No. 20-1237

IN THE

United States Court of Appeals for the Tenth Circuit

TAJUDDIN ASHAHEED

Plaintiff-Appellant,

v.

THOMAS E. CURRINGTON

Defendant-Appellee.

On Appeal from the U.S. District Court for the
District of Colorado, No. 1:17-cv-03002-WJM-SKC
Hon. Judge William J. Martinez

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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STATEMENT OF RELATED CASES

There are no prior or related appeals.

JURISDICTIONAL STATEMENT

The district court had jurisdiction over the federal claims in this case pursuant to 28 U.S.C. § 1331. This Court has appellate jurisdiction under 28 U.S.C. § 1291. On June 23, 2020, appellant filed a notice of appeal from the final judgment entered on May 26, 2020. The appeal was timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

STATEMENT OF ISSUES

By policy, the Colorado Department of Corrections allows prisoners to keep their beards if mandated by their religion. But in this case, an officer violated the policy and forced a plaintiff to shave his beard for no reason other than anti-Muslim animus.

The issue is: When motivated by contempt for a particular religion, does a correctional officer violate clearly established law under the First Amendment and the Equal Protection Clause when they force a prisoner to violate the requirements of his faith?

STATEMENT OF THE CASE

A. Factual Background

Tajuddin Ashaheed is a practicing Muslim who observes the "Sunnha" practice of leaving his beard to grow. Aplt. App. 205. Ashaheed's beard is integral

to his religious identity. Aplt. App. 205. From his perspective, the beard connotes piety and spirituality and dictates how he is perceived in the world. Aplt. App. 205. Ashaheed deeply believes that shaving his beard violates a core tenet of his faith, based on the word and example of Prophet Muhammad. Aplt. App. 205.

On July 5, 2016, Ashaheed appeared at the Colorado Department of Corrections (CDOC) to begin a ninety-day sentence after a parole violation. Aplt. App. 206. Ashaheed began this sentence during the holy month of Ramadan, the most sacred month for Muslims. Aplt. App. 206.

The CDOC was aware of Ashaheed's religious affiliation; when Ashaheed was serving a previous sentence at the CDOC in 1993, he signed a written declaration of his religious affiliation with the Islamic faith, which was placed in his file. Aplt. App. 205. While serving this sentence, Ashaheed participated in Islamic practices such as congregational prayer, dietary practices, and observance of religious holidays. Aplt. App. 205. When Ashaheed began to serve another sentence in 2014, his file continued to document his Muslim faith. Aplt. App. 205. Throughout his time in CDOC, Ashaheed continued to practice Islam. Aplt. App. 205.

As he had since 1993, Ashaheed continued to wear a beard in accordance with his Muslim faith in 2016 when he was booked into the CDOC at the time at issue in this lawsuit. Aplt. App. 206. An intake officer at the CDOC's Denver Reception and

Diagnostic Center (DRDC) asked Ashaheed to review and update the information in his file. Aplt. App. 206. Ashaheed then confirmed that he continued to practice Islam and has sincerely held his beliefs for decades. The intake officer updated his file to note that Ashaheed continued to be devoutly Muslim. Aplt. App. 206.

During the time relevant to this action, DRDC policy exempted Muslim prisoners from its requirement that prisoners shave their beards at intake. Aplt. App. 206–07. Pursuant to DRDC policy, Muslim prisoners were not required to submit to beard shavings:

> An offender who claims that a beard is a fundamental tenet of a sincerely held religious belief will not be required to shave as long as the offender obtains documentation from the Office of Faith and Citizen Program's coordinator.

Aplt. App. 70.

After the intake interview, Ashaheed continued with the intake process. Aplt. App. 206. Defendant Thomas Currington, a Sergeant the CDOC employed, ordered him to shave his beard. Aplt. App. 204, 207. Ashaheed explained that, as a practicing Muslim, the DRDC policy exempting Muslim prisoners from shaving applied to him and that shaving his beard would violate a core tenet of his faith. Aplt. App. 207. Instead of abiding by DRDC policy and allowing Ashaheed his religious exemption, Currington invented a reason to force Ashaheed to shave that had no basis in DRDC policy or religious doctrine: He told Ashaheed that he must have a full beard to qualify. Aplt. App. 207.

Ashaheed then explained to Currington that he is physically unable to grow a full beard. Aplt. App. 207. Once again, Ashaheed reiterated that he wears his beard in accordance with his religious beliefs and that his religious affiliation was documented in his intake file. Aplt. App. 207. In response, Currington stated that he "didn't want to hear about it." Aplt. App. 207. Rather than allowing Ashaheed to follow his religious beliefs, Currington threatened to have him "thrown in the hole"—solitary confinement—if he did not submit to shaving his beard. Aplt. App. 207.

At no point did Currington tell Ashaheed that he was forcing him to shave to obtain a beardless photo. Aplt. App. 209. In fact, Currington never attempted to justify any of his actions to Ashaheed. Aplt. App. 209.

To avoid the punishment of solitary confinement, Ashaheed submitted to the inmate barber, who shaved his beard. Aplt. App. 208. Ashaheed felt humiliated, demoralized, and dehumanized because of his inability to practice his religion. Aplt. App. 208. He was particularly distraught because of Currington's disrespect for his religion and his own powerlessness to honor his faith during the holy month of Ramadan. Aplt. App. 208. Moreover, to Ashaheed's knowledge, the CDOC had not infringed upon any other inmate's religious freedom in the same way. Aplt. App. 208. No other religious inmates were required to shave in violation of their religious beliefs, and other non-Muslim inmates were allowed to keep items of religious

significance such as crosses, bibles, and wedding rings. Aplt. App. 208. By forcing Ashaheed to shave, Currington singled him out and treated him differently from other inmates of different religions. Aplt. App. 208.

B. Procedural History

In December 2017, Ashaheed filed this action against Defendant John Doe in the U.S. District Court for the District of Colorado. Aplt. App. 13–23. In April 2018, Ashaheed amended his complaint after identifying Currington as the officer who forced him to shave his beard. Aplt. App. 27–37.

In his first amended complaint, Ashaheed asserted that Currington violated his First Amendment right to freely exercise his religion and his Fourteenth Amendment right to Equal Protection.[1] Aplt. App. 33–35. Pleading his First Amendment Claim, Ashaheed described the facts relayed above and alleged that Currington's "knowing and deliberate acts placed a substantial burden on" Ashaheed. Aplt. App. 32. Currington, Ashaheed alleged, "designed" his actions "to limit and interrupt" Ashaheed's religious practice, and when Ashaheed attempted to assert his beliefs, Currington threatened him with retaliation. Aplt. App. 32–33. As to the Equal Protection claim, Ashaheed alleged that Currington's discriminatory conduct was the result of his status as a Muslim inmate. Aplt. App. 35. Currington

[1] Ashaheed also asserted a Religious Land Use and Institutionalized Persons Act claim in his First Amended Complaint but agreed to dismiss it before the district court ruled on Defendant's motion.

moved to dismiss, arguing that the prison's beard policy furthered a legitimate penological interest and that Currington inadequately pled his Equal Protection claim. Aplt. App. 58–61.

In May 2018, the district court granted Currington's motion to dismiss the first amended complaint. Aplt. App. 183–202. The court first concluded that Ashaheed "adequately stated a free exercise claim under Rule 12(b)(6)." Aplt. App. 190. The court acknowledged that Ashaheed's complaint challenged Currington's animus-based discrimination rather than the prison regulation. Aplt. App. 192.

Specifically, the court accepted Ashaheed's allegations that Currington's individual actions "were *designed* to disrupt [Ashaheed]'s religious practices and were *intentionally directed* at [Ashaheed] due to [Currington]'s hostility towards the religion of Islam." Aplt. App. 192 (emphasis added). For example, the court pointed out, when Ashaheed "protested to having his beard shaved because he was a 'practicing Muslim' and 'shaving his beard would violate a core tenet of his faith,' Defendant responded that Plaintiff's beard was not full enough to 'qualify for the religious exemption to beard shaving.'" Aplt. App. 192 (quoting Aplt. App. 31). The court highlighted that when Ashaheed "explained that he was 'physically unable to grow a full beard, reiterated that his beard is worn for religious practices, and stated that his religious affiliation is documented in his CDOC file,'" Currington merely stated that he "'didn't want to hear about it' and that Plaintiff would be 'thrown in

the hole'" if he did not comply. Aplt. App. 192–93 (quoting Aplt. App. 31). Thus, the court concluded, Ashaheed sufficiently alleged a sincere belief in the Islamic faith and that Currington substantially burdened that belief by forcing him to shave. Aplt. App. 191.

The court, however, granted the motion to dismiss the First Amendment claim without prejudice on the ground of qualified immunity, concluding that Currington did not violate clearly established law. Aplt. App. 197. Even while dismissing the claims on the grounds of qualified immunity, the court acknowledged the viability of Ashaheed's claim, dismissing the case because Ashaheed did not cite to precedent showing that Currington "violated the Free Exercise Clause when he coerced Plaintiff into shaving his beard for allegedly no reason other than religious animus (perhaps influenced by religious stereotyping, considering Defendant's alleged explanation that Plaintiff's beard was not full enough to qualify for the religious exemption)." Aplt. App. 196–97. The court also denied the Equal Protection claim without prejudice because Ashaheed did not sufficiently allege that he was treated differently from other religious groups. Aplt. App. 198–99.

Ashaheed filed his second amended complaint in June 2019. Aplt. App. 203–14. Supplementing the allegations included in his first amended complaint, Ashaheed added that 1) Currington discriminated against him on the basis of his religion because he refused to correctly apply the religious exemption policy to

Ashaheed "[o]nce he found out Ashaheed was Muslim," 2) Currington treated Ashaheed differently from non-Muslim inmates because Currington did not infringe upon the religious freedom of any other inmate and allowed "[o]ther non-Muslim inmates" to "keep items of religious significance, such as crosses, bibles and small wedding rings," and 3) Currington violated clearly established First and Fourteenth Amendment law forbidding discrimination against Muslims based on their religious beliefs. Aplt. App. 207, 208, 211, 212. Specifically, Ashaheed alleged that Currington "evinced an intent" to show "hostility toward Islam" and knew of Ashaheed's "religious identification as a Muslim, yet based on [Currington's] discriminatory animus toward [Ashaheed's] religious beliefs, . . . victimized and marginalized" him. Aplt. App. 207, 209.

Currington moved to dismiss the second amended complaint, and the district court did so with prejudice on the ground of qualified immunity. Aplt. App. 240–54, 273–86. Per the district court, it was dispositive that Ashaheed failed to produce "Supreme Court or Tenth Circuit case law" or a consensus of cases from other circuits holding that coercing a prisoner "into shaving his beard for allegedly no reason other than religious animus" violates the Free Exercise Clause. Aplt. App. 281.

Despite Ashaheed's allegations that Currington acted with animus towards his religion, the court also dismissed the Equal Protection claim because Ashaheed

failed to adequately show that Currington did not discriminate against similarly situated prisoners. Aplt. App. 284–85.

This appeal followed.

SUMMARY OF ARGUMENT

The district court rightly concluded that Ashaheed alleged that Currington forced him to shave his beard as an intentional act of religious discrimination motivated by animus. But it erred in dismissing the case on the ground of qualified immunity.

Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011). It is axiomatic that animus-driven suppression of religions practices violates the First Amendment. The Pilgrims fled from England and the Founders adopted the Free Exercise Clause because of animus-driven religious discrimination.

In this case, the district court thought it dispositive that Ashaheed failed to produce "Supreme Court or Tenth Circuit case law" or a consensus of cases from other circuits holding that coercing a prisoner "into shaving his beard for allegedly no reason other than religious animus" violates the Free Exercise Clause. Aplt. App. 281. But the lack of such a case does not support qualified immunity because the law clearly prohibits animus-driven religious discrimination. In light of that settled rule, no reasonable officer needs a Tenth Circuit or Supreme Court case to tell him that a particular act of intentional religious discrimination violates the law.

In fact, Currington violated the First Amendment under two independent theories of liability. First, as the district court originally recognized, Currington

invidiously discriminated against Ashaheed based on his religion. Currington forced Ashaheed to shave only after he realized that Ashaheed was Muslim, and religious animus more plausibly explains Currington's actions than his far-fetched justification that Ashaheed's beard was not long enough.

Second, Currington substantially burdened Ashaheed's free exercise rights with no conceivable penological interest. Because he cannot dispute that forcing a Muslim prisoner to shave his beard substantially burdens his right to religious exercise, Currington attempts to justify his behavior by concocting illogical excuses that rest on security interests and the inadequate length of Ashaheed's beard. Given that the DRDC's policy specifically exempted Muslim prisoners from forced shaves and that a longer beard would make security-based identification more difficult, these inconsistent rationales simply do not withstand constitutional scrutiny.

This Court and the Supreme Court have also recognized that the Equal Protection Clause prohibits discriminating on the basis of religion. Yet that is precisely what Currington did when he required Ashaheed—and Ashaheed alone—to violate his religious beliefs and submit to having his beard shaved. No other religious inmates were subjected to this discriminatory treatment. Aware that Ashaheed was Muslim and, therefore, exempt from the beard-shaving requirement, Currington nonetheless contravened DRDC policy and ordered Ashaheed to submit to the prison barber. It stands to reason that Currington follows policy as to most

inmates, and that his violation of policy therefore singled Ashaheed out. This selective refusal to follow policy plausibly suggests that Ashaheed was discriminated against solely on the basis of his religion, in violation of clearly established law. Therefore, Ashaheed properly stated an Equal Protection claim.

Because Currington violated Ashaheed's clearly established First and Fourteenth Amendment rights, this Court should reverse the district court's dismissal of the case and remand for further proceedings.

ARGUMENT

I. Currington Violated Clearly Established First Amendment Law.

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). Even while incarcerated, prisoners retain the fundamental constitutional right, guaranteed by the Free Exercise Clause, to exercise their faith. *Makin v. Colo. Dep't of Corr.*, 183 F.3d 1205, 1209 (10th Cir. 1999). Under this Court's precedent, a prison official can be held liable for violating a prisoner's Free Exercise right under two theories of liability. First, a prison official who purposefully and arbitrarily discriminates against a prisoner based on his religion violates a prisoner's free exercise right. *Carr v. Zwally*, 760 F. App'x 550, 554 (10th Cir. 2019); *Marshall v. Wyo. Dep't of Corr.*, 592 F. App'x 713, 716 (10th Cir. 2014). Second, a prison official violates the First Amendment when he substantially burdens a prisoner's sincerely held religious

belief without a legitimate penological interest.[2] *Turner*, 482 U.S at 89; *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007).

In this case, Ashaheed pleaded that Currington violated his First Amendment Free Exercise rights under both theories of liability. A court could draw the plausible inference that Currington forced Ashaheed to shave out of animus, because Currington invented a dubious excuse to explain why Ashaheed's religion did not exempt him from forced shaving pursuant to prison policy. Further, Currington lacked a legitimate penological purpose in preventing Ashaheed from observing one of his closely held religious beliefs. Security interests in a clear booking photo surely were not the basis of Currington's actions, because prison policy exempted Muslims from forced shaves. Thus, Currington has not offered any remotely legitimate reason to justify stripping Ashaheed of his right to observe his deeply held beliefs. Finally, because it is clearly established that such arbitrary and invidious discrimination based on a prisoner's religion violates the First Amendment, Currington is not entitled to qualified immunity.

In granting qualified immunity, the district court repeated the same mistake that led to summary reversal of this Court in *Sause v. Bauer*. *See* 859 F.3d 1270 (10th

[2] Although the district court questioned the applicability of the *Turner* standard to this case in its opinion dismissing the first amendment complaint, this Court has held that *Turner* is "no less applicable" in cases challenging a prison official's individual actions. *Boles v. Neet*, 486 F.3d 1177, 1181 n.4 (10th Cir. 2007).

Cir. 2017), *judgement rev'd*, 138 S. Ct. 2561 (2018). In *Sause*, officers refused to let the plaintiff pray while visiting her home in response to a noise complaint. *Sause*, 138 S. Ct. at 2562. She claimed that this violated clearly established law. This Court granted qualitied immunity in *Sause* on the same ground relied on by the district court in this case: "Sause doesn't identify a single case in which this court, or any other court for that matter, has found a First Amendment violation based on a factual scenario even remotely resembling the one we encounter here." *Sause*, 859 F.3d at 1275. The Supreme Court summarily reversed the grant of qualified immunity in a unanimous opinion, stating that "[t]here can be no doubt that the First Amendment protects the right to pray," and noting the petitioner's argument that "the absence of a prior case involving the unusual situation alleged to have occurred here does not justify qualified immunity." *Sause*, 138 S. Ct. at 2562.

The same is true here. It is clearly established that the First Amendment prohibits invidious discrimination on the basis of religion. "[T]he unusual situation alleged to have occurred" in this case therefore does not defeat qualified immunity, even in the absence of a factually identical case. *See id.*

A. Forcing Ashaheed To Shave His Beard Violated the First Amendment Because Currington Acted Based on Animus and Lacked A Legitimate Penological Purpose.

1. Ashaheed plausibly alleged that Currington invidiously discriminated against him based on his religious beliefs.

When a prison official denies a prisoner the right to practice his religion based on animus, he violates the prisoner's First Amendment Free Exercise Rights. *See Carr*, 760 F. App'x at 554. In other words, an official violates the First Amendment when he discriminates "because of," as opposed to "in spite of," the action's adverse effects on a religious group. *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009). Here, Ashaheed plausibly alleged that Currington forced Ashaheed to shave his beard "for the purpose of discriminating on account of . . . religion." *Id.* at 664; Aplt. App. 209 ("[B]ased on his discriminatory animus towards Plaintiff Ashaheed's religious beliefs, Defendant Currington victimized and marginalized Plaintiff Ashaheed by ordering that his beard be shaved . . . . "). As the district court correctly recognized in its order addressing the first amended complaint, Ashaheed asserted that Currington's actions "were designed to disrupt Plaintiff's religious practices and were intentionally directed at Plaintiff due to Defendant's hostility to the religion of Islam." Aplt. App. 192.

Ashaheed's assertions that Currington acted with discriminatory animus meet and exceed Rule 8(a)'s plausibility standard. *See Iqbal*, 556 U.S. at 678 ("A claim has facial plausibility when the plaintiff pleads factual content that allows the court

to draw the reasonable inference that the defendant is liable for the misconduct alleged."). Courts draw a reasonable inference that a prison official engaged in "outright arbitrary discrimination" when he either gives no justification for an action restricting a prisoner's religious practice or when that justification is illogical. *Grayson v. Schuler*, 666 F.3d 450, 453 (7th Cir. 2012) (denying qualified immunity to prison official who forced African Hebrew Israelite prisoner to cut his dreadlocks when prison official gave no reason for cutting hair and prison arbitrarily only allowed Rastafarian prisoners to wear dreadlocks); *see also Maye v. Klee*, 915 F.3d 1076, 1079 (6th Cir. 2019) (denying qualified immunity to chaplain who refused to let Muslim prisoner attend Eid celebrations without any justification and to chaplain who refused prisoner attendance to Eid because only practitioners of a different sect of Islam were allowed to go).

In this case, Currington's illogical excuse for forcing Ashaheed to shave his beard gives rise to an inference of animus based on religion. When Ashaheed explained to Currington that he was a practicing Muslim in an attempt to avoid the forced shave, Currington denied his request, purportedly because his beard was not full enough. Aplt. App. 207. One could plausibly infer that Currington concocted this spurious excuse to prevent Ashaheed from practicing his faith, and that he did so because Ashaheed practices Islam. After all, Currington forced Ashaheed to shave his beard, contrary to prison policy, only *after* he learned that Ashaheed practices

Islam. There is no suggestion that Currington fails to follow policy as to other inmates, so it stands to reason at the motion to dismiss stage that he singled Ashaheed out on the basis of his faith. Because religious animus more plausibly explains Currington's actions than his ludicrous excuse that Ashaheed's beard was not long enough, a court could reasonably infer that Currington violated the First Amendment.

In fact, the district court *did* reasonably infer that Currington acted with animus when first considering the merits of Ashaheed's claim. Mindful of the principle that granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice," *Dias v. City & Cty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009), the district court recognized that Ashaheed's allegations were plausible and that Currington's purported rationales for his discrimination were not. Aplt. App. 192 ("Nor can the allegations plausibly lead to the proposition that Defendant's actions were undertaken to further the state's interest in prison security and identification of its prisoners."). The district court noted that 1) "when Plaintiff protested to having his beard shaved because he was a 'practicing Muslim' and 'shaving his beard would violate a core tenet of his faith,' Defendant responded that Plaintiff's beard was not full enough to 'qualify for the religious exemption to beard shaving'" and 2) when Ashaheed "explained that he was 'physically unable to grow

a full beard, reiterated that his beard is worn for religious practices, and stated that his religion is documented in his CDOC file,' Defendant responded that he 'didn't want to hear about it' and that Plaintiff would be 'thrown in the hole'" if he did not comply. Aplt. App. 192–93. From these allegations, the district court reasonably inferred that Currington's "*individual* actions" were "designed to disrupt Plaintiff's religious practices and were intentionally directed at Plaintiff due to Defendant's hostility toward the religion of Islam." Aplt. App. 192. This Court should join the district court in recognizing the plausibility of Ashaheed's allegations.

2. Currington lacked any conceivably rational penological interest in forcing Ashaheed to shave his beard.

Currington is also liable under a second theory of First Amendment liability. A prison official who substantially burdens a prisoner's sincerely held religious belief with no legitimate penological purpose violates the First Amendment. *Turner*, 482 U.S. at 84, 89. Currington does not dispute that forcing Ashaheed to shave substantially burdened Ashaheed's religious beliefs and that those beliefs are sincerely held. Nor could he, given that the Supreme Court established that forcing a Muslim prisoner to shave his beard substantially burdens a prisoner's religious exercise in *Holt v. Hobbs*, 574 U.S. 352, 356 (2015). Instead, despite his implausible explanation for denying Ashaheed his rightful religious-based exception to the prison grooming policy, he claims that he acted pursuant to a legitimate penological purpose without animus toward Islam. Aplt. App. 247–49.

Viewing the facts in the light most favorable to Ashaheed, however, Currington lacked any legitimate penological interest in forcing Ashaheed to shave his beard. The prison grooming policy itself *exempted* Muslim prisoners, so Currington cannot point to it as evidence that the prison had a security interest in compelling Muslims to shave. As the district court acknowledged in its first dismissal order, the prison policy and its exception "*support* [Ashaheed's] assertion that Defendant's conduct was intentional and discriminatory." Aplt. App. 193.

Indeed, Currington's purported interest in "requiring a beardless photo during inmate intake" for the "quick and reliable identification of prisoners" defies common sense and appears nowhere in Ashaheed's allegations. Aplt. App. 248–49. In fact, Currington's condition that Ashaheed have a "full beard" to qualify for the religious beard-shaving exemption suggests that he might have allowed Ashaheed to keep a *fuller* beard that better concealed his identity. Currington's failure to offer Ashaheed this nonsensical explanation during intake suggests that the beardless photo excuse is not a legitimate penological interest, but rather a post-hoc rationalization put forth by Currington's counsel. *See Boles v. Neet*, 486 F.3d 1177, 1183 (10th Cir. 2007) (rejecting defendant's security interest rationale for denying a prisoner's request to wear religious garments where nothing in the record reflected such a motivation).

Finally, at a minimum, the district court dismissed Ashaheed's complaint prematurely. This Court does not inquire into a prison's legitimate penological

interest at the motion-to-dismiss stage. *Williams v. Wilkinson*, 645 F. App'x 692, 704 (10th Cir. 2016). A proper determination of whether Currington's decision was made pursuant to a legitimate penological interest would require discovery into the prison's policies, the alternative means for the prisoner to exercise the right at issue, the impact of the accommodation on the guards and inmates, and the presence or absence of ready alternatives. *Turner*, 482 U.S. at 89–91.

Deferring examination of legitimate penological interests until the summary judgment stage makes sense given that post-hoc rationalizations for a prison official's actions—as the dubious "beardless photo" rationale here appears to be—do not satisfy *Turner*'s constitutional standard. *See Boles*, 486 F.3d at 1183; *see also Salahuddin v. Goord*, 467 F.3d 263, 276–77 (2d Cir. 2006) (holding "[p]ost hoc justifications with no record support will not suffice" under *Turner*); *Wares v. VanBebber*, No. 99–3362–JWL, 2003 WL 22757930, at *4 (D. Kan. Nov. 13, 2003) (finding First Amendment violation where prison official's ignored prisoner's religious-based request despite prison official's "post-hoc" justification in the form of a security concern). Thus, at this stage, all Ashaheed must do to plead a violation of his First Amendment Free Exercise rights is show that a prison official substantially burdened the exercise of his sincerely held beliefs or that he acted with discriminatory animus in doing so. Because Ashaheed has adequately pled both theories of liability, the district court incorrectly dismissed his claim.

B. Currington Is Not Entitled to Qualified Immunity on the First Amendment Claim.

To overcome qualified immunity, a plaintiff must show that the defendant's actions violated his constitutional right and that the right was clearly established at the time of the conduct at issue. *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014). To show that a right was clearly established, a plaintiff may point to "a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts." *Gutierrez v. Cobos*, 841 F.3d 895, 899 (10th Cir. 2016) (citations omitted). But qualified immunity does not shield a defendant when "a reasonable officer would understand that what he is doing violates that right." *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001). Nor does qualified immunity require the plaintiff to show "the very act in question previously was held unlawful." *Gutierrez*, 841 F.3d at 899. "[N]ot every constitutional violation has factual antecedents," and courts "can occasionally rely on the general proposition that it would be 'clear to a reasonable officer that his conduct was unlawful in the situation he confronted . . . even though existing precedent does not address similar circumstances.'" *Colbruno v. Kessler*, 928 F.3d 1156, 1165 (10th Cir. 2019) (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018)). In fact, "[t]he more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation." *Perea v. Baca*, 817 F.3d 1198, 1204 (10th Cir. 2016). "[I]t would be remarkable if

the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt." *Colbruno*, 928 F.3d at 1165.

Qualified immunity does not protect Currington in this case. Invidiously discriminating based on religion—by forcing a prisoner to abide by grooming regulations that do not even apply to him—violates the First Amendment. Following the Supreme Court's directive in *Turner*, this Court has also recognized that the First Amendment forbids a prison official from arbitrarily and capriciously burdening a prisoner's Free Exercise right. No reasonable official in Currington's position could think that cutting off Ashaheed's beard for no reason other than religious hostility was constitutional. Thus, Currington is not entitled to qualified immunity.

1. Currington Is Not Entitled To Qualified Immunity Because It Is Clearly Established that Religious Deprivations Based on Animus Violate the First Amendment.

It is axiomatic that invidious discrimination based on religious beliefs violates the First Amendment's Free Exercise Clause. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 524 (1993) (holding that officials who enacted zoning ordinance that discriminated against practitioners of Santeria religion violated "the Nation's essential commitment to religious freedom"); *McDaniel v. Paty*, 435 U.S. 618, 626 (1978); (holding clergy-disqualification provision of Tennessee Constitution violated First Amendment because it "punish[ed] a religious

profession with the privation of a civil right" (quoting 5 Writings of James Madison 288 (G. Hunt ed. 1904))); *Fowler v. Rhode Island*, 345 U.S. 67, 68–69 (1953) (overturning criminal conviction of Jehovah's witness based on discriminatory application of ordinance prohibiting religious gatherings in public park); *Shrum v. City of Coweta, Okla.*, 449 F.3d 1132, 1145 (10th Cir. 2006) (acknowledging that "[p]roof of hostility or discriminatory motivation may be sufficient to prove that a challenged governmental action" violates the Free Exercise Clause); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293 (10th Cir. 2004) (reversing summary judgment on student actor's Free Exercise claim where she alleged that state university forced her to utter profanities in a script due to "anti-Mormon" sentiment); *see also Jehovah v. Clarke*, 798 F.3d 169, 181 (4th Cir. 2015) (holding that Christian prisoner alleged First Amendment claim against officers who deliberately assigned him to a cell with non-Christian inmates in order to harass him); *Grayson*, 666 F.3d at 453; *Maye*, 915 F.3d at 1079. In the prison context, prison officials are on notice that a specific form of invidious discrimination—forcing a Muslim prisoner to shave his beard for no good reason—is a serious deprivation that substantially burdens a Muslim prisoner's religious exercise. *See Holt*, 574 U.S. at 356. In light of this clearly established law, no reasonable official in Currington's position could plausibly claim that he was unaware that forcing a Muslim prisoner to shave out of religious animus violated the First Amendment.

In addition, this Court has previously found a violation of clearly established First Amendment law where prison officials engaged in virtually identical conduct. In *Marshall*, the plaintiff alleged that prison officials forced him to shave his kouplock, a hairstyle that conformed to his Native American religious practices, because they did not like it. 592 F. App'x at 715. This Court denied the officials qualified immunity, rejecting the district court's holding that the prisoner had no clearly established right to wear a kouplock. *Id.* at 716. Noting that the Wyoming prison system had a policy that allowed prisoners to wear religious hairstyles, this court held that "the well-pleaded facts indicate that '[t]his . . . is a case of outright arbitrary discrimination rather than of a failure merely to accommodate religious rights.'" *Id*. (citing *Grayson*, 666 F.3d at 453).

Ashaheed's forced shave constitutes the same "outright arbitrary discrimination" that was at issue in *Marshall*. Just like in *Marshall*, where prison policy allowed the plaintiff to wear religious hairstyles, the DRDC policy allowed Ashaheed to wear a beard for religious reasons. And just like the plaintiff in *Marshall*, who pled that the prison officials cut his kouplock for an arbitrary reason—they did not like it—Ashaheed pled that Currington offered a similarly arbitrary reason—his beard was not long enough. *Marshall* shows that Currington's malicious and arbitrary actions in forcing Ashaheed to cut his hair violated clearly established First Amendment law.

The fact that *Marshall* denied qualified immunity and found a violation of clearly established law in an unpublished case—i.e., a disposition that breaks no new ground—underscores how plain and unmistakable the rule is.[3] Of course, forcing a prisoner to shave *because of* animus against the prisoner's faith violates the law. No reasonable officer could possibly think otherwise. As shown above, this Court and the Supreme Court have held time and time again that animus-driven deprivations of religious freedom violate the First Amendment.

Moreover, Currington violated clearly established law by retaliating against Ashaheed. Currington not only discriminated against Ashaheed by ordering him to submit to a shave, but also by threatening to retaliate—indicating that he would throw Ashaheed into solitary confinement—if he did not do so. Retaliation based on animus toward a religion is a clearly established violation of the First Amendment. *See Cruz v. Beto*, 405 U.S. 319, 319 (1972) (finding a First Amendment violation where a prisoner alleged that he shared his Buddhist religious material with other prisoners and was placed in solitary confinement in retaliation). This Court has repeatedly found First Amendment violations when a prisoner is faced with the

[3] An opinion's unpublished status does not render the law unclear. As the district court correctly recognized, this Court has "never held that a district court must ignore unpublished opinions in deciding the law is clearly established." Aplt. App. 282; *Morris v. Noe,* 672 F.3d 1185, 1197 n.5 (10th Cir. 2012). In fact, this Court has held that language to the contrary in other cases "stands for the unremarkable proposition that a single unpublished district court opinion is not sufficient to render the law clearly established." *Morris,* 672 F.3d at 1197 n.5.

"Hobson's choice" of practicing his religion or facing negative consequences. *See Khan v. Barela*, 808 F. App'x 602, 615 (10th Cir. 2020) (finding First Amendment violation where defendants served plaintiff ham as Ramadan meal, forcing him to choose to violate his beliefs by eating pork or not eat for an entire month); *Williams v. Wilkinson*, 645 F. App'x 692, 703, 704–05 (10th Cir. 2016) (finding First Amendment violation where failure to provide plaintiff with a Kosher diet gave plaintiff choice of "eating a diet contrary to his beliefs or not eating at all"). By leaving Ashaheed with the impossible choice between following his deeply held religious beliefs or facing prison's most severe punishment for no good reason, Currington discriminated against Ashaheed and violated the First Amendment.

2. Currington Is Not Entitled to Qualified Immunity Because He Has Not Put Forth A Remotely Plausible Legitimate Reason for Shaving Ashaheed's Beard.

"The Supreme Court clearly established in *Turner* that prison regulations cannot arbitrarily and capriciously impinge on inmates' constitutional rights." *Boles v. Neet*, 486 F.3d 1177, 1184 (10th Cir. 2007). This Court has also clearly held that a prison official's arbitrary reason for denying a prisoner a reasonable opportunity to practice his religion fails to satisfy the First Amendment's command. *Marshall*, 592 F. App'x at 716; *Tennyson v. Carpenter*, 558 F. App'x 813, 818 (10th Cir. 2014) (reversing dismissal of prisoner's First Amendment claim where plaintiff alleged he

was denied participation in the prison's Christian choir under a pretextual allegation of misconduct).

Currington's flagrant dismissal of Ashaheed's Free Exercise rights with no legitimate explanation was so plainly unlawful that any reasonable officer would understand that his forced shave violated the Constitution. Indeed, as the Supreme Court has recognized, the First Amendment's nonpersecution principle is so "fundamental" that precedent addressing its violation is sparse. *Lukumi*, 508 U.S. at 523 (holding that "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded" in its precedent); *see also Lowe v. Raemisch*, 864 F.3d 1205, 1210–11 (10th Cir. 2017) ("Even in the absence of egregious conduct the constitutional violation may be so obvious that similar conduct seldom arises in [this Court's] cases." (citing *Safford Unified Sch. Dist. No. 1 v. Redding*, 557 U.S. 364, 377–78 (2009))).

Thus, where, as here, an official's proffered rationale for denying a religious accommodation is not only arbitrary but defies all logic, qualified immunity is even more inappropriate because the violation is unmistakable. *See Grayson*, 666 F.3d at 455 (denying qualified immunity to prison official who arbitrarily cut of religious prisoner's dreadlocks because such an action "could not reasonably be thought constitutional"); *see also Colbruno*, 928 F.3d at 1165 (denying qualified immunity to prison officials who paraded a prisoner nude through a hospital because it was

"common sense" that their egregious actions did not relate to any legitimate goal of the prison). As described in Section A, *infra*, it is "common sense" that Currington's absurd rationale for forcing Ashaheed to shave—that Ashaheed's beard was not long enough to qualify for the religious exemption and thus Ashaheed would have to shave it off completely—related to no legitimate penological interest. Currington's post-hoc illogical excuse cannot now shield him with qualified immunity.

Ashaheed's right to be free from discriminatory animus and to reasonably exercise his religion is well established. Despite the clear precedent from the Supreme Court, this Court, and courts in other circuits holding that a prison official cannot arbitrarily and capriciously impinge upon a prisoner's Free Exercise rights, Currington forced Ashaheed to act contrary to his deeply held religious beliefs for no legitimate reason. Because Ashaheed's right to exercise his religion is so fundamental—and its violation so patent in this case—qualified immunity does not protect Currington from liability.

3. Currington Is Not Entitled To Qualified Immunity Because He Knew That He Was Violating Clearly Established Law.

Qualified immunity does not protect "the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). While *Harlow v. Fitzgerald*, excised the subjective component of qualified immunity analysis, the individual defendant's actual knowledge did not become completely irrelevant thereby. 457 U.S. 800, 815–19 (1982). Indeed, Justice Brennan, in his

concurrence in *Harlow*, noted specifically that he joined the majority's opinion because the standard it adopted "would not allow the official who actually knows that he was violating the law to escape liability for his actions, even if he could not 'reasonably have been expected' to know what he actually did know." 457 U.S. at 821 (Brennan, J. concurring); *see also Butz v. Economou*, 438 U.S. 478, 506 (1978) ("[I]t is not unfair to hold liable the official who knows or should know he is acting outside the law[.]"). And, the Tenth Circuit, citing Justice Brennan's concurrence in *Harlow*, has specifically stated that a "government official who actually knows that he is violating the law is not entitled to qualified immunity even if [his] actions [are] objectively reasonable." *Pleasant v. Lovell*, 876 F.2d 787, 798 (10th Cir. 1989).[4]

[4] *See also Russo v. Massullo*, Nos. 90–3240, 90–3241, 1991 WL 27420, at *6 (6th Cir. March 5, 1991) (holding that "[q]ualified immunity is not intended to protect those who knowingly violate the law" and, therefore, officer who testified he knew he could not seize property was not entitled to qualified immunity); *Krohn v. United States*, 742 F.2d 24, 31 (1st Cir. 1984) ("If a plaintiff proves some peculiar or unusual source, specially known to the defendant, then, by hypothesis, this is what the defendant, as a reasonable man, must take into account."); *Zweibon v. Mitchell*, 720 F.2d 162, 171 n.16 (D.C. Cir. 1983) ("We would not have our opinion read to excuse the extraordinarily sly violator 'who *actually knows* that he was violating the law . . ., even if he could not "reasonably have been expected" to know what he actually did know.' The Court's *Harlow* opinion appears to have been carefully crafted to avoid such an egregious, if doubtless rare, result." (citation omitted)); *Greater L.A. Council on Deafness, Inc. v. Zolin*, 812 F.2d 1103, 1109 n.7 (9th Cir. 1987) (holding that officials waived qualified immunity after acknowledging awareness of requirements to accommodate disabled potential jurors by virtue of past lawsuit).

In this case, CDOC informed Currington, through an official DRDC policy, that Muslim prisoners were not required to submit to beard shavings. Aplt. App. 70, 206–07. And, the findings of the district court, and allegations in the amended complaint, demonstrate that Currington knew there was a religious exemption to the shaving requirement. Aplt. App. 192–93 (noting that "when Plaintiff protested to having his beard shaved because he was a 'practicing Muslim' and 'shaving his beard would violate a core tenet of his faith,' Defendant responded that Plaintiff's beard was not full enough to 'qualify for the religious exemption to beard shaving'"). There is no question that, under these circumstances, Currington had "fair warning" that forcing a Muslim prisoner to shave his beard was unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002).

II. Currington Is Not Entitled To Qualified Immunity On Ashaheed's Equal Protection Claim.

Clearly-established equal protection law forbids discrimination on the basis of religion. Ashaheed adequately pled that Currington singled him out for discriminatory treatment due to anti-Muslim animus. Therefore, Currington is not entitled to qualified immunity on Ashaheed's equal protection claim.

A. Clearly Established Equal Protection Law Prohibits Religious Discrimination.

The Equal Protection Clause is a "particular and profound recognition of the essential and radical equality of all human beings." *SECSYS, LLC v. Vigil*, 666 F.3d

678, 684 (10th Cir. 2012). Its directive is clear: No State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. It is, in essence, "a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985).

The law prohibiting discrimination on the basis of religion is clearly established. A "challenged state action" that "intentionally discriminates between groups of persons" is impermissible unless the state's intentional decision to discriminate can be justified by reference to a legitimate penological interest. *SECSYS*, 666 F.3d at 685–86; *Patel v. Wooten*, 15 F. App'x 647, 650–51 (10th Cir. 2001). It has long been recognized, by both this Court and the Supreme Court, that the Equal Protection Clause prohibits differential treatment on the basis of religion. *United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979) ("The Equal Protection Clause prohibits selective enforcement 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962))); *Cooper v. Pate*, 378 U.S. 546, 546 (1964) (per curiam) (reversing dismissal of complaint in which petitioner alleged that "solely because of his religious beliefs he was denied . . . privileges enjoyed by other prisoners"); *Oyler*, 368 U.S. at 456 ("a policy of selective enforcement . . . deliberately based upon an unjustifiable standard such as race [or] religion" would support a finding of a denial of equal protection); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir.

2010) ("Religion is a suspect classification."); *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (per curiam) (religion is an "inherently suspect distinction[]" under the Equal Protection Clause); *Barton v. Malley*, 626 F.2d 151, 155 (10th Cir. 1980) (claim of selective enforcement of parole revocation guidelines is analyzed according to ordinary equal protection standards and requires a showing of "intentional, purposeful discrimination stemming from impermissible considerations such as race, religion, or the desire to prevent the exercise of other constitutionally secured rights."); *Wolff v. McDonnell*, 418 U.S. 539, 556 (1974) ("Prisoners have been held to enjoy substantial religious freedom under the . . . Fourteenth Amendment[]."). Decades of precedent demonstrate that the Equal Protection Clause's directive that "all persons similarly situated should be treated alike" leaves no room for religious discrimination. *City of Cleburne*, 473 U.S. at 439.

B. Ashaheed Properly Alleged That He Was Discriminated Against Based Solely on His Religion.

When evaluating an equal protection claim, this Court first asks "whether the challenged state action intentionally discriminates between groups of persons." *SECSYS*, 666 F.3d at 685. To assert a viable equal protection claim, a plaintiff must "demonstrate that he was treated differently than another who is similarly situated." *Brown v. Montoya*, 662 F.3d 1152, 1173 (10th Cir. 2011) (citations omitted); *see also Marshall v. Columbia Lea Reg'l Hosp.*, 345 F.3d 1157, 1179 (10th Cir. 2003) ("To sustain a claim under the Equal Protection Clause, a plaintiff must provide

evidence that he was treated differently from others who are similarly situated to him, and that the acts forming the basis of the plaintiff's claim were motivated by a discriminatory purpose."). Ashaheed has alleged sufficient facts to make this showing.

Ashaheed alleged that no other religious inmates going through the intake process were harassed or subjected to unjustified orders because of their sincerely held religious beliefs. Aplt. App. 212 ("No other similarly situated inmates were subjected to this discriminatory treatment."); *id.* ("Ashaheed was singled out among all religious inmates for differential treatment by Currington . . . ."). Rather, because he was a Muslim, Ashaheed was singled out by Currington and was forced to have his beard shaved, in violation of his religious beliefs and DRDC's own policy. Aplt. App. 212 ("Currington singled out Ashaheed solely based upon his religious beliefs and treated him differently from all inmates of other religions.").

Further, Ashaheed alleged that Currington forced him to shave "because of, not merely in spite of" his religious beliefs, demonstrating the "intentional[] discriminat[ion]" that this Court requires in an equal protection claim. *SECSYS*, 666 F.3d at 685 ("Discriminatory intent . . . requires that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part because of, not merely in spite of the law's differential treatment of a particular class of persons.") (internal quotations omitted). Despite knowing that Ashaheed is a practicing Muslim, that he

maintains a beard in accordance with his Muslim faith, that his religious affiliation is documented in his CDOC file, and that DRDC policy recognizes an exemption to the beard-shaving requirement for precisely this situation, Currington nonetheless ordered Ashaheed to submit to having his beard shaved or else be subjected to solitary confinement. Aplt. App. 205–07. Of course, it is reasonable to assume that Currington usually follows policy in most interactions with inmates. Therefore, it stands to reason that by refusing to follow policy when forcing Ashaheed to violate his faith, Currington singled him out for discriminatory treatment.

This Court has recognized that selective enforcement of laws and policies can constitute intentional discrimination. *SECSYS*, 666 F.3d at 686. Here, Currington refused to enforce the DRDC's policy of exempting from the beard-shaving requirement inmates who wear a beard based on religious tenets. Aplt. App. 206–07. Further, Currington's discriminatory intent also is evinced from his other treatment of non-Muslim inmates, who he routinely permits to keep religious artifacts such as bibles, crosses, and wedding rings during the intake process. Aplt. App. 212.

Thus, based on the allegations in the complaint, Ashaheed successfully pled that Currington "intentionally discriminate[d] between groups of persons"—Muslim inmates and inmates of other religions—in violation of the Equal Protection Clause. *SECSYS*, 666 F.3d at 685. Therefore, the district court erred in dismissing his claim.

CONCLUSION

For the reasons stated above, this Court should reverse the district court decision.

Dated: October 23, 2020

Respectfully submitted,

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STATEMENT REGARDING ORAL ARGUMENT

Appellant respectfully requests oral argument given that this case presents an important question that would benefit from a full presentation of argument before the Court: whether qualified immunity shields an official who intentionally discriminates against a person's free exercise rights based on animus for a particular religion.

CERTIFICATES OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(g)(1) because it contains 8,026 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2019 in Times New Roman 14-point font.

Dated: October 23, 2020

/s/ David M. Shapiro
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CERTIFICATE OF DIGITAL SUBMISSION

Pursuant to this Court's guidelines on the use of the CM/ECF system, I hereby certify that:

a. all required privacy redactions have been made;

b. the hard copies that have been submitted to the Clerk's Office are exact copies of the ECF filing; and

c. the ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program, SUPERAntiSpyware, version 10.0.1208, last updated October 23, 2020, and according to the program is free of viruses.

Dated: October 23, 2020

/s/ David M. Shapiro
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CERTIFICATE OF SERVICE

I hereby certify that on October 23, 2020, I electronically filed a true, correct, and complete copy of the foregoing Brief of Appellant with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: October 23, 2020

/s/ David M. Shapiro
David M. Shapiro
Counsel for Appellant Tajuddin Ashaheed

ATTACHMENT 1:

DISTRICT COURT ORDER GRANTING DEFENDANT'S MOTION TO DISMISS FILED MAY 26, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez

Civil Action No. 17-cv-3002-WJM-KMT

TAJUDDIN ASHAHEED,

Plaintiff,

v.

THOMAS E. CURRINGTON,

Defendant.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

In its current posture Plaintiff Tajuddin Ashaheed ("Plaintiff") brings the following claims against Defendant Thomas E. Currington ("Defendant") in this action: (1) violation of his First Amendment right to free exercise of religion, brought pursuant to 42 U.S.C. § 1983 ("Claim 1"; ECF No. 65 at 7–9, ¶¶ 32–42); and (2) violation of his Fourteenth Amendment right to equal protection, brought pursuant to 42 U.S.C. § 1983 ("Claim 2"; *id*. at 9–10, ¶¶ 43–50).

Before the Court is Defendant's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) (the "Motion"; ECF No. 87), which was filed on September 3, 2019.

For the reasons set forth below, the Court grants the Motion and dismisses Claims 1 and 2 with prejudice.

I. BACKGROUND

The following factual summary is drawn from Plaintiff's second amended complaint (the "Second Amended Complaint"; ECF No. 65), except where otherwise

noted. The Court assumes the allegations contained in the Second Amended Complaint to be true for the purpose of deciding the Motion. *See Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

Plaintiff is a practicing Muslim who observes various Islamic practices, including the "'Sunnha' practice of leaving one's beard to grow." (ECF No. 65 at 3, ¶¶ 9–10.) He asserts that his beard is "integral to his religious identity" and serves "as a sign of his sincerely held faith of decades, cultural inclusion and respect for tradition." (*Id.* at 3, ¶ 10.) Plaintiff believes that "shaving his beard is forbidden and, as such, violates a core tenant [*sic*] of his faith." (*Id.*)

In 1993, while serving a prior sentence at the Colorado Department of Corrections ("CDOC"), Plaintiff informed CDOC staff members of "his Muslim faith and signed a written declaration of his religious affiliation." (*Id*. at 3, ¶ 11.) Plaintiff contends that his "CDOC file was documented with his religious affiliation with the faith of Islam." (*Id*.) At the time, he "was given a Koran and prayer rug" and participated in religious practices during his term of incarceration. (*Id.*) Plaintiff was apparently released from the CDOC's custody sometime prior to 2014. (*Id*. at 3, ¶¶ 11–12.)

In 2014, Plaintiff returned to the CDOC for a new 4-year sentence, "at which time his file was updated and continued to document his Muslim faith." (*Id*. at 3, ¶ 12.) In March 2016, Plaintiff was released on parole. (*Id*. at 3, ¶ 13.) In July 2016, however, Plaintiff was remanded to the CDOC to serve 90 days for various parole violations. (*Id*.)

On July 5, 2016, Plaintiff appeared at the CDOC's intake and classification facility, known as the Denver Reception and Diagnostic Center ("DRDC"), so that he could be processed into the CDOC's system and begin serving his 90-day sentence.

(*Id*. at 4, ¶ 14.) On that day, Plaintiff had a beard in accordance with his Muslim faith and was "observing the holy month of Ramadan, the most sacred month for Muslims." (*Id*. at 4, ¶¶ 14–15.)

As the initial step in the intake process, an officer at the DRDC interviewed Plaintiff to review and update the information in the CDOC's file on Plaintiff. (*Id*. at 4, ¶ 16.) As a required part of the interview, the officer asked for Plaintiff's "religious faith group affiliation." (*Id*.) Plaintiff informed the officer that he was a practicing Muslim, and the officer documented the religious affiliation in Plaintiff's file. (*Id*.) The officer, however, did not require Plaintiff to sign a form declaring his religion because the CDOC's file on Plaintiff contained his previous declaration (apparently the declaration he made in 1993). (*Id*.; *see also id*. at 3, ¶ 11.)

The DRDC policies in place at the time of Plaintiff's July 2016 intake required inmates to have their beard shaved during the intake process. (*Id.* at 4–5, ¶ 18.) However, the DRDC provides an exemption for inmates who wear a beard based on religious tenets. (*Id.*) Pursuant to the DRDC policies and the relevant exemption, a Muslim inmate may not be required to have his beard shaved. (*Id.*)

Before Defendant, who is a correctional officer at the DRDC, found out that Plaintiff was a Muslim, he "at first evidenced a desire to follow the rules at [CDOC] by forcing [Plaintiff] to shave, as is the case with all incoming inmates." (*Id.* at 5, ¶ 23.) Plaintiff alleges that when Defendant found out that Plaintiff was Muslim, Defendant "decided to violate [DRDC] policy and force him to shave despite his exemption from the general rule." (*Id.* at 5, ¶ 23.) According to Plaintiff, Defendant "did this knowing

that this violation of [DRDC] policy would violate a fundamental tenant [*sic*] of Islam and evinced an intent by [Defendant] to show hostility towards Islam." (*Id.*)

For example, when "Plaintiff Ashaheed explained that he is a practicing Muslim and that shaving his beard would violate a core tenet of his faith, Defendant Currington stated that Plaintiff Ashaheed must have a 'full beard' in order to 'qualify' for the religious exemption to beard shaving." (*Id*. at 5, ¶ 20.) Plaintiff "then explained [to Defendant] that he is physically unable to grow a full beard, reiterated that his beard is worn for religious practices, and stated that his religious affiliation is documented in his CDOC file." (*Id*. at 5, ¶ 21.) In response, Defendant allegedly told Plaintiff that he "didn't want to hear about it," and he threatened that Plaintiff would be "thrown in the hole" if he did not submit to having his beard shaved. (*Id*. at 5, ¶¶ 21–22.)

As a result of Defendant's threat, Plaintiff submitted to having his beard shaved by the prison barber. (*Id*. at 6, ¶ 25.) Plaintiff claims that he "spent the remaining holy days of Ramadan, and months thereafter, beardless, feeling dehumanized, humiliated, his faith having been disrespected." (*Id*.)

Plaintiff alleges that although Defendant required him to shave his beard, "[o]ther non-Muslim inmates were allowed to keep items of religious significance, such as crosses, bibles and small wedding rings and only [Plaintiff] was singled out by [Defendant] to be treated differently from any other inmate of a different religion." (*Id.* at 6, ¶ 24.)

On December 14, 2017, Plaintiff filed this action against Defendant John Doe. (ECF No. 1.) On April 13, 2018, Plaintiff filed an amended complaint identifying Defendant Thomas E. Currington as the individual previously described as John Doe.

("First Amended Complaint"; ECF No. 13.) In his First Amended Complaint, Plaintiff asserted three claims: (1) Defendant violated Plaintiff's First Amendment right to free exercise of religion; (2) Defendant violated Plaintiff's Fourteenth Amendment right to equal protection; and (3) Defendant violated Plaintiff's religious rights under the Religious Land Use and Institutionalized Persons Act. (ECF No. 13.)

On September 28, 2018, Defendant filed a motion to dismiss the First Amended Complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. (ECF No. 44.) On May 2, 2019, the Court granted Defendant's original motion to dismiss, dismissing Claim 1 and Claim 2 without prejudice, and dismissing Claim 3 with prejudice. (ECF No. 60.) The Court also granted Plaintiff leave to file an amended complaint. (*Id.* at 19.)

On June 26, 2019, Plaintiff filed the Second Amended Complaint against Defendant. (ECF No. 65.) There, Plaintiff alleges that Defendant violated: (1) his First Amendment right to free exercise of religion; and (2) his Fourteenth Amendment right to equal protection. (*Id.*) On September 3, 2019, Defendant moved to dismiss this action pursuant to Federal Civil Rule of Procedure 12(b)(6) and the defense of qualified immunity. (ECF No. 87.) On October 15, 2019, Plaintiff filed a response to the Motion (ECF No. 96), and Defendant filed a reply to the Motion on October 25, 2019 (ECF No. 97).

II. LEGAL STANDARD

Under Rule 12(b)(6), a party may move to dismiss a claim in a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "The court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that

the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Dubbs v. Head Start, Inc.*, 336 F.3d 1194, 1201 (10th Cir. 2003) (internal quotation marks omitted).

The Rule 12(b)(6) standard requires the Court to "assume the truth of the plaintiff's well-pleaded factual allegations and view them in the light most favorable to the plaintiff." *Ridge at Red Hawk, L.L.C.*, 493 F.3d at 1177. Thus, in ruling on a Motion to Dismiss under Rule 12(b)(6), the dispositive inquiry is "whether the complaint contains 'enough facts to state a claim to relief that is plausible on its face.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Granting a motion to dismiss "is a harsh remedy which must be cautiously studied, not only to effectuate the spirit of the liberal rules of pleading but also to protect the interests of justice." *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1178 (10th Cir. 2009) (internal quotation marks omitted). "Thus, 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely.'" *Id.* (quoting *Twombly*, 550 U.S. at 556). However, "[t]he burden is on the plaintiff to frame a 'complaint with enough factual matter (taken as true) to suggest' that he or she is entitled to relief." *Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 556). "[C]omplaints that are no more than 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action,' . . . 'will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

III. ANALYSIS

A. Claim 1—Free Exercise of Religion

Plaintiff alleges that Defendant violated Plaintiff's free exercise of religious freedom under the First Amendment of the U.S. Constitution. (ECF No. 65 at 8–9, ¶¶ 32–42.) Defendant contends in response that he is entitled to qualified immunity and, as such, that Claim 1 should be dismissed. (ECF. No. 87 at 4–10.)

The Court will assume, for purposes of this Order only, that Plaintiff has adequately pleaded a free exercise claim and will turn to whether the defense of qualified immunity applies.

1. Qualified Immunity Standard

"Individual defendants named in a § 1983 action may raise a defense of qualified immunity, which shields public officials . . . from damages actions unless their conduct was unreasonable in light of clearly established law." *Gutierrez v. Cobos*, 841 F.3d 895, 899 (10th Cir. 2016) (internal quotation marks omitted; ellipses in original). "Once the qualified immunity defense is asserted," as Defendant has done here, "the plaintiff bears a heavy two-part burden to show, first, the defendant's actions violated a constitutional or statutory right, and, second, that the right was clearly established at the time of the conduct at issue." *Thomas v. Kaven*, 765 F.3d 1183, 1194 (10th Cir. 2014) (internal quotation marks omitted). "If the plaintiff fails to satisfy either part of the inquiry, the court must grant qualified immunity." *Carabajal v. City of Cheyenne*, 847 F.3d 1203, 1208 (10th Cir. 2017), *cert. denied*, 138 S. Ct. 211 (2017); *see also Cummings v. Dean*, 913 F.3d 1227, 1239 (10th Cir. 2019). "The judges of the district courts . . . [may] exercise their sound discretion in deciding which of the two prongs of

the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, 555 U.S. 223, 236 (2009). When a defendant asserts the defense of qualified immunity, the burden shifts to the plaintiff to overcome the asserted immunity. *See Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009).

"In this circuit, to show that a right is clearly established, the plaintiff must point to a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains." *Gutierrez*, 841 F.3d at 900 (internal quotation marks omitted). "A plaintiff need not show the very act in question previously was held unlawful in order to establish an absence of qualified immunity." *Id*. (internal quotation marks omitted). But "[a]n officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in his shoes would have understood that he was violating it." *City and Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774 (2015) (internal quotation marks omitted).

"The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (emphasis in original) (quoting *al-Kidd*, 563 U.S. at 742). Therefore, a plaintiff may not defeat qualified immunity "simply by alleging violation of extremely abstract rights." *White v. Pauly*, 137 S. Ct. 548, 552 (2017). Nonetheless, the clearly established inquiry "involves more than a scavenger hunt for prior cases with precisely the same facts. The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation."

Perea v. Baca, 817 F.3d 1198, 1204 (10th Cir. 2016) (internal quotation marks and citation omitted).

Because qualified immunity is immunity from suit, rather than a mere defense to liability, *Estate of Reat v. Rodriguez*, 824 F.3d 960, 964 (10th Cir. 2016) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)), a court may dismiss the case with or without prejudice if it finds that a defendant is subject to qualified immunity. *Lybrook v. Members of Farmington Mun. Sch. Bd. of Educ.*, 232 F.3d 1334, 1342 (10th Cir. 2000).

2. Plaintiff Has Not Satisfied His Burden on Qualified Immunity

As discussed above, the Court has discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first. *See Pearson*, 555 U.S. at 236. Considering the circumstances of this particular case, the Court finds that the second prong—whether the constitutional right was clearly established at the time of Defendant's unlawful conduct—should be addressed first.

The Court previously dismissed Claim 1 without prejudice on the following basis:

> Plaintiff's burden is to identify Supreme Court or Tenth Circuit case law, or the great weight of other authority, showing that Defendant violated the Free Exercise Clause when he coerced Plaintiff into shaving his beard for allegedly no reason other than religious animus (perhaps influenced by religious stereotyping, considering Defendant's alleged explanation that Plaintiff's beard was not full enough to qualify for the religious exemption). Plaintiff has not done so.

(ECF No. 60 at 14–15.)

In Plaintiff's Second Amended Complaint, Plaintiff alleges that "Defendant Currington's conduct violated clearly Plaintiff's established rights of which reasonable public officials knew or should have known as the law was clearly established that

discriminating against Muslim inmates based upon their religious beliefs was a violation of the United States Constitution." (ECF No. 65 at 9, ¶ 39.) In support of this proposition, Plaintiff cites *Tennyson v. Carpenter*, 558 F. App'x 813 (10th Cir. 2014), which is an unpublished case involving an inmate who claimed that his First Amendment rights were violated when he was suspended from the Christian prison choir based on a pretextual allegation of misconduct. *See id*. at 817.

Defendant argues that *Tennyson* is insufficient to establish that Plaintiff's rights were clearly established at the time of Defendant's conduct because *Tennyson* is an unpublished opinion. (ECF No. 87 at 6–7.) The Tenth Circuit has recognized it has "never held that a district court must ignore unpublished opinions in deciding the law is clearly established." *Morris v. Noe*, 672 F.3d 1185, 1197 n.5 (10th Cir. 2012). Nonetheless, "an unpublished opinion provides little support for the notion that the law is clearly established on a given point." *Id.* (internal quotation marks omitted); *see also Mecham v. Frazier*, 500 F.3d 1200, 1206 (10th Cir. 2007) (noting, in the context of discussing the import of an unpublished Tenth Circuit decision, that "[a]n unpublished opinion . . . provides little support for the notion that the law is clearly established").

Even if the Court were to consider *Tennyson*, that case does not establish that the *particular conduct* at issue in this litigation was clearly established at the time of Plaintiff's intake at the DRDC. At best, *Tennyson* stands for the broad notion that prison guards may not take action against an individual prisoner which violates that prisoner's right to the free exercise of his or her religious beliefs. This premise, however, is far too expansive to clearly inform a reasonable officer in Defendant's shoes that the particular conduct at issue—requiring a Muslim inmate to shave his

beard during the prison intake process—would violate that inmate's First Amendment rights. *See White*, 137 S. Ct. at 552 (recognizing that a plaintiff may not defeat qualified immunity "simply by alleging violation of extremely abstract rights"); *Mullenix*, 136 S. Ct. at 308; *Sheehan*, 135 S. Ct. at 1774.

Because Plaintiff has failed to establish that Plaintiff's right to maintain his beard was clearly established under the First Amendment at the time of Defendant's conduct, the Defendant is entitled to qualified immunity as to that Claim. As such, the Court must dismiss Claim 1.

B. Claim 2—Equal Protection

1. Equal Protection Standard

"The Equal Protection Clause of the Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' which is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985) (quoting *Plyler v. Doe*, 457 U.S. 202, 216 (1982)).

In order to assert a viable equal protection claim, "the plaintiff must . . . demonstrate that he was treated differently than another who is similarly situated." *Brown v. Montoya*, 662 F.3d 1152, 1173 (10th Cir. 2011) (internal quotation marks omitted); *see also Requena v. Roberts*, 893 F.3d 1195, 1210 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 800 (2019). To be "similarly situated" the individuals must be "*prima facie* identical in all relevant respects or directly comparable in all material respects. Although this is not a precise formula, it is nonetheless clear that similarly situated individuals must be very similar indeed." *United States v. Moore*, 543 F.3d 891, 896

(7th Cir. 2008) (internal citations and quotation marks omitted). The "similarly situated" requirement is an "exacting burden". *Jicarilla Apache Nation v. Rio Arriba Cnty.*, 440 F.3d 1202, 1213 (10th Cir. 2006).

2. Plaintiff Fails To State An Equal Protection Claim Under Rule 12(b)(6)

The Court previously dismissed Claim 2 because the Plaintiff's First Amended Complaint failed to allege "any facts which demonstrate that there are similarly situated inmates who were treated in an allegedly non-discriminatory manner." (ECF No. 60 at 16.) In the Second Amended Complaint, Plaintiff attempts to cure the pleading deficiencies by adding an allegation that "[n]o other similarly situated inmates were subjected to this discriminatory treatment. Currington routinely allows inmates of other religions to keep religious artifacts such as bibles, crosses and wedding rings during the intake process." (ECF 65 at 10, ¶ 48.)

Defendant argues that the Second Amended Complaint "fails to allege facts showing that the equal protection claim involves religions that are similarly situated" and that "allowing religious inmates to retain religious articles does not make them 'similarly situated' to the type of religious tenet that Mr. Ashaheed states he adheres to (requiring that he not shave his beard)." (ECF No. 87 at 11.) The Court agrees.

The comparison offered by Plaintiff—that Muslim inmates who are forced to shave their beards during the DRDC intake process are similarly situated to inmates of other religions who are allowed to keep their religious artifacts—is truly unavailing. These two groups are not "*prima facie* identical in all relevant respects" because the artifacts that Plaintiff identifies (bibles, crosses and wedding rings) do not change or potentially cover in part an inmate's appearance in the same manner as does a beard.

See Moore, 543 F.3d at 896. In the Court's view, inmates of other religions who are allowed to keep religious artifacts such as bibles, crosses and wedding rings are not similarly situated to Plaintiff.

Moreover, despite claiming that "[Plaintiff] was singled out among all religious inmates for differential treatment by [Defendant]" (ECF 65 at 10, ¶ 50), Plaintiff has failed to allege that Defendant allowed *any* inmate of *any* religion to keep a beard during the intake process. Because Plaintiff fails to satisfy his burden to allege that he was treated differently than a similarly situated individual, Plaintiff has not plausibly stated an equal protection claim. Thus, the Court must also dismiss Claim 2.

C. Whether the Court Should Dismiss With or Without Prejudice

The Court turns finally to the question of whether the dismissal of Plaintiff's claims should be with or without prejudice. The Court finds it would be futile to allow Plaintiff yet a fourth opportunity to plead plausible claims of either Free Exercise or Equal Protection. Accordingly, the Court finds it appropriate at this time to dismiss both claims with prejudice. *See Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("A dismissal with prejudice is appropriate where a complaint fails to state a claim under Rule 12(b)(6) and granting leave to amend would be futile.").

IV. CONCLUSION

For the reasons set forth above, it is ORDERED that:

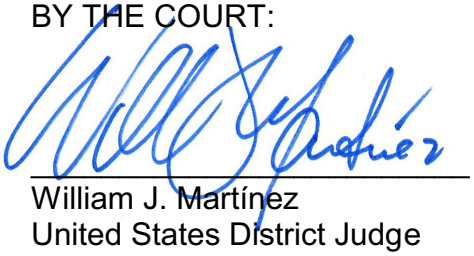
1. Defendant's Motion to Dismiss Complaint and Jury Demand (ECF No. 87) is GRANTED;
2. Plaintiff's claims, and this action, are DISMISSED WITH PREJUDICE;

3. The Clerk shall enter judgment in favor of Defendant and against Plaintiff and shall terminate this case; and

4. Defendant shall have his costs, if any, upon compliance with D.C.COLO.LCivR 54.1.

Dated this 26th day of May, 2020.

BY THE COURT:



William J. Martínez
United States District Judge

ATTACHMENT 2:

DISTRICT COURT FINAL JUDGMENT FILED MAY 26, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Case No. 17-cv-3002-WJM-KMT

TAJUDDIN ASHAHEED,

Plaintiff,

v.

THOMAS E. CURRINGTON,

Defendant.

FINAL JUDGMENT

In accordance with the orders filed during the pendency of this case, and pursuant to Fed. R. Civ. P. 58(a), the following Final Judgment is hereby entered.

Pursuant to the Order Granting Defendant's Motion to Dismiss [ECF 103] entered by Judge William J. Martínez on May 26, 2020, and incorporated herein by reference as if fully set forth, it is

ORDERED that Defendant's Motion to Dismiss Complaint and Jury Demand [ECF 87] is granted. It is further

ORDERED that Plaintiff's claims, and this action, are dismissed with prejudice. It is further

ORDERED that final judgment is hereby entered in favor of Defendant, Thomas E. Currington, and against Plaintiff, Tajuddin Ashaheed. It is further

ORDERED that Defendant shall have his costs by the filing of a Bill of Costs with the Clerk of this Court within fourteen days of the entry of judgment, pursuant to Fed. R. Civ. P. 54(d)(1) and D.C.COLO.LCivR 54.1.

This case will be closed.

DATED at Denver, Colorado this 26th day of May, 2020.

FOR THE COURT:

JEFFREY P. COLWELL, CLERK

By: s/A. Frank
A. Frank, Deputy Clerk