICATE OF COMPLIANCE

In accordance with Rule 32(a) of the Federal Rules of Appellate Procedure, undersigned counsel for appellant certifies that the accompanying brief is printed in Times New Roman 14-point font, and including footnotes, contains no more than 13,000 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 9,315 words.



Daniel S. Harawa

CERTIFICATE OF SERVICE

I hereby certify that on March 10, 2020, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Daniel S. Harawa