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 United States District Court
For the District of Colorado

The Honorable William J. Martinez
District Judge

D.C. No. 17-cv-0302-WJM-KMT

ANSWER BRIEF

ORAL ARGUMENT IS NOT REQUESTED

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Defendant-Appellee Thomas E. Currington, through his counsel, the Colorado Attorney General, respectfully submits his Answer Brief.

STATEMENT OF RELATED CASES

There are no prior or related appeals.

STATEMENT REGARDING JURISDICTION

The Court has subject matter jurisdiction over this appeal. *See* 42 U.S.C. § 1983; 28 U.S.C. § 1331; and 28 U.S.C. § 1342. Jurisdiction to review the district court's entry of judgment is conferred by 28 U.S.C. § 1291.

The district court granted Currington's Motion to Dismiss and entered final judgment in his favor on May 26, 2020. Aplt. App., pp. 290–91.[1] Ashaheed filed a timely Notice of Appeal on June 22, 2020. *Id.* at

[1]In accordance with 10th Cir. R. 28.1(A), references to documents in the record are made by reference to the Appendix page number, e.g. "Aplt. App., p. __." The Plaintiff-Appellant's Appendix contains page numbers in the bottom right-hand corner of each page; however, those numbers do not correspond with the "Page: ___" designation generated by the CM/ECF stamp at the top of each page or the .pdf viewer pagination. To avoid any confusion, references to the Appendix in this Answer Brief correspond to the CM/ECF page number at the top of each page in the Appendix, which also corresponds with the .pdf viewer pagination.

292. Because the district court issued a final judgment on the merits, and the appeal was timely filed, this Court has jurisdiction over the appeal.

STATEMENT OF THE ISSUES

1. Whether the district court properly granted Currington's Motion to Dismiss, given that Ashaheed failed to meet his burden under the doctrine of qualified immunity, specifically, by failing to demonstrate a violation of clearly established law.

2. Whether the district court properly granted Currington's Motion to Dismiss, given that Ashaheed failed to allege any facts to support a claim that he was treated differently than a similarly situated individual or individuals.

STATEMENT OF THE CASE

I. Initiation of the lawsuit.

On July 5, 2016, Plaintiff-Appellant Tajuddin Ashaheed was incarcerated at the Colorado Department of Corrections' Denver Reception and Diagnostic Center ("DRDC") for intake to begin serving a ninety-day parole revocation sentence. Aplt. App., pp. 208–09. Ashaheed is a practicing Muslim who observes "Sunnha"—the practice

of leaving his beard to grow. *Id.* The intake officer documented Ashaheed's file with his continued practice of the Muslim faith. *Id.* at 209. DRDC's policies at the time required all incoming inmates to have their beard shaved but recognized an exemption for inmates who wear a beard based on religious tenets. *Id.* After Ashaheed stated shaving would violate his Muslim faith, Currington allegedly told Ashaheed that he must have a "full beard" to "qualify" for the religious exemption. *Id.* 210. Ashaheed alleges Currington was unpersuaded by his explanation that he was unable to grow a full beard and told him he would be disciplined if he did not have his beard shaved. *Id.* As a result, Ashaheed's beard was shaved. *Id.* at 211.

Ashaheed brought this action under 42 U.S.C. § 1983, alleging that Defendant-Appellant Thomas E. Currington violated Ashaheed's First and Fourteenth Amendment rights. *Id.* at 206–07.

II. Dismissal of Ashaheed's First Amended Complaint without prejudice.[2]

Ashaheed initially filed suit in December 2017 against Defendant John Doe and amended his Complaint in April 2018 after apparently identifying Currington as the Defendant. *Id.* at 16, 30. The First Amended Complaint asserted three violations: (1) Ashaheed's right to freely exercise his religion under the First Amendment; (2) his right to Equal Protection under the Fourteenth Amendment; and (3) his rights under the Religious Land Use and Institutionalized Persons Act ("RLUIPA").[3] *Id.* at 36–38. Regarding his First Amendment claim, Ashaheed alleged Currington's actions were "based on discriminatory animus" for Ashaheed's religious beliefs and "substantially burden[ed]" his exercise of religion. *Id.* at 35. In asserting his equal protection claim,

[2] The district court's first order, while not directly on appeal here, is relevant because Ashaheed's Opening Brief and the Amicus Briefs point to the order granting dismissal without prejudice to support their argument that Ashaheed pleaded a plausible claim for religious discrimination under the First Amendment.

[3] Ashaheed later agreed to dismiss the RLUIPA claim, which is not at issue here.

Ashaheed alleged that Currington subjected him to discriminatory orders because he is Muslim. *Id.* at 38.

Currington filed a motion to dismiss, contending: (1) Ashaheed failed to state a First Amendment claim because the CDOC's beard-shaving policy furthered a legitimate penological interest; (2) Ashaheed failed to state a viable equal protection claim; and (3) Currington was entitled to qualified immunity. *Id.* at 59–66. Notably, the motion to dismiss focused primarily on the penological interests of the CDOC's beard-shaving policy but did not address the alleged religious discrimination of Currington's actions. *Id.* at 61–62.

The district court granted the motion to dismiss without prejudice on May 2, 2019. *Id.* at 204–05. In that order, the district court noted that while the "most common Free Exercise challenge in the prison setting is a challenge to a prison regulation that allegedly impinges on religious expression," Ashaheed's "challenge does not fit that mold, but the parties argue as if it did." *Id.* at 192. It further observed that because Currington's arguments focused solely on how the CDOC's beard-shaving policy did not violate the Free Exercise Clause, the

motion to dismiss "has not challenged Plaintiff's claim under the proper framework," and "necessarily fail[ed]" on Fed. R. Civ. P. 12(b)(6) grounds. *Id.* 196. The district court explicitly noted that Ashaheed's "claim should be evaluated under the standard for pleading acts of religious discrimination by an official acting on his or her personal religious animus, not according to a regulation." *Id.* (citing *Carr v. Zwally*, 760 F. App'x 550, 554 & n.4 (10th Cir. 2019)).

The district court underscored this point by holding that Ashaheed failed to meet his burden to identify Supreme Court or Tenth Circuit precedent or the great weight of other authority to show Currington violated Ashaheed's First Amendment rights. *Id.* at 198–200. Specifically, the court rejected Ashaheed's reliance on *Holt v. Hobbs*, 574 U.S. 352 (2015), which, the court noted, "is centered on a *prison policy* that violated RLUIPA, and not on a violation of the Free Exercise Clause by a prison guard's *individual act of discrimination*." *Id.* at 199. It concluded that if Ashaheed "chooses to amend his Complaint and proceed with a First Amendment claim based on Defendant's *individual* acts of discrimination, he should plead that

claim . . . ." *Id.* at 200. The court also held that Ashaheed failed to plausibly plead he was treated differently from similarly situated inmates with respect to his equal protection claim. *Id.* at 201–02. It dismissed both claims without prejudice. *Id.* at 204.

III. Dismissal of Ashaheed's Second Amended Complaint with prejudice.

In his Second Amended Complaint, Ashaheed incorporated additional allegations to support his religious discrimination claim and equal protection claim, by alleging that forcing Ashaheed to shave despite the religious exemption "evinced an intent by Currington to show hostility toward Islam," and that Currington allowed other "non-Muslim inmates" to keep religious items such as crosses, bibles, and small wedding rings during intake. *See id.* at 210–11. Ashaheed also identified *Tennyson v. Carpenter*, 558 F. App'x 813 (10th Cir. 2014), to support his argument that "the law was clearly established that discriminating against Muslim inmates based upon their religious beliefs was a violation of the United States Constitution." *Id.* at 214.

Currington filed a motion to dismiss the Second Amended Complaint. *Id.* at 243. He argued the First Amendment claim was barred by qualified immunity because Ashaheed failed to meet his burden (1) to show the law was clearly established that Currington's alleged actions were unlawful, and (2) to plausibly allege a discriminatory purpose. *Id.* at 248–52. He also argued Ashaheed's allegations failed to plausibly satisfy the "similarly situated" requirement to bring an equal protection claim and, thus, he was also entitled to dismissal and qualified immunity on that claim. *Id.* at 253–55.

Ashaheed responded that *Tennyson* clearly established "the proposition that individual guards in a prison may not take action against an individual prisoner which violate the prisoner's right to the free exercise of his religious beliefs." *Id.* at 259. He further argued that he plausibly alleged "that Currington acted with animus" "because of his religion" and the "only reason to have forced Mr. Ashaheed to shave would be religious animus, which is what the Complaint spells out." *Id.*

at 260–61. He also asserted that he plausibly alleged a viable equal protection claim. *Id.* at 261–63.

The district court granted Currington's motion and dismissed both claims with prejudice. *Id.* at 288. The court assumed, without deciding, that Ashaheed adequately pleaded a Free Exercise claim. *Id.* at 282. The court then rejected Ashaheed's reliance on *Tennyson*, holding it 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," which 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." *Id.* at 285–86.

The court also found Ashaheed's comparison to inmates who were allowed to keep religious items were not alike in all relevant respects because religious items "do not change or potentially cover in part an inmate's appearance in the same manner as does a beard." *Id.* at 287.

As such, the court held that Ashaheed did not plausibly state an equal protection claim. *Id.* at 288.

On May 26, 2020, the district court entered its final judgment, and this appeal followed. *Id.* at 290–93.

SUMMARY OF ARGUMENT

The district court properly dismissed Ashaheed's First Amendment claim under the doctrine of qualified immunity. Once a defendant asserts qualified immunity, a plaintiff bears a heavy, two-part burden and must demonstrate: (1) the defendant violated the plaintiff's federal constitutional or statutory right; and (2) the right was clearly established at the time of the violation in the circumstances faced by the defendant. Ashaheed failed to identify any Supreme Court or Tenth Circuit authority, or the weight of persuasive authority from other courts that would inform a reasonable officer in Currington's position that the particular conduct at issue—i.e., requiring a Muslim inmate to shave his beard during the prison intake process—would violate the inmate's First Amendment rights.

On appeal, Ashaheed still fails to meet his burden to identify binding precedent or the weight of authority from other courts that show requiring a Muslim inmate to shave his beard during the prison intake process would violate the First Amendment. So instead, Ashaheed's arguments focus on the first prong—i.e., contending that he alleged a plausible First Amendment violation under the theories that Currington's actions were based on religious discrimination and that his free exercise rights were substantially burdened without a legitimate penological interest.

As an initial matter, Ashaheed's conclusory allegations do not state a plausible claim of religious discrimination and do not relieve him of the need to establish the second prong of the analysis. Moreover, his arguments that the law is clearly established rely on cases not particularized to the conduct alleged here, and ask this Court to define clearly established law at such a high level of generality that it would circumvent the clearly established prong of the qualified immunity analysis entirely. Simply put, Ashaheed identifies no Supreme Court or Tenth Circuit authority, or the clearly established weight of authority

from other courts, clearly establishing that Currington's particular conduct violated Ashaheed's clearly established First Amendment rights. Accordingly, dismissal was proper, and this Court should affirm.

Ashaheed also failed to state a plausible equal protection claim because his allegations did not demonstrate he was treated differently than similarly situated inmates. As the district court correctly observed, inmates who were allowed to keep religious items were *not* similarly situated to Ashaheed, as religious items, unlike a beard, cannot change an inmate's appearance. Aplt. App., p. 287. Indeed, the district court found Ashaheed's argument "truly unavailing." *Id.* His arguments on appeal fair no better. Moreover, Ashaheed does not identify any precedent from the Supreme Court, this Court, or the clearly established weight from other courts, which clearly establishes that requiring a Muslim inmate to shave during intake, but allowing other inmates to keep religious items, violates the Equal Protection Clause. Accordingly, the district court correctly dismissed the equal protection claim, and this Court should affirm.

STANDARD OF REVIEW

A court may dismiss a complaint for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). This Court reviews a ruling on a motion to dismiss de novo. *See Forest Guardians v. Forsgren,* 478 F.3d 1149, 1152 (10th Cir. 2007).

To withstand a motion to dismiss, a complaint "must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Plausibility requires more than mere conceivability. *See Khalik v. United Air Lines*, 671 F.3d 1188, 1190 (10th Cir. 2012). Put simply, a plaintiff "must include enough facts to 'nudge[ ] [his] claims across the line from conceivable to plausible.'" *Dennis v. Watco Cos., Inc.*, 631 F.3d 1303, 1305 (10th Cir. 2011) (quoting *Twombly*, 550 U.S. at 570).

The ultimate duty of the Court is to "determine whether the complaint sufficiently alleges facts supporting all the elements necessary to establish an entitlement to relief under the legal theory proposed." *Forsgren,* 478 F.3d at 1160. While detailed factual

allegations are not required, a plaintiff must assert "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. "Factual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. A complaint will not suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555, 557).

ARGUMENT

I. The district court properly granted Currington's Motion to Dismiss Ashaheed's First Amendment claim on the basis of qualified immunity because he failed to demonstrate a violation of clearly established law.

To promote the efficient administration of public services, the doctrine of qualified immunity "shields government officials performing discretionary functions from individual liability under 42 U.S.C. § 1983 unless their conduct violates 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *DeSpain v. Uphoff*, 264 F.3d 965, 971 (10th Cir. 2001) (internal

quotation marks and citations omitted). Qualified immunity is an affirmative defense to a lawsuit brought under § 1983, and provides immunity from the outset. *Adkins v. Rodriguez*, 59 F.3d 1034, 1036 (10th Cir. 1995).

The purpose of qualified immunity is to give government officials "breathing room" to make reasonable but mistaken judgments, so long as their actions are not plainly incompetent. *Stanton v. Sims*, 571 U.S. 3, 5 (2013). Indeed, qualified immunity applies in "all but the most exceptional cases," *Tonkovich v. Kan. Bd. of Regents*, 159 F.3d 504, 516 (10th Cir. 1998) (quoting *Harris v. Board of Educ. of the City of Atlanta*, 105 F.3d 591, 595 (11th Cir. 1997)), and protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

When a defendant asserts qualified immunity, the plaintiff bears a heavy two-part burden. *Reynolds v. Powell*, 370 F.3d 1028, 1030 (10th Cir. 2004)*; DeSpain*, 264 F.3d at 971. Specifically, the plaintiff must show: (1) the defendant violated the plaintiff's federal constitutional or statutory right, *and* (2) the right was clearly established at the time of

the violation in the circumstances faced by the defendant. *Reynolds*, 370 F.3d at 1030. If a plaintiff fails to demonstrate either of these two parts, the court must grant a defendant qualified immunity. *Gross v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001).[4] Courts have discretion to determine the order in which to address these two prongs. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

For a right to be "clearly established" for purposes of the qualified immunity analysis, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (holding qualified immunity shields government officials from liability provided their conduct when committed did not violate "clearly established statutory

[4] Although *Amicus* Cato Institute argues the doctrine of qualified immunity has no legal foundation and should be abandoned altogether, *see Br. of Cato Inst.*, pp. 5–11, this Court is bound by clear Supreme Court rulings upholding the applicability of the doctrine. *See Hohn v. United States*, 524 U.S. 236, 252–53 (1998) (noting that Supreme Court "decisions remain binding precedent until [the Supreme Court] see[s] fit to reconsider them").

or constitutional rights of which a reasonable person would have known"). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question *beyond debate*." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011) (emphasis added) (citing *Anderson*, 483 U.S. at 640; *Malley*, 475 U.S. at 341).

The existence of a general constitutional right—such as the right to be free from religious deprivations based on alleged animus—is not enough to demonstrate a law is clearly established. *See Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("[T]he right allegedly violated must be defined at the appropriate level of specificity before a court can determine if it was clearly established."). "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 v. Cobos*, 841 F.3d 895, 900 (10th Cir. 2016) (emphasis added) (internal quotation marks and citation omitted).

The Supreme Court has "repeatedly told [lower] courts . . . not to define clearly established law at a high level of generality." *Mullenix*

v. Luna, 577 U.S. 7, 12 (2015) (quoting *al-Kidd*, 563 U.S. at 742). Rather, the plaintiff must make a more specific showing that applies to the facts of a particular case. *White v. Pauly*, 137 S. Ct. 548, 552 (2017) ("As this Court explained decades ago, the clearly established law must be 'particularized' to the facts of the case."). The Supreme Court has made clear that defining "clearly established law" at a high level of generality is inconsistent with the Court's precedent in the context of qualified immunity. *Id.* at 552. Rather than relying on principles at a general level, a court must identify cases where an official acting under similar circumstances as the defendant was held to have violated an individual's constitutional rights. *Id.*

In this case, Ashaheed must identify Supreme Court or Tenth Circuit case law on point, or the clearly established weight of authority from other courts, establishing that requiring a Muslim inmate to shave his beard during the prison intake process would violate that inmate's First Amendment rights. Ashaheed argues that he plausibly alleged that Currington discriminated against him based on his religion and that Currington lacked a legitimate penological interest in requiring

Ashaheed to shave his beard. *Opening Br.*, pp. 15–20. He then relies on three broad propositions to circumvent qualified immunity, contending: (1) it was clearly established that religious deprivations based on animus violate the First Amendment; (2) Currington did not identify a legitimate penological reason for requiring Ashaheed to shave his beard; and (3) Currington "knew" he was violating clearly established law. *Opening Br.*, pp. 22–30. As an initial matter, Ashaheed has not stated a plausible First Amendment claim based on religious discrimination. Moreover, as described in turn below, Ashaheed's arguments fail to show the particular conduct at issue here—i.e., requiring a Muslim inmate to shave his beard during the prison intake process—was a clearly established First Amendment violation. Accordingly, this Court should affirm the dismissal of Ashaheed's First Amendment claim.

A. Ashaheed has not stated a plausible First Amendment claim based on religious discrimination.

To state a claim for religious discrimination in violation of the First Amendment, a plaintiff must plead "that the defendant acted with

discriminatory purpose," which "requires more than intent as volition or intent as awareness of consequences." *Iqbal*, 556 U.S. at 676 (internal quotation marks and citations omitted). "It instead involves a decisionmaker's undertaking a course of action 'because of,' not merely 'in spite of,' [the action's] adverse effects upon an identifiable group." *Id.* at 676–77 (citation omitted; alteration in original). Thus, to state a valid claim, Ashaheed was required to plausibly allege Currington required him to shave his beard "because of," not simply "in spite of" his religion.

In his Second Amended Complaint, Ashaheed added the following allegations:

> Before Defendant Currington found out Ashaheed was Muslim, at first evinced a desire to follow the rules at DOC by forcing Ashaheed to shave, as is the case with all incoming inmates. Once he found out Ashaheed was Muslim, Currington decided to violate DOC policy and force him to shave despite his exemption from the general rule. Currington did this knowing that this violation of DOC policy would violate a fundamental tenant of Islam and evinced an intent by Currington to show hostility towards Islam.

Aplt. App., p. 210. These conclusory allegations do not meet the *Iqbal* standard. Ashaheed admits Currington was motivated by compliance

with the CDOC's beard-shaving policy, but simply failed to recognize that Ashaheed qualified for an exemption to the general policy. Standing alone, this failure does not plausibly show Currington shaved Ashaheed's beard "because of" (rather than "in spite of") his religion. Indeed, Currington allegedly told Ashaheed he needed a "full beard" to "qualify" for the religious exemption, *id.*, which implies, at most, a reasonable mistake by Currington regarding whether Ashaheed qualified for the exemption. Despite characterizing Currington's actions as evincing a hostility towards Islam or Muslims or as "arbitrary," there are simply no *factual* allegations establishing Currington's mere failure to recognize the exemption was "because of" Ashaheed's Muslim faith, as opposed to "because of" the prison's general intake policy. *See Robbins v. Oklahoma*, 519 F.3d 1242, 1247 (2008) (noting "'plausible' cannot mean 'likely to be true'" and a plaintiff must plead claims that cross "the line from conceivable to plausible" (citing *Twombly*, 550 U.S. at 570)).

To avoid this conclusion, Ashaheed asserts that the district court reasonably inferred Currington acted with animus in its first order

granting dismissal without prejudice. *Opening Br.*, p. 17. But this overstates the district court's order. The district court's first order focused on the parties' "confusion in regard to what Plaintiff is actually alleging in his First Amendment claim" due to the first motion dismiss briefing focusing on whether the CDOC's *policy* violated Ashaheed's free exercise rights, as opposed to Currington's putative religious animus. Aplt. App., p. 200. The district court specifically held Currington's 12(b)(6) challenge "necessarily fail[ed]" because he did not challenge the "claim under the proper framework." *Id.* at 196.

The notion that Ashaheed's unchallenged religious discrimination allegations *plausibly* stated a First Amendment claim is further belied by the district court's statement in granting qualified immunity:

> If Plaintiff chooses to amend his Complaint and proceed with a First Amendment claim based on Defendant's *individual* acts of discrimination, he should plead that claim (and Defendant should challenge it, if he so chooses) with reference to the proper standard in analyzing that actual claim.

Id. at 200. And, in fact, Ashaheed incorporated additional allegations in the Second Amended Complaint regarding religious discrimination.

But, as noted above, those allegations do not plausibly demonstrate religious discrimination or animus. While Ashaheed characterizes the "full beard" colloquy as an "illogical excuse" inferring animus, *Opening Br.*, pp. 16–17, there are no facts that nudge this unsupported claim from merely conceivable to *plausible*. For example, there are no allegations Currington made any anti-Muslim statements in connection with the order to shave or that he allowed inmates of other religions to keep their beards and enforced the general shaving policy as to only Muslim inmates. Rather, as the district court pointed out, Ashaheed "failed to allege that Defendant allowed *any* inmate of *any* religion to keep a beard during the intake process." Aplt. App., p. 288.

The thrust of Ashaheed's religious discrimination claim therefore hinges on a single, isolated incident of mistaken belief, which fails to state a plausible First Amendment claim. *See Gallagher v. Shelton*, 587 F.3d 1063, 1070 (10th Cir. 2009) (holding that failing to timely approve an inmate's various request for religious accommodations were "at most, isolated acts of negligence" that do not violate the First Amendment); *Peterson v. Lampert*, 499 F. App'x 782, 783–85 (10th Cir.

2012) (holding same in context of prison losing inmate's religious personal property after transfer to another facility); *Tenison v. Byrd*, 826 F. App'x 682, 692–93 (10th Cir. 2020) (holding same after inmate's religious diet was temporarily canceled due to prison official's mistaken belief that inmate had violated a religious diet agreement). Thus, even taking all well-pled facts as true, the allegations plausibly suggest only that Currington was mistaken and simply failed to recognize that Ashaheed met the exemption.[5] The allegations here fall well-short of plausibly stating a religious discrimination claim.[6]

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[5] Ashaheed also argues Currington violated clearly established law by allegedly retaliating against Ashaheed based on religious animus. *Opening Br.*, p. 25. But Ashaheed did not bring a retaliation claim. Ashaheed's burden is to show that requiring a Muslim inmate to shave his beard during prison intake is a clearly established violation of the First Amendment free exercise clause—not that retaliation is a clearly established violation of the First Amendment. This Court generally does not review claims asserted for the first time on appeal, and it should similarly reject Ashaheed's argument that the law was clearly established based on an entirely different legal theory for a claim he did not assert in the district court. *See Fogle v. Gonzales*, 570 F. App'x 795, 796 (10th Cir. 2014).

[6] Amici's suggestion that this Court rule on the constitutional question, even if it agrees with the district court's determination that the law was not clearly established, is unwarranted given the lack of plausible

B. Ashaheed has not demonstrated the alleged conduct was a clearly established violation of his First Amendment rights.

Despite the failure to plead a plausible First Amendment violation, Ashaheed argued in the district court that he met his burden to identify clearly established law because *Tennyson v. Carpenter*, 558 F. App'x 813 (10th Cir. 2014), stands for "the proposition that individual guards in a prison may not take action against an individual prisoner which violate that prisoner's right to the free exercise of his religious beliefs." Aplt. App., p. 259. *Tennyson* is an unpublished case involving an inmate who claimed that his First Amendment rights were violated when he was suspended from a Christian prison choir based on a

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allegations demonstrating a constitutional violation. Although Amici raise the concern that affirming on the second prong inhibits the development of constitutional law, the Supreme Court has made clear that lower courts have discretion to rule on qualified immunity without reaching the constitutional question, based in part on the acknowledgement that "the development of constitutional law is by no means entirely dependent on cases in which the defendant may seek qualified immunity." *Pearson*, 555 U.S. at 242 (noting that constitutional issues also arise in criminal cases and civil cases seeking injunctive relief). Given the particular allegations in this case, there is no reason to reach the constitutional question here.

pretextual allegation of misconduct. 558 F. App'x at 817. As the district court correctly noted, however, *Tennyson* and Ashaheed's proffered proposition were "far too expansive" to clearly inform Currington that the particular conduct at issue would violate Ashaheed's First Amendment rights. Aplt. App., pp. 285–86.

Ashaheed generally asserts that it is clearly established that religious deprivations based on animus violate the First Amendment. *Opening Br.*, pp. 22–26. To support this claim, he now relies on this Court's unpublished decision in *Marshall v. Wyoming Department of Corrections*, 592 F. App'x 713 (10th Cir. 2014), and on *Grayson v. Schuler*, 666 F.3d 450 (7th Cir. 2012). In *Marshall*, a plaintiff alleged that prison officials made him shave his kouplock, a hairstyle he wore as a Native American religious practice, because they "did not like it" and harassed him when it started to grow back. 592 F. App'x at 715–16. This Court held "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 v. Schuler*, 666 F.3d 450, 453 (7th Cir. 2012)). In *Grayson*, an inmate was forced to shave his

dreadlocks (not during intake), which he wore in accordance with his African Hebrew Israelites of Jerusalem faith. 666 F.3d at 451–52. The inmate was told his dreadlocks "posed a security risk" and only Rastafarians were permitted to wear dreadlocks. *Id.* In reversing summary judgment, the court concluded this was "a case of outright arbitrary discrimination," because nothing suggested the prison officials "reasonably thought the plaintiff insincere in his religious belief, or a security threat," but rather they were allowing only Rastafarians to wear dreadlocks, "which could not reasonably be thought constitutional." *Id.* at 453, 455.

Neither case establishes that requiring a Muslim inmate to shave his beard during intake was a clearly established First Amendment violation. First, these two cases do not constitute established law on anything. One unpublished decision from this Court is insufficient to show the law was clearly established in this Circuit. While this Court is not required to completely ignore unpublished decisions in deciding whether the law is clearly established, "an unpublished opinion 'provides little support for the notion that the law is clearly established'

on a given point." *Morris v. Noe*, 672 F.3d 1185, 1197 n.5 (10th Cir. 2012) (citing *Mecham v. Frazier*, 500 F.3d 1200, 1206 (10th Cir. 2007)). Particularly standing alone, *Marshall* simply does not provide a sufficient basis to qualify as clearly established law that requiring a Muslim inmate to shave his beard during the prison intake process violates the First Amendment.[7]

Ashaheed's reliance on *Grayson* is similarly misplaced, because it is well-established that a single case from another circuit is not the "robust 'consensus of cases of persuasive authority'" necessary to constitute clearly established law in the absence of controlling law in the circuit. *See al-Kidd*, 563 U.S. at 742 (citing *Layne*, 526 U.S. at 617); *Routt v. Howry*, No. 19-6187, 2020 WL 6940791, at *6 (10th Cir. Nov. 25, 2020) (noting that "only one case from another circuit" "is insufficient to constitute the weight of authority from other circuits that

[7] Indeed, *Marshall* explicitly states that it "is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1." *Id.* at 714 n*.

is necessary to finding it clearly established that" a defendant's "*particular conduct* violated" a plaintiff's rights (emphasis added)).

Second, *Marshall* and *Grayson* involved very different factual scenarios that are not particularized to the facts alleged here. The prison officials in *Marshall* specifically and repeatedly targeted an individual inmate with a religious hairstyle (not during the prison's intake process) by forcing him to cut his hair and then badgering him once it began to grow back. 592 F. App'x at 715–16. The allegations that prison officials "did not like his kouplock" and "arbitrarily harassed him about" it after it began to grow back showed a pattern of continued harassment, which "plausibly pleaded plausible claims for unconstitutional discrimination." *Id.* And in *Grayson*, the court found it dispositive that the prison's policy allowing inmates of only Rastafarian faith to wear dreadlocks but requiring an inmate of a different faith to shave his dreadlocks was unconstitutional as outright discrimination. 666 F.3d at 451–52, 455.

By contrast, Ashaheed's allegations assert only a one-time misapplication of an exemption to the general policy that was just as

likely the result of an honest mistake. Ashaheed's religious discrimination claim rests solely on the allegation that his beard was shaved during standard intake procedures, despite a religious exemption. This occurrence is his only factual allegation that Currington had animus for his Muslim faith. He alleges no additional facts that would let this Court reasonably infer religious animus. Indeed, Ashaheed alleges he grew his beard back and, unlike in *Marshall*, he does not claim that Currington, or anyone else, harassed him about it. Aplt. App., pp. 211–12. Currington's mistaken belief that Ashaheed did not qualify for the exemption, without more, does not establish he was targeted *because of* his Muslim faith. Moreover, the general policy here required all incoming inmates to have their beards shaved during intake. Although there was religious exemption, unlike in *Grayson*, it did not specify that it applied to only certain religions.[8] And there are no allegations that Currington allowed inmates of *certain*

[8] The exemption noted: "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., p. 99.

faiths (let alone any inmates, for that matter) to keep their beards during intake.

Simply put, Ashaheed cannot satisfy his burden to show the law was clearly established based on the different circumstances in one, non-published opinion from this Court in *Marshall* and in a single opinion from another circuit in *Grayson*.

C. Whether Currington identified a legitimate penological interest is not relevant to the *Iqbal* plausibility test for asserting religious discrimination, and Ashaheed fails to show this was a clearly established violation of his First Amendment rights under *Turner*.

Ashaheed asserts he stated a First Amendment claim under the traditional framework that his sincerely held religious beliefs were substantially burdened without a legitimate penological interest. *Opening Br.*, p. 18. He argues qualified immunity is inappropriate here because the "proffered rationale for denying a religious accommodation is not only arbitrary but defies all logic." *Id.* at 27. But this argument simply reiterates a general premise, which, as the district court

correctly held, does not establish that the particular conduct at issue was a clearly established constitutional violation.

Under the traditional framework, "a prisoner-plaintiff must survive a two-step inquiry. First, the prisoner-plaintiff must first show that a prison regulation 'substantially burdened . . . sincerely-held religious beliefs.'" *Kay v. Bemis*, 500 F.3d 1214, 1218 (10th Cir. 2007) (quoting *Boles v. Neet*, 486 F.3d 1177, 1182 (10th Cir. 2007)). "Second, prison officials-defendants may 'identif[y] the legitimate penological interests that justif[ied] the impinging conduct.'" *Id.* Then, courts balance the factors in *Turner v. Safley*, 482 U.S. 78, 89–91 (1987), to determine the regulation's reasonableness.[9] *Kay*, 500 F.3d at 1218–19.

The district court questioned the applicability of *Turner* in its first order granting dismissal, and observed that Ashaheed's "claim should

[9] The factors include: "(1) whether a rational connection exists between the prison policy regulation and a legitimate governmental interest advanced as its justification; (2) whether alternative means of exercising the right are available notwithstanding the policy or regulation; (3) what effect accommodating the exercise of the right would have on guards, other prisoners, and prison resources generally; and (4) whether ready, easy-to-implement alternatives exist that would accommodate the prisoner's rights." *Kay*, 500 F.3d at 1219.

be evaluated under the standard for pleading acts of religious discrimination by an official acting on his or her personal religious animus, not according to a regulation." Aplt. App., p. 196. On appeal, Ashaheed contends that *Turner* is "no less applicable" in cases challenging a prison official's individual actions, as opposed to a regulation. *Opening Br.*, p. 13 n.2 (citing *Boles*, 486 F.3d at 1181 n.4). But in the Second Amended Complaint, Ashaheed incorporated additional allegations to clarify that Currington's actions were based on putative religious animus, in line with the district court's first order. Further, Ashaheed argued the "only reason to have forced Mr. Ashaheed to shave would be religious animus, which is what the Complaint spells out" in responding to the motion to dismiss his Second Amended Complaint. Aplt. App., p. 261. Thus, it appears Ashaheed's theory below relied on alleged religious discrimination. And this Court has noted that claims based on religious discrimination should be evaluated under the *Iqbal* standard, rather than the four-part *Turner* test focusing on general prison policies. *Carr*, 760 F. App'x at 554 & n.4 ("We analyze this claim differently than the district court, as Mr. Carr's

allegations concern an *individual act of discrimination instead of a policy or regulation*.") (emphasis added)).

Even assuming *Turner* provides the proper framework for evaluating Ashaheed's claim, the mere fact that Ashaheed's beard was shaved despite the potential availability of a religious exemption, on its own, does not mean there was no legitimate penological interest. In fact, the Supreme Court has held that prison officials have a compelling interest in requiring a beardless photo during inmate intake. *See Holt v. Hobbs*, 574 U.S. 352, 365–66 (2015) (agreeing prisons have a compelling interest in the quick and reliable identification of inmates and acknowledging shaving a beard after intake could frustrate this objective). It follows, then, that Currington's decision was neither arbitrary, nor did it defy all logic, because the general policy required all incoming inmates to have their beard shaved. Indeed, Ashaheed's allegations admit this: "Before Defendant Currington found out Ashaheed was Muslim, at first evinced a desire to follow the rules at DOC by forcing Ashaheed to shave, as is the case with all incoming inmates." Aplt. App., p. 210.

While Ashaheed characterizes the beardless photo rationale as a "post-hoc rationalization," *Opening Br.*, p. 19, the CDOC's policy explicitly noted, "for security purposes, [it] require[d] that newly admitted offenders be clean shaven during the admission process." Aplt. App., p. 99. Indeed, other circuits have recognized that prisons do not *lack* a legitimate penological interest in beard-grooming policies simply because a policy provides an exception for some inmates or because a policy is subsequently changed to remove beard-grooming restrictions generally. *See Green v. Polunsky*, 229 F.3d 486, 490–91 (5th Cir. 2000) (upholding prison policy prohibiting Muslim inmate from wearing any beard, even a quarter-inch beard, in accordance with his faith, but allowing inmates with certain medical conditions to wear three-quarter-inch beards as related to legitimate penological interests); *Gentry v. Robinson*, --- F. App'x ---, 2020 WL 7181318, at *2, *6 (4th Cir. Dec. 7, 2020) (upholding qualified immunity on First Amendment claim where prison's grooming policy allowed only quarter-inch or half-inch beards worn for religious purposes during relevant time but was later revised to generally eliminate beard-length restrictions).

Ashaheed essentially asks this Court to reformulate the qualified immunity test by requiring a legitimate penological interest before qualified immunity can apply. Additionally, Ashaheed's approach—focusing solely on whether the plaintiff has alleged a *potentially* viable constitutional violation—asks this Court to do what the Supreme Court has "repeatedly told courts" *not* to do in determining qualified immunity: "define clearly established law at a high level of generality." *al–Kidd*, 563 U.S. at 742; *White*, 137 S. Ct. at 552 ("[T]he clearly established law must be 'particularized' to the facts of the case . . . [o]therwise, '[p]laintiffs would be able to convert the rule of qualified immunity . . . into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights.'" (quoting *Anderson*, 483 U.S. at 639)).

This Court, consistent with applicable Supreme Court precedent, has rejected similarly broad definitions of clearly established law. For example, in *Stewart v. Beach*, this Court rejected an inmate's argument that the district court's definition of an inmate's free exercise claim was too narrow in granting prison officials qualified immunity for cutting

his dreadlocks, which he wore according to his Rastafarian faith. 701 F.3d 1322, 1326, 1330–31 (10th Cir. 2012). The inmate asserted that the Supreme Court and the Tenth Circuit emphasize a broad standard that the right at issue should be "the right to reasonably exercise one's religion in prison." *Id.* at 1330. In rejecting that overbroad definition, this Court observed the "additional level of specificity is helpful to focus on case law that would have given [defendants] 'reasonable warning that the conduct then at issue violated constitutional rights,'" and "a more precise definition does not lead to an *overreliance* on factual similarity but to a *proper* reliance." *Id.* at 1331 (quoting *United States v. Lanier*, 520 U.S. 259, 269 (1997); *see also Kemp v. Liebel*, 877 F.3d 346, 352 (7th Cir. 2017) (rejecting as overbroad plaintiff's request that the court "define the relevant clearly established law as 'the right of prisoners not to have their religious practices interfered with and prevented absent a legitimate penological basis'"). The inmate failed to identify any Supreme Court or Tenth Circuit case law that clearly established cutting his dreadlocks *for security reasons* violated the First

Amendment, and therefore this Court affirmed that defendants were entitled to qualified immunity. *Stewart*, 701 F.3d at 1331–33.

Here, Ashaheed has failed to identify a single Supreme Court or Tenth Circuit decision, or a robust consensus of decisions from other circuits, clearly establishing that requiring a Muslim inmate to shave his beard *during the prison intake process* violates the First Amendment. Nor can he. In fact, another court in the District of Colorado recently granted defendants qualified immunity regarding an inmate's First Amendment challenge to having his beard shaved during the prison intake process. *Hancock v. Cirbo*, No. 17-CV-02255-RM-NRN, 2018 WL 6605839, at *6–7 (D. Colo. Dec. 14, 2018) (finding no Supreme Court or Tenth Circuit case on point and granting dismissal on qualified immunity grounds of First Amendment claim regarding shaving of Jewish inmate's beard, worn for religious purposes, during intake). Moreover, several courts have rejected First Amendment challenges to prison beard policies, in some cases upholding restrictions that prohibit beards entirely and in other cases finding it is not clearly established that requiring an inmate to shave a beard worn for religious purposes

violates the First Amendment. *Polunsky*, 229 F.3d at 490–91 (holding prison policy refusing to permit inmates to wear any beard, even a quarter-inch beard, except for medical reasons did not violate free exercise rights of Muslim inmate who desired to wear quarter-inch beard for religious reasons); *Lovell v. McAuliffe*, No. 9:18-CV-0685-TJM/CFH, 2020 WL 4938165, at *5–6 (N.D.N.Y. July 14, 2020) (finding no clear precedent that would warn a reasonable officer that requiring a Rastafarian inmate to shave his dreadlocked beard could potentially violate the First Amendment and collecting cases from other jurisdictions upholding inmate facial-hair restrictions under the First Amendment); *Oakes v. Green*, No. 08-CV-12-HRW, 2008 WL 559683, at *1–4 (E.D. Ky. Feb. 27, 2008) (holding prison regulation prohibiting beards did not violate First Amendment); *Black v. Walker*, No. 5:11-CV-472-CAR-CHW, 2013 WL 782868, at *6–7 (M.D. Ga. Jan. 23, 2013) (finding no clearly established law that prison policy requiring Muslim inmate to shave his beard violated the First Amendment).

Because other courts have acknowledged the lack of clearly established law regarding First Amendment challenges to inmate beard

shaving and, in some cases, have even upheld prison policies prohibiting beards entirely, Ashaheed simply cannot meet his burden to show that requiring him to shave during the intake process violated his clearly established First Amendment rights here.

D. Ashaheed's allegations do not establish that Currington knew he was violating CDOC policy.

Finally, Ashaheed argues qualified immunity should not apply because Currington knew he was violating clearly established law, based on the allegation that Ashaheed told Currington he was a practicing Muslim and there was a religious exemption to the CDOC's beard-shaving policy. *Opening Br.*, pp. 28–30. But Ashaheed's allegations do not plausibly establish that Currington *knew* he was violating the policy. As described above, Currington's statement that Ashaheed needed a "full beard" to "qualify" for the exemption plausibly suggests Currington was simply mistaken or misunderstood Ashaheed's entitlement to the exemption.

The notion that Currington "knew," or it was "obvious," or he had "fair notice" his actions violated clearly established law merely boil

down to an argument that the *policy* constitutes clearly established law sufficient to defeat qualified immunity. The Supreme Court and this Court have explicitly rejected this argument. *See Davis v. Scherer*, 468 U.S. 183, 194 (1984) ("Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision."); *Elder v. Holloway*, 510 U.S. 510, 515 (1994) (clarifying that qualified immunity depends on the violation of a clearly established federal right, *not* "where a defendant violates *any* clearly established duty, including one under state law"); *Herring v. Keenan*, 218 F.3d 1171, 1179–80 (10th Cir. 2000) (holding probation officer's disclosure to probationer's sister and employer of his HIV status violated internal policy, but violating policy did not constitute a violation of probationer's clearly established constitutional right to privacy); *Tanberg v. Sholtis*, 401 F.3d 1151, 1159–60 (10th Cir. 2005) ("Even if it were clear that [the police officer] had violated the [Albuquerque Police Department standard operating procedures], that

violation would not transform an arrest supported by probable cause into an unconstitutional seizure.").[10]

Because the law is not clearly established that requiring a Muslim inmate to shave his beard during the intake process would violate that inmate's First Amendment rights, Currington did not violate Ashaheed's clearly established constitutional right. It follows, then, that Ashaheed failed to meet his burden with respect to Currington's assertion of qualified immunity. *Gross*, 245 F.3d at 1156. Therefore, Currington was entitled to qualified immunity with respect to the First Amendment allegations asserted against him in Ashaheed's Second

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[10] Amici also rely on *Hostetler v. Green*, 323 F. App'x 653 (10th Cir. 2009), to support this argument. In *Hostetler*, although the court noted a guard's knowing violation of a policy, which he knew "was enacted *specifically to prevent sexual assault* " did support "an inference that he was aware of an increased risk of sexual assault," the court also explained that "a failure to adhere to administrative regulations does not equate to a constitutional violation." *Id.* at 657–58. Moreover, the court concluded it was clearly established, under then-existing Supreme Court and Tenth Circuit precedent, "that an inmate has an Eighth Amendment right to be protected against prison guards taking actions that are deliberately indifferent to the substantial risk of sexual assault by fellow prisoners." *Id.* at 659. Here, the failure to adhere to the CDOC's beard-shaving exemption does not equate to a constitutional violation, nor does the policy itself constitute clearly established law.

Amended Complaint, and the district court correctly dismissed the First Amendment claim.[11]

II. Ashaheed failed to state a plausible equal protection claim because he failed to allege he was treated differently than other inmates who were similarly situated.

"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

[11] *Sause v. Bauer*, 138 S. Ct. 2561 (2018), does not demand a different result. In *Sause*, police officers ordered the plaintiff the stop praying while they were inside her apartment investigating a noise complaint. *Id.* at 2562–63. The Court noted it was "impossible to analyze [the plaintiff's] free exercise claim" without knowing "what, if anything, the officers wanted her to do at the time when she was allegedly told to stop praying." *Id.* at 2563. Though the plaintiff abandoned her Fourth Amendment claim on appeal, the Court reasoned, "the First Amendment claim demanded consideration of the ground on which the officers were present in the apartment and the nature of any legitimate law enforcement interests that might have justified an order to stop praying at the specific time in question." *Id.* Thus, the Court reversed and remanded for further proceedings. *Id.* Here, there are no competing Fourth Amendment concerns that make it "impossible to analyze" Ashaheed's First Amendment claim. Moreover, Ashaheed has failed to state a plausible religious discrimination claim or to establish that requiring him to shave his beard during intake was a clearly established constitutional violation. Accordingly, *Sause* has no application here.

persons similarly situated should be treated alike." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). To maintain an equal protection claim, plaintiffs "must first make a threshold showing that they were treated differently from others who were similarly situated to them." *Barney v. Pulsipher*, 143 F.3d 1299, 1312 (10th Cir. 1998); *Requena v. Roberts*, 893 F.3d 1195, 1210 (10th Cir. 2018). "Individuals are 'similarly situated' only if they are alike 'in all relevant respects.'" *Requena*, 893 F.3d at 1210 (citation omitted); *accord Jicarilla Apache Nation v. Rio Arriba Cty.*, 440 F.3d 1202, 1213 (10th Cir. 2006) (observing the "similarly situated" requirement is an "exacting burden[]").

Ashaheed's Second Amendment Complaint alleged on "information and belief, no other inmate had their religious freedom infringed upon by Currington at DOC," and that other "non-Muslim inmates were allowed to keep items of religious significance such as crosses, bibles and small wedding rings and only Ashaheed was singled out by Currington to be treated differently from any other inmate of a different religion." Aplt. App., p. 211. But these allegations do not

plausibly show that Currington treated Ashaheed differently than other inmates who were similarly situated to him in *all relevant respects*.

Inmates who were allowed to keep religious items during intake are not similarly situated to Ashaheed, because the two groups involve readily discernible categories: those who keep religious items versus those who make grooming decisions for religious purposes. As the district court properly pointed out, religious items "do not change or potentially cover in part an inmate's appearance in the same manner as does a beard." *Id.* at 287. Simply put, Ashaheed and the inmates who were permitted to keep religious items during prison intake were not "alike 'in all relevant respects'"—a necessary requirement to bring any Equal Protection claim. *Requena*, 893 F.3d at 1210 (holding inmates were not similarly situated where plaintiff's request to use *defendant's phone* to call his *ill father* was denied but other inmate was allowed to use the *prison phone* to call his *pregnant wife*).

On appeal, Ashaheed seeks to overcome this deficiency by arguing he was discriminated against based solely on his religion. *Opening Br.*, pp. 32–34. In support, he references several conclusory allegations:

- "No other similarly situated inmates were subjected to this discriminatory treatment." Aplt. App., p. 215;
- "Ashaheed was singled out among all religious inmates for differential treatment by Currington . . . ." *Id.*; and
- "Currington singled out Ashaheed solely based upon his religious beliefs and treated him differently from all inmates of other religions." *Id.*

But these allegations fail to identify any facts about a particular inmate or inmates who were similarly situated but treated differently than Ashaheed.

As with his First Amendment claim, Ashaheed's reliance on conclusory allegations of religious discrimination fail to state a plausible equal protection claim. *See, e.g.*, *Brown v. Montoya*, 662 F.3d 1152, 1173 (10th Cir. 2011) (holding inmate's conclusory allegations that "he was treated differently from others who had been 'convicted of crimes involving no sexual act, motive, or purpose'" failed to state equal protection claim where inmate did not allege facts about other similarly situated inmates); *Requena*, 893 F.3d at 1210 (affirming dismissal of inmate's race-based equal protection claim supported by conclusory allegations).

Because Ashaheed has failed to state a plausible equal protection claim, the district court correctly granted Currington's Motion to Dismiss. This is especially true because Ashaheed failed to show Currington violated any of his clearly established constitutional rights. *Wilder v. Turner*, 490 F.3d 810, 813 (10th Cir. 2007) ("If the officer's conduct did not violate a constitutional right, the inquiry ends and the officer is entitled to qualified immunity."). Ashaheed does not identify *any* Supreme Court or Tenth Circuit authority, or the clearly established weight from other courts, that hold requiring a Muslim inmate required to shave during intake, but allowing other inmates to keep religious items, violates his clearly established equal protection rights. *Gutierrez*, 841 F.3d at 900.

Because Ashaheed has failed to meet his burden to show a violation of his clearly established equal protection rights, this Court should affirm the district court's order dismissing this claim.

CONCLUSION

The district court properly granted Currington's Motion to Dismiss the First Amendment claim on the grounds of qualified

immunity because Ashaheed failed to meet his burden of demonstrating a violation of clearly established law with respect to Currington's conduct. The district court also properly held Ashaheed failed to state a plausible equal protection claim. Accordingly, this Court should affirm the district court's decision.

STATEMENT REGARDING ORAL ARGUMENT

Counsel for Currington does not believe oral argument would significantly aid the decisional process, given the limited record and the nature of the issues before this Court. Therefore, pursuant to Fed. R. App. P. 34(a)(1) and 10th Cir. R. 34.1, Currington does not request oral argument in this matter.

Respectfully submitted January 6, 2021.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(B), I certify that this brief is proportionally spaced and contains 9,905 words. I relied on my word processor to obtain the count. Additionally, this brief is written in Century Schoolbook font, Type Size 14.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after reasonable inquiry.

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CERTIFICATIONS

This is to certify that all privacy redactions have been made, and with the exception of those redactions, every document submitted in Digital Form or scanned PDF is an exact copy of the written document filed with the Court; and

The digital submission has been scanned for viruses with the most recent version of CrowdStrike Falcon, Version 614.12806.0, recently updated on December 16,2020, and according to the program is free of viruses.

Dated: January 6, 2021.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Answer Brief upon all parties herein electronically through the Court's electronic filing system or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, on January 6, 2021, addressed as follows:

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