No. 19-6523

IN THE 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

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INTRODUCTION

Plaintiff-appellant Randy Burke frames this case as involving "an impossible choice." Burke Br. 1. According to Burke, the Virginia Department of Corrections (Department) violated his rights by forcing him to either cut his dreadlocks (which would violate his Rastafarian faith) or be placed in the Violators Housing Unit (which, according to Burke, affords him markedly fewer rights than are given to offenders in his facility's general population). There are two problems with that framing: (1) that is not the case Burke presented to the district court; and (2) any request for equitable relief on such a claim is now moot.

Before the district court, Burke raised different religion-based claims—specifically, that he was denied access to group Rastafarian services, specific religious items, and holy day meals. As the district court correctly concluded, however, neither Burke's chosen hairstyle nor his presence in the VHU prevented him from availing himself of the generally applicable procedures for requesting those services, items, and meals. This Court should not fault the district court for not addressing an argument that was never before it.

What is more, the VHU no longer exists and has not existed for nearly a year. Burke currently resides in his facility's general population, and at no point during his confinement has Burke cut his dreadlocks. Accordingly, to the extent Burke's newly cast claims seek relief under RLUIPA or prospective relief under the First Amendment, they are moot.

As for the claims Burke did present below, the district court properly disposed of them. Burke argued that defendants violated his free-exercise rights by denying him "Rastafarian religious services, service items, and Rastafarian religious holy day meals." JA 11. But, as the district court properly held, Burke was never *denied* those services, items, or meals—he just never submitted the necessary requests. Unable to prove a substantial burden, Burke cannot proceed under RLUIPA or the First Amendment. Burke's equal protection claims likewise fail because all offenders are subject to the same procedures, regardless of their faith or national origin, and Burke has not shown that any of the Department's facially neutral policies have been applied in an intentionally discriminatory manner.

The judgment of the district court should be affirmed.

JURISDICTIONAL STATEMENT

Because this is an 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. This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment on March 26, 2019, JA 505, and Burke filed a timely notice of appeal on April 18, 2019, JA 506. See Fed. R. App. P. 4(a)(1)(A).

ISSUES PRESENTED

1. Whether Burke may challenge, for the first time on appeal, the Department's former procedure that violators of its (since-modified) grooming policy be placed in a special housing unit when that unit no longer exists and the grooming policy has been amended so that Burke is no longer in violation.

2. Whether the district court properly granted summary judgment on Burke's Free Exercise Clause and RLUIPA claims on the grounds that the defendants had not substantially burdened his religious beliefs.

3. Whether the district court properly granted summary judgment on Burke's Equal Protection Clause claims.

STATEMENT

I. Regulatory Background

The Department strives "to provide reasonable opportunities for offenders incarcerated in [Department] facilities to voluntarily pursue religious beliefs and practices." JA 126 (policy effective July 1, 2015); see also JA 431 (policy effective March 1, 2018) (same). Throughout Department facilities, offenders are members of 42 different officially recognized religions (including Rastafarianism), celebrate 35 distinct religious holidays (including the coronation and birthday of King Haille Selaisse, two Rastafarian holy days), and have access to dozens of religious items with which to worship (including medallions, head coverings, and prayer rugs). See JA 449, JA 451–59.

Because the Department's efforts to accommodate each offender's religious beliefs must account for "concerns regarding facility security, safety, order, space, and resources," JA 126; see also JA 431 (same), the Department has developed one procedure for requesting and approving access to religious items, and for recognition of religious holidays and

holy meals; along with a parallel procedure for requesting to participate in religious group services.

Religious Items: Offenders may access religious items in one of two ways: (1) by purchasing religious items for "individual offender possession" from the commissary; or (2) by requesting a "donated faith item by contacting the facility chaplain," who "based on item availability will provide the offender with the item." JA 137–38. Either way, the religious item must be approved for possession and use before it is eligible for sale or donation. See JA 130 ("Offenders may possess individual faith objects as authorized on . . . [the] *Approved Religious Items* [list].").

If a particular item is not already approved for possession, any offender may "request that" it "be approved by submitting a *Request for Approval of Religious Items*." JA 440; see also JA 395–97 (list of approved religious items as of July 30, 2016); JA 451–53 (list as of June 28, 2018). The facility unit head then "research[es] the item and recommend[s] approval, approval with restrictions, or disapproval and forward[s]" the request and that recommendation to a Department-wide faith review committee. JA 440. That committee "ensure[s]

[Department]-wide consistency for offender accommodation of religious property and practices based on legitimate facility security and operational concerns." JA 262. If the faith review committee approves the item, the "*Approved Religious Items* [list] will be amended to allow the approved religious item for offenders throughout the [Department]." JA 440; see also JA 257. Any offender may then purchase the item from the commissary, or—if the item has been donated—request the item from the facility chaplain. See JA 137–38.

Religious Holidays: The Department consistently updates its calendar to reflect offenders' religious beliefs. During the course of this litigation alone, the Department has approved seven different such holidays, along with accompanying celebrations and events. Compare JA 367–71 (master religious calendar as of July 2015, listing 28 approved holidays), with JA 454–59 (same as of March 2018, listing 35 approved holidays). Throughout, the birthday and coronation of King Haille Selaisse—both Rastafarian holy days—were recognized as religious holidays, to be accompanied by a "[s]pecial service or ceremony," but no "special menu" or "group meal." JA 384, 385.

Although holidays are not automatically accompanied by a particular meal—and many, if not most, are not—the Department offers celebratory meals and special menus based on its own research and nation-wide practice. See JA 430. If offenders find these offerings insufficient, they "may submit additional requests for specific holy day meals to the faith review committee for consideration." *Id.*

Religious Services: Approval for religious group services works much the same way. Provided the religion itself has been recognized, offenders may seek approval for "new religious group activities not currently offered." JA 136. If there is "sufficient offender interest," Department officials "should consider the request and provide time and space for the group to meet," subject to "restrictions of the facility['s] security level, mission, space, time, available supervision, etc." *Id.*

Once services are approved, offenders sign up using a *Request to Attend Religious Services* form. JA 127; see generally JA 127–30 ("Access to Religious Services"). Offenders are given the option to sign up during facility orientation, and may change their selection during the two-week "Open Enrollment" period, which "shall be provided at least once each calendar quarter." JA 127. "The offender population

shall be notified on a continued basis, as necessary, when religious services are added or changed." JA 128.

II. Factual & Procedural Background

1. Plaintiff-appellant Randy Burke was convicted and sentenced to a period of incarceration for a crime he committed in the U.S. Virgin Islands. JA 15. Pursuant to an agreement between the Virgin Islands Bureau of Corrections and the Department, JA 194–216, Burke is serving that sentence in Virginia in Department facilities. Since May 2014, that facility has been Wallens Ridge State Prison. See JA 17. For the duration of this litigation, Burke has worn his hair in dreadlocks. JA 15.

a. When Burke was transferred to Department custody in 2013, the Department's then-existing grooming policy prohibited offenders from wearing their hair in certain styles, including dreadlocks. JA 15, 154. For that reason, Burke was placed in restrictive housing and then assigned to a special housing unit—the Violators

Housing Unit (VHU)—a since-dissolved facility that housed violators of the grooming policy. JA 15, 17.[1]

b. i. Once in the VHU, Burke "began to explore the available opportunities concerning Rastafarian religious services." JA 17; see also JA 78 (Burke's affidavit) (same). According to Burke, he discovered that there were "no Rastafarian religious services" or "Rastafarian religious service items." JA 17. When the Department began offering Rastafarian group services in January 2015, Burke attended, finding the services inadequate. See JA 17 (describing the services as "make shift" because they were held in "an empty room with no Rastafarian religious service items" and no "Levi and high priest to instruct the service"). Although Burke alleges he was later denied access to group services, JA 40–43, there is no evidence that he ever submitted a *Request to Attend Religious Services*. See JA 141 (sample form); JA 189 (affidavit of John Combs, Assistant Warden of Wallens

[1] Before the creation of the VHU, the grooming policy authorized the use of "reasonable force or restraints . . . to the extent needed to bring the offender into compliance," and required that violators thereafter be placed in restrictive housing until they complied. See JA 150–51. The grooming policy has since been further updated to permit dreadlocks, and the VHU has been eliminated altogether. See *infra* pp. 30–31 & n.6.

Ridge) (noting that the unit manager informed Burke "he had not been denied participation in religious group services and that he simply needed to sign up").

Burke also contacted the facility chaplain to request Rastafarian religious service items and holy meals. JA 18, 31. But the chaplain could provide offenders only with those items that had been approved and donated, see *supra* pp. 5–6; JA 137–38, and as the chaplain explained, Burke's requested items not been donated, JA 19. The commissary did not offer those items for sale, JA 37–39, and Burke never attempted to have any Rastafarian items approved for sale or donation. See JA 130 ("Offenders may possess individual faith objects as authorized on . . . [the] *Approved Religious Items* [list]."); JA 338 (supplemental affidavit of John Combs, dated July 10, 2018) ("As of the date of this affidavit, there is no record that offender Burke ever submitted [a] Request for Approval of Religious [I]tem form."). Nor did Burke submit a request to the faith review committee for approval of a special menu or group meal associated with any Rastafarian holiday.

ii. Instead, Burke turned to the Department's grievance procedure, which prisoners must complete before filing a lawsuit under

the Prison Reform Litigation Act (PLRA), 42 U.S.C. § 1997e(a). JA 18–20; see also JA 32–36 (Burke's informal complaint, regular grievance, and appeal regarding religious items and holy meals); JA 40–43 (same for religious group services).

Within that procedure, Burke first sought "religious service items" for "Rastafari services," along with "Rastafarian holy day meals." JA 32 (informal complaint); see also JA 33 (second informal complaint) (same); JA 34 (regular grievance) (same); JA 36 (appeal) (same). Burke's informal complaint was assigned to the chaplain, who reiterated that the items he requested had not been donated, and that "all items I have are donated." JA 32. When Burke then filed a regular grievance, Department officials explained that only those items that were approved were available. JA 35.

Burke separately initiated a series of grievances regarding his perceived lack of access to religious services. JA 40–43; see JA 189 ("Rather than sign up to participate in religious group services in the pod, offender Burke submitted a regular grievance concerning the issue."). In his informal complaint, Burke alleged that he "never received a hearing" to explain why he couldn't "participate in the

Rastafarian services that [are] held in Wallens Ridge State Prison." JA 40. Though Department officials responded that "there is no formal hearing done for religious services" and that Burke simply needed to "enroll during open enrollment by writing the chaplain," *id.*, Burke continued to pursue his grievance and filed an appeal, JA 43.

c. Burke also sought access to in-person vocational training and educational programming. See JA 17. Because he resided in the VHU, however, Burke had access only to distance learning. JA 19.

Burke returned to the grievance procedure, contending that he "never received a hearing" explaining "why [he] c[ouldn't] participate in vocational training due to the fact of being housed in the (VHU)." JA 115. Moreover, Burke argued, under Virgin Islands law and the contract between the Virgin Islands Bureau of Corrections and the Department, no Virgin Islands offender was "to be transferred to any institution lacking" "educational and/or vocational programs." *Id.* The unit manager responded that Burke was "allowed to and afforded the opportunity to" pursue vocational and educational programs, but that

under Department policy he must do so "through long distance learning." *Id.* Burke then filed a regular grievance and an appeal.[2]

2. Dissatisfied with the outcome of these grievance procedures, Burke filed this action under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Person Act (RLUIPA), 42 U.S.C. § 2000cc-1(a). See JA 10–30. Burke identified three claims, including that thirteen different named defendants violated his "rights to Rastafarian religious services, service items, and Rastafarian holy day meals" and his "rights to vocational/ educational programs." JA 11.

Later, in the section of his complaint titled "Legal Claims," Burke expanded on these claims. See JA 21–24. *First,* Burke contended that, "by denying [him] and depriving him access to Rastafarian religious group service[s]" and "Rastafarian religious service item[s]/ holy day meals," defendants violated his rights under the First Amendment and RLUIPA. JA 21. *Second,* Burke argued that defendants violated the Equal Protection Clause of the Fourteenth Amendment by "treating

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[2] The relevant regular grievance and appeal are not in the joint appendix, though Burke attached those documents (as Exhibit F-2) to his complaint. See No. 7:16-cv-00365 (W.D. Va.), ECF No. 1, Attachment 1, pp. 47–50; see also JA 19 (complaint) (citing to Exhibit F-2 for his grievances regarding "vocational/ and educational programs").

[him] different apart from other Virgin Islands prisoners who are in compliance with the Virginia Department of Corrections grooming policy that are housed in the compliance general population . . . as far as access to religious group service and religious service item/ holy day meals are concerned." *Id. Third*, Burke raised a separate equal protection claim, alleging that defendants treated him differently from "other Virgin Islands prisoners who are in compliance with the . . . grooming policy . . . as far as access to vocational/educational programs are concerned." JA 22. As required by law, Burke alleged that he "exhausted his administrative remedies with respect to all claims and all defendants." JA 21.

As relief, Burke sought declarations that various Department policies and actions were unlawful under the First Amendment, the Fourteenth Amendment, and RLUIPA. JA 24. He also requested an injunction ordering that he be "returned to the physical custody and control[] of the Virgin Islands Bureau of Corrections," JA 24–25, and nearly $3 million in monetary damages, JA 27–28.

3. The district court disposed of each of Burke's claims in two separate opinions. See JA 294–310, 491–505.

a. In the first opinion, the district court interpreted Burke's complaint as raising "five broad claims," including that defendants violated (1) "the First Amendment and RLUIPA because [Burke] was denied access to Rastafarian religious group services, service items, and holiday meals"; and (2) the Equal Protection Clause by denying him the same "access to vocational and educational programs and the religious practices described in the first claim" that similarly situated offenders received. JA 295.[3]

i. As for the free exercise claims, the court determined that Burke had "describe[d] a substantial burden on his religious exercise." JA 306. That burden, the court explained, was that Burke's "personal religious beliefs require him to meet, discuss, and practice his religion in a group with other Rastafarians and in a location adorned with religious paraphernalia." *Id.* Because Burke "allege[d] that [he] was not

[3] The remaining claims, as the district court understood them, were: that defendants violated the Due Process Clause by not giving Burke access to vocational and educational programs; that defendants violated Burke's First Amendment right to access courts; and that certain defendants "witnessed or learned of these violations but did not intervene." JA 295. The district court granted summary judgment on each of these claims, see JA 299–304, and Burke has not appealed those rulings. Accordingly, they are not before this Court.

allowed to congregate with other Rastafarians," and "that he has not been provided with religious service items needed for his religion," the district court denied summary judgment. JA 306–07. The court also pointed to evidence that Department policy "does not authorize any special holiday meals for Rastafarian holy days." JA 306.

ii. Turning to the equal protection claims, the court granted summary judgment to the extent Burke challenged "the disparity between conditions and programs afforded inmates in general population versus in the VHU" because "these distinct groups [we]re not 'similarly situated' for equal protection purposes." JA 307–08. The court explained that "[i]nmates in general population conform their hair styles and length to policy," whereas "inmates in the VHU refuse to cut their hair, and thus, present an increased risk of security that requires different conditions, policies, and customs to ensure and maintain security." *Id.*

Two equal protection claims were permitted to proceed, however: (a) Burke's claim that "inmates in the VHU who are from Virginia are afforded more educational or vocational programming" than inmates from the Virgin Islands; and (b) Burke's claim that the Department

"allows Muslim inmates to enjoy holiday meals and items" when "Rastafarian inmates are not afforded the same privileges." JA 308.

b. In a second opinion, the district court granted summary judgment on each of Burke's remaining claims. JA 491–505.[4]

i. The district court again understood Burke to press RLUIPA and First Amendment claims based on the alleged denial of "access to Rastafarian group services, religious items and special holiday meals for holy days." JA 492. The court first concluded that "Burke ha[d] offered no evidence that any of the defendants took any specific action to deny Burke access to group religious services or religious items or holy day meals/feasts." JA 501. And to the extent Burke challenged "the policies[] themselves," those claims failed because Burke had offered insufficient evidence that the policies imposed a "substantial burden on the free exercise of his religious beliefs," or that any such beliefs were sincerely held. JA 502.

ii. The district court concluded that there was insufficient evidence to create a genuine issue of material fact regarding Burke's

[4] The second opinion was issued by the Honorable Pamela Meade Sargent because the parties consented to the jurisdiction of a magistrate judge. See ECF Dkt. No. 47.

remaining equal protection claims. The "undisputed evidence," the court noted, "is that all offenders housed in the VHU have access to the same educational and vocational programs, regardless of whether they are Virginia or Virgin Islands offenders." JA 503. Regarding Burke's religious disparate-treatment claims, the court concluded that "defendants have also 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 holiday meal/feast be offered for Rastafarians." *Id.* And "[w]ith regard to [Burke's] request to participate in group religious services," the court found that "Burke offered no evidence that he was being treated any differently than any other offender held in Phase 1 of the VHU." *Id.*

SUMMARY OF ARGUMENT

1. Burke never presented his "impossible choice" argument to the district court and it is too late for him to make such a claim now. This Court "examine[s] the district court's action in light of what was, in fact, before it." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985). Before the district court, Burke's theory was consistent:

that "defendants violated [his] rights to Rastafarian religious services, service items, and Rastafarian religious holy day meals." JA 11 (complaint). This Court should not now entertain a new theory that Burke never presented to the district court—that the Department forced an "impossible choice" on him by making him choose between his dreadlocks and the privileges of general-population housing. Burke Br. 1, 17. This is especially so because Burke currently faces no such choice: the VHU no longer exists and Burke continues to wear his hair in dreadlocks as a member of the general population. For that reason, any claim based on this new theory under RLUIPA (or any claim for prospective relief under the First Amendment) is moot.

2. As for the claims Burke did present, the district court properly rejected them. No defendant denied Burke access to Rastafarian group services, items, or meals. Neither did the Department's policies. Instead, the record shows that—despite being repeatedly advised of the relevant procedures—Burke never submitted the appropriate requests. For that reason, the record does not include sufficient evidence to create a genuine issue of material fact that *the*

defendants' actions or policies "substantially burden[ed] [Burke's] exercise of religion." *Couch v. Jabe*, 679 F.3d 197, 200 (4th Cir. 2012).

Burke's equal protection claims failed for similar reasons. As the district court recognized, Burke was in the same situation as any other offender in Department custody: He needed to request the religious services, items, and holy meals he desired. There is, accordingly, no evidence that Burke "has been treated differently from others with whom he is similarly situated." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). To the extent Burke argues he was afforded fewer vocational and educational opportunities than those who were not in the VHU, Burke cannot show that he was "similarly situated" to those who were compliant with the grooming policy, *id.*, or that defendants "*intended* to discriminate against him" on the basis of his religion. *Townes v. Jarvis*, 577 F.3d 543, 552 (4th Cir. 2009) (emphasis added).

STANDARD OF REVIEW

This Court reviews a district court's grant of summary judgment *de novo*. *Hill v. Lockheed Martin Logistics Mgmt., Inc.*, 354 F.3d 277, 283 (4th Cir. 2004) (en banc). "Summary judgment is proper where there is no genuine issue of material fact and the moving party is

entitled to judgment as a matter of law." *Couch v. Jabe*, 679 F.3d 197, 200 (4th Cir. 2012). "[T]he mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). "Conclusory or speculative allegations do not suffice, nor does a mere scintilla of evidence in support of [the non-moving party's] case." *Thompson v. Potomac Elec. Power Co.*, 312 F.3d 645, 649 (4th Cir. 2002) (quotation marks and citation omitted).

ARGUMENT

I. Burke's primary argument is not properly before this Court because it was never presented below and the policies it challenges no longer exist

Burke's principal argument on appeal is that defendants violated his rights by forcing him to make an "impossible choice: cut his dreadlocks and violate his religion or face the punitive conditions of the VHU." Burke Br. 17. But Burke never made that argument to the district court, and, even if he had, the majority of any claims based on that theory are now moot.

A. Burke did not present his central theory on appeal to the district court

1. Although pro se complaints must, of course, be literally construed, the principle of "generous construction" is not "without limits." *Beaudett v. City of Hampton*, 775 F.2d 1274, 1278 (4th Cir. 1985). Instead, courts are required to do no more than "discern[] the expressed intent of the litigant." *Williams v. Ozmint*, 716 F.3d 801, 811 (4th Cir. 2013).

a. Throughout this litigation, Burke's intent has been consistent: to pursue a claim that "[d]efendants violated [his] rights to Rastafarian religious services, service items, and Rastafarian religious holy day meals." JA 11 (complaint).

Indeed, Burke began framing his case that way even before he filed suit. When Burke filed his internal grievances—a prerequisite to litigation under the PLRA, see 42 U.S.C. § 1997e(a)—he identified the same issues: group service, service items, and holy meals. See JA 32–36, 40–43. If there were any doubt, Burke later made clear that he understood his grievances as centered on religious services, items, and meals. See JA 19 ("alleging that "[he] continued to exhaust the administrative remedies by pursuing the next step of filing the regular

grievances, . . . *which was based on religious group services for Rastafarians [and] religious services items*" (emphasis added)).

Once in federal court, Burke maintained this focus on religious services, items, and holy meals. In his complaint, Burke alleged that defendants violated RLUIPA and the First Amendment "[b]y denying [Burke] and depriving him access to Rastafarian religious group service, Rastafarian religious item/holy day meals." JA 21. Later in the complaint, Burke reiterated this theory, claiming that defendants "utilized [the grooming policy] as a reason to continuously deny him access to Rastafarian religious group services, [and] Rastafarian religious service items/holy day meals." JA 23.

Burke continued to emphasize religious services, items, and meals as this litigation progressed. After defendants answered his complaint, JA 68–76, Burke filed an affidavit claiming that, as a result of the grooming policy and the VHU, he "ha[d] been denied the privil[e]ges of Rastafarian religious service[s], holy day meals and service items, which creates a burden and is unconstitutional by being in violation[] of the (R.L.U.I.P.A.)." JA 78; see also JA 79 ("As a result to these defendants actions, I am unable to practice my Rastafarian religious

services amongst my fellow Rastafarian brethrens in a group service and receive holy day meals or service items.").

b. Given Burke's consistent framing of his own claims, the district court appropriately read Burke's complaint as raising free exercise claims based on the denial of religious services, items, and meals. In its first opinion, the court stated that Burke alleged "various defendants violated [Burke's] religious rights protected by the First Amendment and RLUIPA because he was denied access to Rastafarian religious group services, service items, and holiday meals." JA 295. And when the district court later held that Burke "describe[d] a substantial burden on his religious exercise," JA 306, the court also framed that burden in terms of religious services, items, and meals. "[Burke] explains that his personal religious beliefs require him to meet, discuss, and practice his religion in a group with other Rastafarians and in a location adorned with religious paraphernalia." *Id.*; see also *id.* (noting that the master religious calendar did not "authorize any special holiday meals for Rastafarian holy days").

The district court's second opinion reflects the same understanding of Burke's claims. The court began by describing Burke's

"claim[s]" as being "that the defendants violated his rights under the First Amendment and RLUIPA because he was denied access to Rastafarian group services, religious items and special holiday meals for holy days." JA 492. The court went on to reject those claims on the grounds that Burke had not, in fact, been denied access to those services, items, or meals. See JA 501–02. That analysis, in turn, is the proper subject of this appeal.

c. Before this Court, Burke seeks to radically reframe his claims. According to Burke's current argument, the issue is "[w]hether [the Department] 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 [the Department's] grooming policy without violating his Rastafarian beliefs." Burke Br. 4. Rather than the denial of religious services, items, or meals, Burke articulates his "substantial burden" as the following "impossible choice": "comply with the prison's grooming policy and violate his sincerely held religious beliefs" by cutting his dreadlocks, or "face the consequences." Burke Br. 1, 25.

That is not the case Burke presented to the district court. Neither district court opinion understood Burke's complaint to be raising a RLUIPA or First Amendment claim based on this choice between his dreadlocks and the VHU. Instead, both read Burke's complaint exactly as he wrote it. Compare JA 21 (complaint) (alleging that defendants violated RLUIPA and the First Amendment "by denying [him] and depriving him access to Rastafarian religious group service, Rastafarian religious service item/holy day meals"), with JA 295 (first district court opinion) (stating that Burke claimed "various defendants violated [his] religious rights protected by the First Amendment and RLUIPA because he was denied access to Rastafarian religious group services, service items, and meals"), and JA 494 (second district court opinion) (stating that Burke "claim[ed] that the defendants violated his rights under the First Amendment and RLUIPA because he was denied access to Rastafarian group services, religious items and special holiday meals for holy days").

Indeed, neither district court opinion even considered whether forcing Burke to choose between living in general population or cutting his dreadlocks imposed a substantial burden on his faith. And

defendants never addressed an alleged substantial burden of that kind. These omissions are telling. The theory that Burke now presses on appeal was being litigated at the same time as this case, and in at least one instance in the very same court.[5] Surely either the district court or the defendants (or likely, both) would have recognized, and addressed, an impossible-choice argument of the kind Burke now articulates.

2. This Court has long recognized that, "[i]n the light of hindsight . . . and with the benefit of counsel on appeal, issues may be brought before this [C]ourt that were never fairly presented below." *Beaudett*, 775 F.2d at 1278. But this Court has never "require[d] the district courts to anticipate all arguments" that might arise in some "appellate future." *Id.* And that is because "the special judicial solicitude with which a district court should view pro se filings does not transform the court into an advocate." *United States v. Wilson*, 699

[5] See, *e.g.*, *Greenhill v. Clarke*, No. 7:16-CV-00068, 2018 WL 4512074, at *6 (W.D. Va. Sept. 19, 2018) (addressing argument that "the VDOC grooming policy is placing a substantial burden on [a Muslim offender's] religious practice to wear a four-inch beard"). Indeed, that same district court has been addressing similar challenges for over a decade. See *Acoolla v. Angelone*, No. 7:01-CV-01008, 2006 WL 938731, at *1 (W.D. Va. Apr. 10, 2006) (addressing claim by Rastafarian offender that defendants substantially burden his religious practice by "coercing [him] to remove beads from his dreadlocks").

F.3d 789, 797 (4th Cir. 2012) (quotation marks, alterations, and citations omitted). Any other rule would require that district courts "explore exhaustively all potential claims of a pro se plaintiff," and convert "the district court from its legitimate advisory role to the improper role of an advocate seeking out the strongest arguments and most successful strategies for a party." *Beaudett*, 775 F.2d at 1278.

It is axiomatic that a plaintiff is the "master of his complaint." *U.S. ex rel. Bunk v. Gosselin World Wide Moving, N.V.*, 741 F.3d 390, 406 (4th Cir. 2013) (quotation marks and citation omitted). This status ensures that the plaintiff—whether pro se or represented—has complete control over which claims to bring, which court to file in, and which theories to articulate.

Accordingly, a pro se complaint, just like an informal brief, is "an important document." *Jackson v. Lightsey*, 775 F.3d 170, 177 (4th Cir. 2014). And just as this Court's "review is limited to issues preserved in that [informal] brief," *id.*, this Court passes judgment on district courts' decisions only in light of the claims the plaintiff chose to pursue, *Beaudett*, 775 F.2d at 1278. Here, Burke decided to base his free exercise claims on the alleged denial of religious group services, service

items, and holy meals. This Court should not fault the district court for resolving *those* claims rather the materially different impossible-choice theory that Burke now advances on appeal.

B. Even if Burke had presented an impossible-choice theory below, most claims under that theory are now moot

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citation and quotation marks omitted). To the extent Burke bases his case on an impossible choice between wearing dreadlocks and confinement at the VHU, there is no such "actual case[] or controvers[y]" because Department policy no longer prohibits dreadlocks and the VHU no longer exists. *Id.* Accordingly, any RLUIPA claims Burke brings under this late-arriving theory are moot, as are any First Amendment claims for prospective relief.

1. "The case-or-controversy requirement applies to all stages of a federal case." *Williams*, 716 F.3d at 808 (quotation marks omitted). "[I]t is not enough that a dispute was very much alive when [the] suit was filed, but the parties must continue to have a particularized, concrete stake in the outcome of the case through all stages of

litigation." *Id.* at 808–09 (quotation marks omitted). "A change in factual circumstances can moot a case on appeal . . . when the plaintiff receives the relief sought in his or her claim, or when an event occurs that makes it impossible for the court to grant any effectual relief to the plaintiff." *Id.* at 809 (citations omitted). "Mootness questions often arise in cases involving inmate challenges to prison policies or conditions because by the time such a suit is ready for adjudication, the challenged practice or policy may no longer affect the prisoner." *Id.* (quotation marks omitted).

2. That is what happened here. On appeal, Burke frames his suit as an effort to secure the benefits of general-population membership while wearing his hair in dreadlocks. See Burke Br. 17. And it is true that, when Burke was initially transferred into the Department's custody, the then-current grooming policy meant that he could not both reside in general population and wear his hear in dreadlocks. See JA 154 (prohibiting dreadlocks); JA 156–57 (describing VHU).

But that is no longer the case. Burke currently resides in general population housing (and has for the better part of a year), and at no point has Burke ever cut his dreadlocks. The reason is because the

Department's grooming policy was changed nearly a year ago (effective June 1, 2019) and both updated the grooming standards and eliminated the VHU.[6] Under those new standards, Burke may wear his hair in dreadlocks. In fact, the only hair styles that are not permitted are those that "could promote identification with gangs or create a health, hygiene, or sanitation hazard." Current Policy IV(B) (Addendum).

And even if Burke did violate the current grooming standards, he would not return to the VHU because the VHU has been abolished. Instead, any offenders who were in the VHU have been "classified to the appropriate security level and transferred to a suitable institution," where their chosen hairstyle has no bearing on the privileges they enjoy. Current Policy V(C). To the extent Burke sought relief from the hairstyle restrictions in earlier versions of the Department's grooming policy—specifically the portion of that policy that placed grooming policy violators in the VHU—Burke has "receive[d] the relief [he]

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[6] The current version of the grooming policy is available at https://vadoc.virginia.gov/files/operating-procedures/800/vadoc-op-864-1.pdf. Although the current policy is not contained in the record, Burke discusses it in his brief, see Burke Br. 13 & n.7, and this Court may take judicial notice of publicly available government documents. See *United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017). A copy of the current policy is attached as an Addendum for the Court's convenience.

sought," and those claims are now moot. *Williams*, 716 F.3d. at 809 (citations omitted).

3. Because "a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior," *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001), courts have created an exception to this jurisdictional mootness principle. That exception—the voluntary cessation doctrine—"seeks to prevent a manipulative litigant from immunizing itself from suit indefinitely, altering its behavior long enough to secure a dismissal and then reinstating it immediately after." *Porter v. Clarke*, 852 F.3d 358, 364 (4th Cir. 2017) (quotation marks and citation omitted).

As the party pressing mootness, defendants must show that is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 189 (2000) (quotation marks and citation omitted). Although this is a "heavy burden," *id.*, it is not an impossible one. In making that determination, this Court asks whether the party pressing mootness has "commit[ted] to keep the revised policies in place and not revert to the challenged practices." *Porter*, 852

F.3d at 365. Relatedly, this Court has invoked the voluntary cessation doctrine where "the defendant expressly states that, notwithstanding its abandonment of a challenged policy, it could return to the contested policy in the future, or when the defendant's reluctant decision to change a policy reflects a desire to return to the old ways." *Id.* (quotation marks and citations omitted).

Here, defendants have invested significant resources in implementing the updated grooming policy—and, indeed, have eliminated the VHU and committed to re-assigning offenders formerly assigned to the VHU. See Current Policy V(C). Nothing in these Department-wide changes "reflects a desire to return" to the old grooming policy. *Porter*, 852 F.3d at 365. To the contrary, defendants expressly disclaim any intention of doing so.

It is true that the Department generally updates policies three years from the effective date of the previous policy, and so the Department will in all likelihood update the grooming policy sometime during 2022. Compare JA 217 (grooming policy effective April 1, 2013), with JA 223 (grooming policy effective April 1, 2016), with Current Policy (grooming policy effective June 1, 2019). But the Department's

revisions have reliably made that policy less (not more) restrictive. And particularly given the Department's prior conduct and defendants' express disclaimer of any intent to revert to the VHU, the bare possibility of future revisions does not warrant the application of a jurisdictional exception intended only for "manipulative litigant[s]" who attempt "to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *Porter*, 852 F.3d at 364 (quotation marks and citation omitted).

4. For those reasons, even had Burke presented his impossible-choice theory to the district court (which he did not), any RLUIPA claims attached to that theory must be dismissed, along with any First Amendment claims for prospective relief. Of course, even where a claim for injunctive relief has been rendered moot by intervening events, retrospective claims for monetary damages may remain live. See *Covenant Media of SC, LLC v. City of N. Charleston*, 493 F.3d 421, 429 n.4 (4th Cir. 2007) (collecting cases). But this Court has squarely held that RLUIPA does not entitle plaintiffs to seek monetary damages, so any impossible-choice claims under that statute are fully moot. See *Rendelman v. Rouse*, 569 F.3d 182, 189 (4th Cir. 2009) (no money

damages in individual-capacity suits); *Madison v. Virginia*, 474 F.3d 118, 121–22 (4th Cir. 2006) (same for official-capacity suits).[7]

II. The district court properly granted summary judgment on the claims Burke did present

A. Burke's free exercise claims failed because he has not shown that defendants imposed any substantial burden on his religious beliefs

1. To establish a free exercise claim under either RLUIPA or the First Amendment, a plaintiff "must demonstrate that: (1) he holds a sincere religious belief; and (2) a prison practice or policy places a substantial burden on his ability to practice his religion." *Carter v. Fleming*, 879 F.3d 132, 139 (4th Cir. 2018) (discussing free exercise claims); see also *Couch v. Jabe*, 679 F.3d 197, 200 (4th Cir. 2012) (under RLUIPA, "[a] plaintiff bears the burden of persuasion on whether the policy or practice substantially burdens his exercise of religion").

A plaintiff can show a "substantial burden" in a number of ways. See *Lovelace v. Lee*, 472 F.3d 174, 187 (4th Cir. 2006) (holding that the

[7] Although 42 U.S.C. § 1983 does permit monetary damages, any such claims would be subject to a qualified-immunity defense and the lack of any clearly established law at the time of the relevant conduct would almost certainly prevent Burke from overcoming it. The Court need not resolve that question here, however: It need only hold Burke to the claims he made below.

term carries the same meaning under RLUIPA and the First Amendment). One way is to prove that a government actor or policy has "put substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id.* (quotation marks, alterations, and citation omitted). Another is to identify a "significantly great restriction or onus upon religious exercise," or "a burden that necessarily bears direct, primary, and fundamental responsibility for rendering religious exercise effectively impracticable." *Id.* (quotation marks, alterations, and citation omitted).

2. a. Under any of these definitions, Burke has failed to establish that *defendants* imposed a "substantial burden" on his Rastafarian faith.[8] As described above, throughout this litigation Burke has pegged his RLUIPA and First Amendment claims to a perceived lack of access to Rastafarian religious items, holy meals, and group services. JA 11 (complaint); see also JA 32–36 (grievances

[8] The district court also held, in the alternative, that Burke had not demonstrated that his religious beliefs were sincerely held. See JA 502. Although neither the First Amendment nor RLUIPA "preclude[s] inquiry into the sincerity of a prisoner's professed religiosity," *Lovelace*, 472 F.3d at 187 n.2 (quotation marks and citation omitted), we agree with Burke that he introduced sufficient evidence of the sincerity of his beliefs to survive summary judgment, see Burke Br. 21–22.

regarding religious items and holy meals); JA 40–43 (grievances regarding group services). The defendants, Burke has contended, imposed a substantial burden on the practice of his Rastafarian faith "[b]y denying [Burke] and depriving him access to Rastafarian religious group service, Rastafarian religious service item[s]/ holiday meals." JA 21.

b. As the district court correctly concluded, see JA 502, the defendants never "den[ied]" Burke "access," JA 21. Instead, the undisputed evidence is that Burke never availed himself of procedures necessary to access those items, meals, and services. And—crucially—although Burke attributed his perceived lack of access to the Department's grooming policy and the VHU, see JA 23, 78, the relevant Department procedures apply to *all* offenders in *all* Department facilities—not just those in violation of the Department's grooming policy or those placed in the (now-dissolved) VHU. See JA 126 ("This operating procedure applies to *all units* operated by the Department of Corrections." (emphasis added)).

i. Department policy makes clear that "[o]ffenders may [only] possess individual faith objects" that are "authorized on. . . [the]

Approved Religious Items [list]." JA 130. But as of July 2018, "there [wa]s no record that offender Burke ever submitted [a] *Request for Approval of Religious [I]tem* form." JA 338 (emphasis added). And Burke has introduced no evidence that he ever submitted a request to have any of his desired Rastafarian religious items approved for donation or sale. As the district court correctly recognized, defendants "presented undisputed evidence that Burke did not request that any specific religious items be added to those approved for purchase by offenders." JA 503. Although Burke did ask the facility chaplain for "religious service item[s]," JA 31, that is not the same thing as a request for the approval of a religious item.

This difference matters: A request to approve a new item triggers a multi-tiered review to determine whether the item is appropriate for individual use in light of the policy's over-arching "concerns regarding facility security, safety, order, space, and resources." JA 126; see also JA 440 (describing review process); *Morrison v. Garraghty*, 239 F.3d 648, 652 (4th Cir. 2001) ("[T]o maintain prison security and order, the Virginia Department of Corrections strictly limits the possession of

personal property by prison inmates."). Once approved, items are available for sale and donation Department-wide. JA 130.

The chaplain, by contrast, can only provide those items that have been approved and donated, as the chaplain explained. See JA 31–32. Burke's grievance procedure appeal even acknowledges being told to "request what materials are approved and available per" Department policies. JA 36. Moreover, the chaplain is not a Department official and does not sit on the faith review committee, so he is not part of the review process necessary to approve items for personal use by offenders. See JA 126. To be sure, Burke is correct when he notes (at 9) that the items he sought were not yet approved. See JA 395–97, 451–53. But the solution was to file a *Request*, not a federal lawsuit.

ii. The same goes for Burke's complaints about the lack of Rastafarian holiday meals. Although Burke mentioned "holy meals" in his request to the chaplain, JA 31, there is no evidence that Burke ever submitted a request for the faith committee to consider such a meal, as required by Department policy. See JA 430. Indeed, it remains entirely unclear what kind of meal Burke would like. Although Burke is correct that the Department makes special accommodations for certain

holidays—such as by providing pre-dawn meals for Muslims during Ramadan, JA 34—he has never identified any dietary restrictions or celebratory meals associated with Rastafarian holidays.[9]

The Department recognizes (and makes arrangements to celebrate) dozens of holidays, but those celebrations do not automatically include a specific meal. See JA 377–81 (listing recognized holidays). Indeed, there is no "special menu" or "group meal" for the Buddhist holiday Bodhi (JA 380), for the Jewish holiday Rosh Hashanah (JA 379), or for the Christian holiday Easter (JA 378). And that is for the same reason that there was no special menu or group meal on the officially recognized Rastafarian holidays for Haille Selaisse's birthday and coronation—no such meal had ever been approved. And that could not change unless Burke (or someone else) initiated the review process by submitting a request. See JA 430.

iii. Burke's allegations that he was denied Rastafarian group services fail for the same fundamental reason. Such services were

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[9] What is more, Burke has never connected his unelaborated desire for a meal to any Rastafarian belief or practice. And "mere dietary preferences, unrelated to religious observances, need not be accommodated." *Neely-Bey Tarik-El v. Conley*, 912 F.3d 989, 999 (7th Cir. 2019).

available beginning in January 2015, and, indeed, Burke attended for a time. See JA 17.[10] But by early 2016, when Burke submitted the informal complaint that began this litigation, Burke was no longer on the pass list, and accordingly needed to submit a *Request to Attend Religious Services*. JA 40, 42; see also JA 141 (sample *Request* form).

Rather than submit the necessary *Request*, Burke initiated the grievance procedure and demanded a "formal hearing" regarding his purported denial. See JA 40. Department officials explained that Burke needed only to "enroll during open enrollment by writing the chaplain."

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[10] To the extent Burke presses a free exercise claim based on the lack of group services prior to January 2015, defendants are entitled to qualified immunity on any such claim. See *Attkisson v.* Holder, 925 F.3d 606, 642 n.7 (4th Cir. 2019) (affirming on qualified immunity grounds, even though the district court had not reached that issue). Burke does not focus on any such theory, and at any rate has failed to identify any decision that "clearly established [a] statutory or constitutional right[]" violated by this temporary denial of group services. *Crouse v. Town of Moncks Corner*, 848 F.3d 576, 583 (4th Cir. 2017 (quotation marks and citation omitted). To the contrary, district courts repeatedly held that the denial of group services in the VHU did not violate offenders' free exercise rights. See *Peters v. Clarke*, No. 7:14CV00598, 2015 WL 5042917, at *8 (W.D. Va. Aug. 26, 2015) ("I conclude that Peters has failed to show that officials' temporary refusal to allow VHU Rastafarians to attend group services substantially burdened his religious exercise so as to violate his rights under the First Amendment or RLUIPA."); *Blyden v. Clarke*, No. 7:15CV00042, 2015 WL 5043259, at *7 (W.D. Va. Aug. 26, 2015) (similar).

JA 40; see also JA 127 ("An open enrollment period of two weeks shall be provided at least once each calendar quarter to allow offenders to change their selection of religious services to attend (including change of religion) by submitting a new *Request to Attend Religious Services*."). But, "[r]ather than sign up to participate in religious group services in the pod, offender Burke submitted a regular grievance concerning the issue." JA 189. The Department who official received that regular grievance rejected it, "instructing him to submit a participation form." *Id.* Burke declined to do so, and instead appealed that decision. *Id.*

By resorting to litigation, Burke circumvented the Department procedures designed to ensure the safe and orderly scheduling of religious group services. Facilities (including Wallens Ridge) maintain "pass lists" of offenders scheduled to attend religious group services. See JA 127. Once offenders submit a *Request to Attend a Religious Services*, they "will be added to the appropriate pass lists—i.e., for the regular, ongoing activities (weekly worship services, study groups, etc.) that they have specified on the *Request*." *Id.* These lists, and the parallel requirement that offenders specify one religion per quarter, ensure that Department officials are able to make the necessary arrangements

before each service and maintain "offender movement control." JA 128. The Department officials who reminded Burke to submit a *Request*, see JA 40, 42, 189, were enforcing a central component of the Department's efforts to "provide reasonable opportunities for offenders . . . to voluntarily pursue religious beliefs and practices" with accounting for "concerns regarding facility security, safety, order, space, and resources." JA 126.[11]

c. In short, Burke never utilized the generally available procedures for accessing the religious items, holy meals, and services he seeks through this federal lawsuit. See JA 126 (policy "applies to *all units* operated by the Department" (emphasis added)). And Burke has *never* argued that being forced to use a specific process for accessing the

[11] As Burke notes, Burke Br. 12 n.5, in August 2016 the grooming policy was updated to divide the VHU into two Phases. Although only Phase 2 offenders were eligible attend group services, that change did not affect Burke because he was in Phase 2. JA 348. Only when Burke refused a double-occupancy cell (a requirement for Phase 2 offenders) was he adjusted to Phase 1 (in which offenders have their own cell). JA 336. Until the Department eliminated the VHU, see *supra* pp. 30–31 & n.6, Burke "remain[ed] in Phase 1 of his own choice"—namely, his election to forego Phase 2 privileges in order to remain in a single cell, JA 336. And being asked to have a cell mate in order to access group services does not "put substantial pressure on [Burke] to modify his behavior and to violate his beliefs." *Lovelace*, 472 F.3d at 187 (quotation marks, alterations, and citation omitted).

means to celebrate his faith imposes a substantial burden on his religious practice. Burke would be hard-pressed to do so, even had he tried, as RLUIPA requires "due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources." *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005) (quotation marks and citation omitted).

Instead, Burke has maintained that, "[a]s a result of the [grooming policy] and the (V.H.U.) I have been denied the privil[e]ges of Rastafarian religious service, holy day meals and service items, which creates a burden and is unconstitutional by being in violation[] of the (R.L.U.I.P.A.)." JA 78. Because neither the grooming policy nor the VHU had anything to do with that alleged denial, the district court correctly held that "Burke has offered no evidence of any substantial burden on the free exercise of his religious beliefs." JA 502.

B. The district court properly granted summary judgment on Burke's equal protection claims

1. The Equal Protection Clause "does not forbid classifications. It simply keeps governmental decision[-]makers from treating

differently persons who are in all relevant respects alike." *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992). "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." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001). "Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny." *Id.*

2. Two of Burke's equal protection claims remain. Both fail at the very first step of the analysis.

a. First, Burke alleges that defendants violated the Equal Protection Clause by "treating [him] different [] from other Virgin Islands Prisoners who are in compliance with the [Department's] grooming policy that are housed in the [] general population . . . as far as access to religious group service and religious service items/holy day meals are concerned." JA 21. To support that allegation, Burke pointed to preferential treatment that, he believed, offenders of other faiths received—including special holy meals and access to personal religious items with which to worship. See, *e.g.*, JA 43. And on appeal, Burke

argues that offenders of other faiths received that preferential treatment because their religious beliefs did not require that they violate the grooming policy. Burke Br. 31–35.

These arguments misperceive the role of the grooming policy and the VHU. As described above, all Department-housed offenders have the same access to group religious services, religious service items, and holy day meals. See *supra* pp. 5–7. The relevant policies "appl[y] to all units operated by the Department." JA 126. Burke's decision to forego those policies and pursue an internal grievance and then a federal lawsuit would have left him no closer to those services, items, and meals, regardless of whether he was Rastafarian, Muslim, or Catholic. Accordingly, Burke has not been "treated differently from others with whom he is similarly situated." *Morrison*, 239 F.3d at 654.

b. Burke's other equal protection claim involved allegations that other "Virgin Islands prisoners," who were in compliance with the grooming policy and therefore "housed in the . . . general population," received preferential treatment "as far as access to vocational/ educational programs [we]re concerned." JA 22. It is true that offenders housed in the VHU were provided educational and vocational training

through distance learning programs, rather than the in-person instruction to which general-population offenders had access. See JA 188–89. But Burke's claim fails both because, as the district court held, Burke was not similarly situated to those who complied with the grooming policy, JA 307–08, and because Burke has failed to introduce sufficient evidence that any "unequal treatment was the result of intentional or purposeful discrimination," *Morrison*, 239 F.3d at 654.

i. Burke cannot show that "he has been treated differently from others with whom he [wa]s similarly situated," *Morrison*, 239 F.3d at 654, for a simple reason: Burke was subjected to the very same grooming policy as all offenders in Department facilities. See JA 126. Burke argues that the "grooming policy forced similarly situated prisoners down starkly different roads solely *because* of what their religion allowed," Burke Br. 32 (emphasis), but we know that is incorrect. Burke was (again, formerly) assigned to the VHU not because he was Rastafarian, but because he wore his hair in dreadlocks. Burke would have been assigned to the VHU regardless of why he wore dreadlocks. See JA 154 (prohibiting "dreadlocks" without reference to religion). Indeed, because the criteria for the VHU did not include a

religious objection, see JA 151, 156, offenders of many faiths, along with offenders who adhered to no religion, were eligible to be housed there. The only thing that linked VHU offenders was that each failed to adhere to the Department's grooming policy.

The Equal Protection Clause "requires that the states apply each law, within its scope, equally to persons similarly situated, and that any differences of application must be justified by the law's purpose." *Sylvia Dev. Corp. v. Calvert Cty.*, 48 F.3d 810, 818 (4th Cir. 1995). That is exactly what the Department did in enforcing the former grooming policy. All offenders were subject to that policy, and if any "refuse[d] to cut their hair," they were placed in the VHU because they "present[ed] an increased risk of security that requires different conditions, policies, and customs to ensure and maintain security." JA 308.

ii. Even had Burke shown he was similarly situated to those who were in general population, he failed to produce sufficient evidence that any "unequal treatment was the result of intentional or purposeful discrimination," *Morrison*, 239 F.3d at 654.[12] As Burke concedes, the

[12] Although the district court did not reach this issue, "[i]n reviewing the grant of summary judgment, [this Court] can affirm on

grooming policy was facially neutral. See Burke Br. 31 (acknowledging that "[t]here were no special exemptions, exceptions, or accommodations for any prisoners for any reason on the face of the policy," and that "all had to comply regardless of race, religion or security level"). Burke instead insists that defendants enforced the grooming policy so as to "effect an unequal application by favoring one class of persons and disfavoring another." Burke Br. 31 (quoting *Sylvia Dev. Corp.*, 48 F.3d at 818–19). Namely, Burke contends on appeal, a Catholic offender would not be required by faith to violate the grooming policy, whereas Burke, as a Rastafarian, was so compelled. Burke Br. 32.[13]

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any legal basis supported by the record and [is] not confined to the grounds relied on by the district court." *Bryant v. Bell Atl. Md., Inc.*, 288 F.3d 124, 132 (4th Cir. 2002). Indeed, this Court "ha[s] freely exercised th[at] authority in actions brought by prison inmates." *Cochran v. Morris*, 73 F.3d 1310, 1315 (4th Cir. 1996); see *id.* (noting "the well-recognized authority of courts of appeals to uphold judgments of district courts on alternate grounds").

[13] Before the district court Burke focused on the privileges afforded Muslim offenders. See, *e.g.*, JA 43. Accordingly, the district court understood his equal protection claim as predicated on "denied access to Rastafarian group services, religious items and special holiday meals for holy days when these were provided to *Muslim inmates*." JA 492 (emphasis added); accord JA 308 ("Plaintiff alleges that the VDOC allows Muslim inmates to enjoy holiday meals and items, yet Rastafarian inmates are not afforded the same privileges."). This is but one more way in which Burke re-casts his case on appeal. See *supra*

But even assuming that the Catholic offender and Rastafarian offender were similarly situated, unequal treatment does not itself suffice to establish an equal protection violation. Instead, "'to prove that a statute has been administered or enforced discriminatorily,' and so violates equal protection rights, a plaintiff must show 'more than the fact that a benefit was denied to one person while conferred on another.'" *Townes v. Jarvis*, 577 F.3d 543, 552 (4th Cir. 2009) (quoting *Sylvia Dev. Corp.*, 48 F.3d at 819) (alterations omitted). "He must also allege that the state *intended* to discriminate against him." *Id.* (emphasis added).

Here, there is no evidence that any differential treatment "was the result of intentional or purposeful discrimination." *Morrison*, 239 F.3d at 654. To the contrary, Burke's own complaint acknowledges that the reason some offenders were permitted in-person instruction was that those offenders were "in compliance with the Virginia Department of Corrections grooming policy." JA 22. That policy, in turn, was designed

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Part I(A). And this re-casting (switching from a comparison with Muslim offenders to one with Catholic offenders) matters, as many Muslim offenders also felt religiously compelled to violate the grooming policy, and were, accordingly, placed in the VHU.

"to facilitate the identification of offenders and to promote safety, security, and sanitation." JA 148.

Although Burke now argues that the grooming policy itself was motivated by animus towards Rastafarians, Burke Br. 35 & n.5, he points to only one piece of record evidence: A parenthetical note in the Department's list of "Religions Approved to Operate in DOC Facilities," that Rastafarians "must follow DOC grooming standards." JA 393. That parenthetical, however, is insufficient to demonstrate that defendants "intended to discriminate against him." *Townes*, 577 F.3d at 552. The list of approved religions is not itself part of the grooming policy, and does nothing to limit or expand that policy's reach. And, more importantly, the grooming policy applies to *all* offenders, regardless of their faith. See JA 148 (stating that the grooming policy "applies to *all units* operated by the Department" (emphasis added)). Burke does not argue otherwise, and a passing confirmation that Rastafarians (like all offenders) must comply with a generally applicable policy fails to establish the level of purposeful or intentional discrimination required for an equal protection claim.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Defendants-appellees agree that oral argument may aid in the decisional process.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 10,312 words, excluding the parts exempted by Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

/s/

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CERTIFICATE OF SERVICE

I hereby certify that on May 1, 2020, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/

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Virginia Department of Corrections

Offender Management and Programs

Operating Procedure 864.1

Offender Grooming and Hygiene

Authority:
Directive 864, *Offender Grooming and Hygiene*

Effective Date: June 1, 2019

Amended:

Supersedes:
Operating Procedure 864.1, August 1, 2016

Access: ☒ Public ☐ Restricted
☒ Incarcerated Offender

ACA/PREA Standards: 5-3D-4283, 5-4A-4262, 5-4A-4263, 5-4B-0017, 5-4B-0018, 5-5D-4341, 5-5D-4342, 5-5D-4343; 4-4262, 4-4263, 4-4283, 4-4341, 4-4342, 4-4343; 4-ACRS-4B-01; 2-CO-4D-01

Content Owner/ Reviewer:	Randall C. Mathena Director of Security and Correctional Enforcement	*Signature Copy on File* Signature	4/1/19 Date
Signatory:	A. David Robinson Chief of Corrections Operations	*Signature Copy on File* Signature	4/2/19 Date

REVIEW

The Content Owner will review this operating procedure annually and re-write it no later than three years after the effective date.

COMPLIANCE

This operating procedure applies to all units operated by the Virginia Department of Corrections. Practices and procedures must comply with applicable State and Federal laws and regulations, ACA standards, PREA standards, and DOC directives and operating procedures.

Table of Contents

PURPOSE

In order to promote safety, security, and sanitation, this operating procedure establishes uniform personal grooming and hygiene standards for offenders incarcerated in Department of Corrections facilities.

PROCEDURE

I. Initial Intake to the Department of Corrections

A. On initial intake into a reception or parole violator unit, a picture will be taken of every offender in accordance with *Identification Card Photo Requirements* of Operating Procedure 410.3, *Offender Movement Control,* to record the offender's appearance as received.

1. Facial hair must be cut as needed to not exceed ¼ inch length.
2. Long or bulky hair will be pulled back into a ponytail or covered with a swim/shower cap revealing the shape of the offender's head to allow a photograph simulating the offender's appearance as clean-shaven and with short hair.
3. If an offender refuses to cooperate, the use of reasonable force or restraints is authorized to the extent needed to bring the offender into compliance with requirements.

B. An identification card photograph of the offender with the hair worn naturally and any facial hair trimmed to ¼ inch will be taken in accordance with Operating Procedure 410.3, *Offender Movement Control.*

II. Notice of Grooming Standards

Each facility's Offender Orientation Handbook will address appropriate clothing requirements for each area of the facility and will include grooming and personal hygiene requirements and the sanctions for non-compliance.

III. Personal Hygiene (2-CO-4D-01)

A. All offenders are expected to maintain good personal hygiene to promote a safe and healthy environment for themselves and others.

B. General population offenders will have ready access to a sink for washing, shaving, and brushing their teeth. Offenders should be given the opportunity to shower daily, must be no less than three times per week. (5-5D-4341; 4-4341)

C. Restrictive housing offenders will have access to a sink and will be given the opportunity to shower and shave at least three times per week. (5-4A-4262, 5-4B-0017; 4-4262)

D. Personal hygiene items will be made available to all offenders for purchase through the facility's commissary. Identified indigent offenders will be provided personal hygiene items in accordance with Operating Procedure 802.2, *Offender Finances*. (5-5D-4342; 4-4342, 4-ACRS-4B-01)

E. Fingernails

1. Offenders will trim their fingernails to extend no more than 1/8 inch beyond the tip of the finger or thumb.
2. Fingernails will be rounded, not filed to a point.
3. Offenders in Security Level 4, 5, and S/6 institutions are not allowed to possess personal nail clippers.
   a. These institutions will make nail clippers available to offenders (generally through housing unit control centers) using a check-out/check-in log.
   b. The nail clippers will be thoroughly cleaned with the currently approved disinfectant (same as for barber equipment) after each use and prior to storage.
4. Offenders in Security Level W, 1, 2, and 3 institutions may possess personal nail clippers (maximum

2" length, no file), but are not allowed to possess personal toenail clippers.

a. These institutions will make toenail clippers available to offenders (generally through housing unit control centers) using a check-out/check-in log.

b. The toenail clippers will be thoroughly cleaned with the currently approved disinfectant (same as for barber equipment) after each use and prior to storage.

F. Identification photographs

1. To ensure a current likeness, identification photographs for inclusion in permanent records and on offender identification cards will be updated whenever an offender's appearance changes.

2. An offender who turns in an old identification card should not be charged for a new identification card needed due to change in appearance.

3. Whenever available, separate identification photos should be maintained in VACORIS showing the offender as received into the DOC, actual or simulated clean-shaven/short-hair, and current appearance.

IV. Personal Grooming and Hair Care (2-CO-4D-01)

A. Offenders will keep themselves and their hair clean and neat in appearance.

B. Offenders are permitted freedom in personal grooming. Hair styles and beards that could promote identification with gangs or create a health, hygiene, or sanitation hazard are not allowed. (5-3D-4283; 4-4283)

C. Facilities will ensure that all offenders, regardless of housing status, have sufficient access to adequate hair care and barbering services that comply with applicable DOC requirements and state health regulations. (5-4A-4263, 5-4B-0018, 5-5D-4343; 4-4263, 4-4343)

D. An offender convicted of concealing contraband in long hair or beard will be required to maintain head and facial hair at a length (generally not to exceed two inches) that facilitates search and minimizes ability to conceal contraband.

1. This restriction should be noted on the offender identification card.

2. For the first offense, the restriction will be enforced for a period of two years.

3. For a second offense, the restriction will be enforced for the remainder of the offender's period of incarceration.

4. After a period of five years, an offender may request review of grooming restrictions at their annual review. The ICA may recommend removal of the restriction based on an acceptable period of good behavior.

E. An offender who removes long hair and/or facial hair in an attempt to disguise their identity will be required to maintain head and facial hair at a length not to exceed ½ inch.

1. The offender will be subject to attempted escape or other such appropriate charges.

2. This restriction should be noted on the offender identification card.

3. For the first offense, the restriction will be enforced for a period of two years.

4. For a second offense, the restriction will be enforced for the remainder of the offender's period of incarceration.

5. After a period of five years, an offender may request review of grooming restrictions at their annual review. The ICA may recommend removal of the restriction based on an acceptable period of good behavior.

F. Hair color will not be altered; however facilities with Correctional Education operated Cosmetology Programs may allow offenders to have their hair colored within the same range as the original color.

V. Offenders in Violation of Prior Grooming Standards

A. Within one month of the effective date of this operating procedure, all offenders that are in the Grooming Standards Violator Housing Unit (VHU) or a restrictive housing unit for violation of prior grooming standards will be provided the opportunity to allow a photograph to be taken simulating the offender's appearance as clean-shaven and with short hair.

B. The clean-shaven/short-hair simulation photograph will require that long or bulky hair will be pulled back into a ponytail or covered with a swim/shower cap to reveal the shape of the offender's head and to have facial hair trimmed to ¼ inch.

C. An offender who complies with the clean-shaven/short-hair simulation photograph requirement will be classified to the appropriate security level and transferred to a suitable institution.

D. An offender who refuses to comply with the clean-shaven/short-hair simulation photograph requirement will be classified to Security Level 5 based on an override due to the security risks of not having a clean-shaven/short-hair simulation photograph. Such an offender will remain at Security Level 5 until they comply with the clean-shaven/short-hair simulation photograph requirement.

VI. For Community Corrections facilities, an offender who does not comply with grooming requirements may be subject to removal from the program.

DEFINITIONS OF TERMS USED IN THIS OPERATING PROCEDURE

None

REFERENCES

Operating Procedure 410.3, *Offender Movement Control*

Operating Procedure 802.2, *Offender Finances*

ATTACHMENTS

None

FORM CITATIONS

None

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
- Any corporate amicus curiae must file a disclosure statement.
- Counsel has a continuing duty to update the disclosure statement.

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

Pursuant to FRAP 26.1 and Local Rule 26.1,

ALL DEFENDANTS-APPELLEES
(name of party/amicus)

who is Appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

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
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
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:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
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/ Zachary R. Glubiak Date: 5/1/2020

Counsel for: All Defendants-Appellees