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

REPLY BRIEF

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INTRODUCTION

This case involves two primary claims. One, that Virginia Department of Corrections' (VDOC) confinement of Randy Burke in the punitive Violators Housing Unit (VHU) due to his religious hairstyle constituted a substantial burden on his religious practice in violation of RLUIPA and the Free Exercise Clause. *See* Appellant's Br. at 20–29. Two, that VDOC's systematic and explicit targeting of Rastafarians, and the corresponding denial of religious accommodation, both inside and outside the VHU, violated the Equal Protection Clause. *See id.* at 29–41.

VDOC does not contest the merits of the RLUIPA or Free Exercise Clause claims, thereby conceding the point. Instead, VDOC argues that Mr. Burke did not raise the claims below, and that the RLUIPA claim is now moot because during the course of this litigation it has changed its grooming policy. Appellees' Br. at 21–35. However, Mr. Burke has consistently argued that the grooming policy substantially burdened his religious practice, and thus this argument is properly before this Court. Moreover, this case is not moot both because Mr. Burke is seeking compensatory and punitive damages and VDOC cannot meet its heavy burden of proving mootness given that it can return to the old grooming policy at any time.

As for Mr. Burke's Equal Protection Clause claim, VDOC first argues that the grooming policy did not treat Mr. Burke differently from similarly situated inmates because the same policy applied to all inmates. *Id.* at 47. But Mr. Burke sufficiently

proved how the grooming policy punished him and other Rastafarians because of their religion and did not punish other religions similarly. VDOC then faults Mr. Burke for the unavailability of Rastafarian religious services, spiritual items, and group holy day meals, suggesting that the prison did not deny Mr. Burke anything because he failed to fill out the correct forms. *Id.* at 37. Yet Mr. Burke filed numerous grievances with various prison officials requesting religious services and implements, and at every turn, prison officials stonewalled his requests, gave him conflicting advice, and never once pointed him in the right direction or attached the relevant form that VDOC now claims he should have completed. VDOC finally maintains "there is no evidence that any differential treatment 'was the result of intentional or purposeful discrimination.'" *Id.* at 50 (quoting *Morrison v. Garraghty*, 239 F.3d, 648, 654 (4th Cir. 2001)). As it turns out, VDOC policies expressly target Rastafarians—on an official VDOC document of religions approved to practice in the prison system, only Rastafarianism has a condition attached to it, and that combined with the disparate treatment is enough to prove purposeful discrimination.

At bottom, VDOC's arguments are unavailing. This Court should reverse and remand for further proceedings.

ARGUMENT

I. Mr. Burke's RLUIPA and First Amendment Claims Are Properly Framed and Present a Live Controversy, and VDOC Has Conceded Any Arguments as to Their Merits.

Mr. Burke was confined to the punitive VHU for *four years* because he could not adhere to VDOC's grooming policy without violating his religious beliefs. *See* JA17. The grooming policy "force[d] [Mr. Burke] 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." *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019). Mr. Burke chose to live in quasi solitary confinement rather than cutting his dreadlocks in violation of his religion. "Because the grooming policy puts [Mr. Burke] to this choice, it substantially burden[ed] his religious exercise." *Holt v. Hobbs*, 574 U.S. 352, 361 (2015).

VDOC does not respond to the claim that its grooming policy substantially burdened Mr. Burke's religious exercise, and has therefore conceded the point. This Court recently said that "an appellee's wholesale failure to respond to a conspicuous, nonfrivolous argument in the appellant's brief ordinarily constitutes forfeiture." *W. Va. Coal Workers' Pneumoconiosis Fund v. Bell*, 781 F. App'x 214, 226 (4th Cir. 2019) (unpublished); *see Alvarez v. Lynch*, 828 F.3d 288, 295 (4th Cir. 2016) ("an outright failure to join the adversarial process would ordinarily result in waiver").

Indeed, VDOC *cannot* respond to this claim because in *Greenhill*, this Court ruled that the exact policy challenged here was a substantial burden on an inmate's religious exercise. *Greenhill*, 944 F.3d at 250. And *Greenhill* was simply following the Supreme Court's decision in *Holt*, where the Court held that a similar grooming policy substantially burdened an inmate's religious exercise. *Holt*, 574 U.S. at 361. *Greenhill* and *Holt* foreclosed any meaningful response to Mr. Burke's Free Exercise and RLUIPA claims.

To avoid responding to the merits of Mr. Burke's claims, VDOC argues that Mr. "Burke never presented his 'impossible choice' argument to the district court," and as such, "it is too late for him to make such a claim now." Appellees' Br. at 18. VDOC goes so far as to accuse Mr. Burke of "radically refram[ing] his claims" on appeal. *Id.* at 25.[1]

VDOC is actually lobbing this accusation at this Court, because when it appointed counsel for Mr. Burke, it specifically requested briefing on "whether restrictions placed on inmate who refused to cut dreadlocks amounted to substantial

[1] VDOC claims that neither of the district court opinions "recognized [or] addressed, an impossible-choice argument of the kind Burke now articulates." Appellees' Br. at 27. However, in its first opinion, although the district court did not go into great detail, it explicitly held that Mr. Burke had "describe[d] a substantial burden on his religious exercise." JA306. To the extent VDOC relies heavily on the second opinion by Magistrate Judge Sargent to support its argument (which contradicts the district court's first opinion), that opinion is fatally infected by her holding that Mr. Burke did not prove the sincerity of his religious beliefs, which VDOC now concedes was error. *See* Appellees' Br. at 36 n.8.

burden on inmate's Rastafarian religious practice." Appointment Letter, at 1. This Court clearly understood that Mr. Burke was alleging that the grooming policy and VHU placed a substantial burden on his religious exercise.

It makes sense that this Court would ask for briefing on this question, as its "focus remains on discerning the expressed intent of the litigant." *Williams v. Ozmint*, 716 F.3d 801, 811 (4th Cir. 2013). A cursory read of Mr. Burke's *pro se* pleadings, which must be construed liberally, *see Erickson v. Pardus*, 551 U.S. 89, 94 (2007), makes clear that Mr. Burke was alleging that the grooming policy and VHU placed a substantial burden on his religious practice.

In his complaint, Mr. Burke clearly identifies the grooming policy as the source of his injury, *see* JA23, and one of his requested remedies was a declaration that the grooming policy violated RLUIPA and the Free Exercise Clause. *See* JA24. In both of his initial requests for relief from the prison system, he also identified the grooming policy and VHU as the source of his injury. *See* JA36, 43. Most of the affidavits submitted to support his claim also spoke to the burden of the grooming policy and VHU. *See* JA45, 50–51, 58–59, 60, 61–67, 81–83, 85. And in his opposition to summary judgment, Mr. Burke asserted "that Virginia Department of Corrections grooming standards places a substantial burden on the religious exercise of Rastafarians and Muslims," and "VDOC should not be punishing Rastafarian religious prisoners for growing their hair due to religious purposes, and VDOC is

well aware of the burdens caused by the 864.1 [the grooming policy]." JA283. VDOC's claim that Mr. Burke did not make this "impossible choice" argument below is thoroughly belied by the record.

VDOC alternatively argues that because it amended its grooming policy in June 2019, and the "policy no longer prohibits dreadlocks and the VHU no longer exists . . . any RLUIPA claims Burke brings under this late-arriving theory are moot, as are any First Amendment claims for prospective relief." Appellee's Br. at 29.

By selectively focusing on Mr. Burke's RLUIPA claim and requests for declaratory relief, VDOC does *not* argue that the *entire case* is moot. The fact that Mr. Burke is also seeking damages keeps this case alive. Apart from his RLUIPA claim and First Amendment claim for declaratory relief, Mr. Burke sought damages "for the infringement of [his] right to the free exercise of [his] Rastafarian religious practices as protected by [the] [First] Amendment to the United States Constitution." JA25. It is well-established that a claim for "money damages" for past injuries, "if at all plausible, ensure[s] a live controversy." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1660 (2019) (citing *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8–9, (1978)); *Central Radio Co. v. City of Norfolk*, 811 F.3d 625, 631–32 (4th Cir. 2016) (claim for nominal damages precluded mootness); *see also* 13C Charles Alan Wright et al., Federal Practice & Procedure § 3533.6 (3d ed. 2008) (Wright & Miller) ("[M]ootness is defeated so long as damages

or other monetary relief may be claimed on account of the former provisions."). Because Mr. Burke requested damages, his case remains a live controversy.[2]

To be certain, Mr. Burke has suffered mightily at the hands of VDOC. Despite VDOC now touting that Mr. Burke "currently resides in general population housing (and has for the better part of a year), and at no point has [he] ever cut his dreadlocks," Appellees' Br. at 30, from the moment Mr. Burke was transferred into VDOC custody in 2013, he was placed in either solitary confinement or segregation because he refused to violate his religion and cut his hair.[3] Over a century ago, the Supreme Court remarked that solitary confinement bears "[a] further terror and peculiar mark of infamy." *In re Medley*, 134 U.S. 160, 170 (1890). As Justice Kennedy remarked, "Years on end of near-total isolation exact a terrible price."

[2] VDOC suggests in passing that its officials may be entitled to qualified immunity on the damages claims, but asserts this "Court need not resolve that question here." Appellees' Br. at 35 n.7. Because VDOC "fail[ed] to develop this argument to any extent in its brief," this Court should find it waived. *Belk, Inc. v. Meyer Corp.*, 679 F.3d 146, 152 n.4 (4th Cir. 2012).

[3] Mr. Burke was transferred from the Virgin Islands Bureau of Corrections into the custody of VDOC on April 12, 2013, and was immediately placed in segregation for refusing to cut his dreadlocks. JA15. Prior to this transfer, there was no screening process that identified inmates with religious objections to the VDOC grooming policy. Religion screening processes have been standard practice for other state prisons for decades. *See Gartrell v. Ashcroft*, 191 F. Supp. 2d 23, 32 n.10 (D.D.C. 2002) ("Other prison systems have also implemented religion screening processes without problems. For example, states have removed groups of inmates from sister-state prisons when the sister-state infringes on a group's religious practice."). Mr. Burke remained in segregation for thirteen months at Red Onion State Prison before he was transferred to Wallens Ridge State Prison, where he remained in segregation for nearly another month before being moved into the VHU. JA17.

Davis v. Ayala, 135 S. Ct. 2187, 2210 (2015) (Kennedy, J., concurring). Mr. Burke was forced to pay this terrible price for following his religion.

Beyond Mr. Burke's damages claim, VDOC cannot meet its "heavy burden" of proving mootness. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 170 (2000). A defendant's voluntary cessation of a challenged practice moots a case only if it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 n.10 (1982) (citation omitted). As is the case here, "[t]he mootness doctrine ordinarily does not extend to situations where a party quits its offending conduct partway through litigation." *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 407 (4th Cir. 2019); *Pashby v. Delia*, 709 F.3d 307, 316–17 (4th Cir. 2013) (opining that a governmental entity's change to a challenged policy generally does not moot an action when the government retains authority to "reassess . . . at any time" the change and revert to the challenged policy). This Court has "previously held that when a defendant retains the authority and capacity to repeat an alleged harm, a plaintiff's claims should not be dismissed as moot." *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) (collecting cases).

Before this Court, VDOC now "expressly disclaim[s] any intention" of returning to its old policy. Appellees' Br. at 33. However, in at least two cases, this Court has held that similar appellate promises by VDOC were insufficient to moot

a claim. In *Wall*, this Court rejected VDOC's mootness argument because "[u]nsubstantiated assurances in their appellate brief aside, the defendants ha[d] failed to put forth even a single piece of evidence establishing that the [policy] ha[d] been terminated once and for all." *Wall*, 741 F.3d at 497. This Court noted that "the fact that at least three separate policies have been utilized at [Red Onion State Prison] since 2009 indicate[d] some degree of doubt that the new policy will remain in place for long." *Id.* Three years later, this Court again rejected a mootness argument because nothing prohibited VDOC from reverting to the challenged policy in the future, highlighting the fact that VDOC "review[s] the policy . . . annually and rewrite[s] that policy no later than three years after the current policy's effective date." *See Porter v. Clarke*, 852 F.3d 358, 365 (4th Cir. 2017).

Here, VDOC admits that it retains the authority to revise the grooming policy, admits that it reviews and revises its policies every three years, and has refused to expressly concede that its prior policy was unlawful. Appellees' Br. at 33. More to the point, VDOC has stated for the first time in their appellate brief that the "VHU has been abolished," *id.* at 31, but the current grooming policy does not explicitly abolish the VHU; it only states that offenders who were in the VHU have been "transferred to a suitable institution." *Id.* Just like its "unsubstantiated assurances in their appellate brief" in *Wall*, VDOC's disclaimer of any intention to return to the old grooming policy is equally unconvincing given that "[n]othing in the [new

grooming policy] suggests that VDOC is actually barred—or even considers itself barred—from reinstating the [previous grooming] policy should it so choose." *Wall*, 741 F.3d at 497. To the contrary, at least three separate grooming policies have been utilized at VDOC since 2016. JA153, 158; Appellees' Br. at 31. This fact indicates "some degree of doubt that the new policy will remain in place for long." *Wall*, 741 F.3d at 497. Therefore, it is more than a "mere possibility" that VDOC will alter the present grooming policy. *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). Accordingly, this Court should find that VDOC did not meet its heavy burden of proving the mootness of Mr. Burke's RLUIPA and declaratory relief claims. *See Greenhill*, 944 F.3d at 248 (holding the same grooming policy posed a substantial burden on Greenhill's religious exercise despite noting that the policy had changed).

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

Mr. Burke alleged that the VDOC grooming policy treated him differently from similarly situated inmates solely because of his religion. All inmates in the VDOC were similarly situated because all must comply with the grooming policy. But even though the grooming policy was facially neutral, Rastafarians were treated differently because of what their religion allows. Mr. Burke could not follow the grooming policy because his Rastafarian faith forbids him from cutting his dreadlocks, so VDOC banished him to the punitive segregation of the VHU. Inmates without such religious precepts were free to comply with the policy, so VDOC

allowed them to enjoy the privileges of general population. Viewing the evidence and drawing all inferences in Mr. Burke's favor, the record demonstrates that this differential treatment was intentional. Indeed, VDOC policy singled out Rastafarians—and Rastafarians alone—for compliance with the grooming policy. JA393.

In the prison more broadly, Rastafarians were treated differently from inmates of other religions. From the time he arrived in the VDOC from the Virgin Islands, Mr. Burke was regularly denied requests for group religious services, religious service items, and the opportunity to celebrate Rastafarian holy days by sharing a meal with his fellow adherents. *See, e.g.*, JA31–36, 40–43, 97–100, 109–12, 117, 123. For adherents of various other faiths, VDOC afforded group religious services, sold their faith items at commissary, and authorized group meals separate and apart from general population to celebrate religious holy days. This segregation and differential treatment of Rastafarians 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). VDOC makes no attempt to justify this differential treatment.

Instead, VDOC first responds by making the same mistake as the district court below, arguing that the grooming policy did not treat Mr. Burke differently on the

basis of religion. VDOC claims that "[Mr.] Burke would have been assigned to the VHU regardless of why he wore dreadlocks." Appellees' Br. at 47.

This may well be true, but it misses the point. An inmate who wore their hair in dreadlocks of their own volition and nevertheless endured the punitive segregation of the VHU would be making their own choice. But because Mr. Burke's religion requires him to wear his hair in dreadlocks, he had no choice: he *had to* violate the grooming policy and endure the VHU. The district court recognized this and found that the VHU was home to "inmates who have a religious objection to cutting their dreadlocks." JA296. And as evinced in prior litigation, at least one VDOC official believed 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), *vacated 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.'").

No matter what VDOC may argue, its grooming policy forced similarly situated prisoners down starkly different roads solely because of their religion. Because Mr. Burke's religion forbids him from cutting his dreadlocks, VDOC punished him. He was segregated in the VHU, forced to eat all his meals alone, JA163, allotted only five hours per week of recreation in a segregated cage, JA85,

102, 163, denied vocational training and a job, JA17, 85, restricted to one-fifth of the commissary spending limit as other inmates, JA101–02, 163, and confined to his cell for 21 hours a day with the lights on at all times, JA287, 85. Were Mr. Burke not Rastafarian, and were he allowed to cut his dreadlocks, he would not have suffered any of these punitive conditions.

Second, VDOC suggests that because Mr. Burke failed to fill out the correct forms for religious services, items, and holy day meals, VDOC did not really deny him anything at all. But VDOC concedes, as it must, that Mr. Burke filled out numerous grievances requesting the same services and accommodations provided to other religious groups, and that his requests were routinely denied. Appellees' Br. at 36–43.

To the extent VDOC is trying to import an exhaustion-type argument into an equal protection analysis—a novel proposition for which VDOC does not cite a single case—such an argument is unavailing. "Although when administrative procedures are clearly laid out . . . an inmate must comply with them in order to exhaust his remedies, we have in this case, a muddle created by the people running the [prison]. *Swisher v. Porter Cty. Sheriff's Dep't*, 769 F.3d 553, 555 (7th Cir. 2014) (quotations omitted) (cleaned up). For instance, VDOC's responses to Mr. Burke's desire to attend a Rastafarian religious service ranged from "you are allowed to practice your religion in your cell," JA110, to "you must enroll . . . by writing the

chaplain." JA113.[4] And his request for religious items from the chaplain was stonewalled: "Can't. Don't have any of this." JA31. As Mr. Burke pointed out below, at no point did VDOC officials direct him to the proper forms he was supposed to fill out. JA487–89. And even if they had, those forms would not have solved Mr. Burke's requests. Tellingly, the *Request to Attend to Religious Services* form that VDOC chides Mr. Burke for failing to submit does not even have an option to attend Rastafarian religious services. Appellees' Br. at 9 (citing sample form at JA141).

Mr. Burke made his claims known to several prison officials through various official channels and was denied at every turn. To the extent the completion of a particular form is relevant to an equal protection claim, "[w]hen jail personnel mislead inmates about how to invoke the procedure the inmates can't be blamed for failing to invoke it." *Swisher*, 769 F.3d at 555; *see also Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008) ("[A]n administrative remedy is not considered to have been available if a prisoner, through no fault of his own, was prevented from availing himself of it.").

Third, VDOC asserts that Mr. Burke's equal protection claim must fail because "there is *no evidence* that [such treatment] 'was the result of intentional or purposeful discrimination.'" Appellees' Br. at 50 (quoting *Morrison*, 239 F.3d at

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[4] This is even more confusing now given VDOC's assertion that "the chaplain is not a Department official . . . so he is not part of the review process necessary to approve items for personal use by offenders." Appellees' Br. at 39.

654) (emphasis added). But this is simply not true. Discriminatory intent behind a facially neutral policy can be found through "evidence of a 'consistent pattern' of actions by the decisionmaking body disparately impacting members of a particular class of persons." *Sylvia Dev. Corp. v. Calvert Cty., Md.*, 48 F.3d 810, 819 (4th Cir. 1995) (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266–68 (1977)).

There is a consistent pattern of different rules applying to Rastafarians in the VDOC. Despite having housed Rastafarian inmates from the Virgin Islands since the inception of the contractual agreement in 2001, *see* JA194, Rastafarian religious service items still do not appear on the approved religious items list. *See* JA395–96. VDOC claims this is because Mr. Burke never made the proper request. But the absence of Rastafarian religious items from the approved list suggests that no Rastafarian has *ever* made the proper request in two decades. This is doubtful, especially since the approved religious item list includes tarot cards, Wiccan sea salt, and Thor's hammer medallions. JA395–96.

The differential authorizations for group services and meals on religious holidays under the Master Religious Calendar further suggests a consistent pattern of disparate treatment. VDOC notes that no group meals are required for the "Buddhist holiday Bodhi (JA380), for the Jewish holiday Rosh Hashanah (JA379), or for the Christian holiday Easter (JA378)." Appellees' Br. at 40. But VDOC fails

to recognize that group meals separate from general population *are* authorized for another Buddhist holiday—Vesak, and the Jewish holiday of Purim. JA377–78. Nor does VDOC acknowledge that although "no group meal is required" on Christian holidays, the religious calendar mandates that group services *will* be held on Easter and Christmas. JA378, 381. In short, every religion on the master calendar is authorized a celebration separate and apart from general population on at least one holiday during the year. Rastafarian adherents like Mr. Burke do not get the same special authorizations for either of the Rastafarian holy days.

As further proof of VDOC's intentional discrimination, on an official VDOC document, Rastafarians—and Rastafarians alone—are singled out for compliance with the grooming policy. *See* JA393. VDOC attempts to spin this as nothing more than a "passing confirmation that Rastafarians (like all offenders) must comply with a generally applicable policy," Appellees' Br. at 51, but if the policy was simply a general mandate, there would have been no reason to single out Rastafarians. By unnecessarily singling out Rastafarians on an official document, VDOC said the quiet part out loud, affixing upon Rastafarians a "badge of second-class citizenship." *Bell*, 378 U.S. at 260. When taken with the consistent pattern of differential treatment of Rastafarians, there is enough evidence of intentional discrimination to raise an issue of material fact that precludes summary judgment.

CONCLUSION

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

Respectfully submitted,

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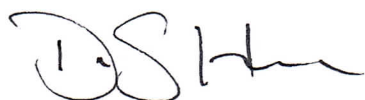
CERTIFICATE OF COMPLIANCE

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 6,500 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 4,145 words.



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CERTIFICATE OF SERVICE

I hereby certify that on May 20, 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