2013

Gary Wall, Plaintiff-Appellant v. James Wade, et al., Defendants-Appellees: Brief of Appellant

Tillman J. Breckenridge

Robert M. Luck III

Patricia E. Roberts
William & Mary Law School, perobe@wm.edu

No. 13-6355

In The

United States Court of Appeals for the Fourth Circuit

Gary Wall,

Plaintiff-Appellant,

v.

James Wade, et al.,

Defendants-Appellees.

On Appeal from the
United States District Court for the Western District of Virginia
in Case No. 7:11-cv-00191-JLK-RSB

BRIEF OF APPELLANT

TILLMAN J. BRECKENRIDGE
REED SMITH LLP
1301 K Street, NW
Suite 1100, East Tower
Washington, D.C. 20005
202-414-9200
tbreckenridge@reedsmith.com

PATRICIA E. ROBERTS
WILLIAM & MARY LAW
SCHOOL APPELLATE AND
SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187
757-221-3821

ROBERT M. LUCK III
REED SMITH LLP
901 East Byrd Street, Suite 1700
Richmond, VA 23219
804-344-3400

Counsel for Appellant

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 13-6355 Caption: Gary Wall v. James Wade

Pursuant to FRAP 26.1 and Local Rule 26.1,

Gary Wall
(name of party/amicus)

who is appellant, makes the following disclosure:
(appellant/appellee/amicus)

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

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: Tillman J. Breckenridge Date: 3-27-13

Counsel for: Gary Wall

CERTIFICATE OF SERVICE

****

I certify that on 3-27-13 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

Tillman J. Breckenridge
(signature)

March 27, 2013
(date)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

JURISDICTIONAL STATEMENT

Jurisdiction in the trial court was based on 28 U.S.C. § 1331. Appellant bases his claims on 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act (the "Act" or "RLUIPA") with regard to a deprivation of his constitutional rights. Summary Judgment was granted to Defendants on November 30, 2012. JA137. Wall timely filed a Notice of Appeal from this final order on December 10, 2012. JA148. Therefore, this Court has jurisdiction under 28 U.S.C. § 1292.

STATEMENT OF ISSUES

I. Whether Wall's claims for equitable relief under the Act and § 1983 are moot.

II. Whether the district court improperly granted summary judgment in the Defendants' favor on Wall's § 1983 claim based on its finding that defendants are entitled to qualified immunity.

STATEMENT OF CASE

In 2011, Gary Wall filed his original complaint in this action and subsequently filed two amended complaints asserting Defendants violated 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act with regard to his observation of Ramadan. JA9, JA27. On April 9, 2012, Defendants moved for summary judgment. JA67. Wall filed his response to that motion, JA109, and the next day was transferred out of Red Onion State Prison to Wallens Ridge State Prison. JA135. The district court granted the Defendants' motion for summary judgment, finding that Defendants were entitled to qualified immunity on the § 1983 claim, and, because of Wall's transfer from Red Onion, his claims under the Act were moot. JA137. After the trial court entered judgment, JA147, Wall timely appealed and filed a motion for reconsideration. JA148. Also, on December 31, 2012, Wall was transferred back to Red Onion and filed a second motion for reconsideration. JA150, JA154. On March 7, 2013, the district court denied both motions for reconsideration, and this appeal proceeded. JA157.

STATEMENT OF FACTS

Gary Wall is a state prisoner currently housed at Red Onion State Prison ("Red Onion") in Pound, Virginia. Over the course of his incarceration, Wall has established a history as a member of the Nation of Islam faith. For example, Wall engaged in and successfully observed Ramadan fasting in 2008 and 2009. JA139. Additionally, while at Red Onion Wall received common fare meals to accommodate his religious beliefs. JA139.

A. The Ramadan List

Around June 2010, inmates at Red Onion were notified that they had until July 25th to sign up to participate in fasting for the month of Ramadan. JA138. Wall submitted his form on July 1, 2010 and received a reply from Red Onion officials saying "You are on the list." JA138.

After the sign up deadline for Ramadan, Food Service Manager James Wade, Counselor J. Stallard, and Food Service Supervisor C. Selyers, visited Wall's and the other prisoners' cells in accordance with a new, apparently unwritten policy at Red Onion. JA138-39. Wade and the others demanded that each inmate who had requested to participate in Ramadan fasting produce physical items as proof of the sincerity of their faith. JA138. Unfortunately, as Wall informed Wade, all his belongings, including articles of his faith, were lost in his transfer to Red Onion. JA138-39. Wall presented Wade a court order directing a

monetary judgment in Wall's favor against the Commonwealth to confirm that his belonging were lost. JA138-39. Wall also produced documents showing that Wall was currently receiving common fare meals in accordance with his Nation of Islam faith. JA138-39. Wall further explained to Wade that he had faithfully observed the Ramadan fasting in both 2008 and 2009. JA139. Despite these documents and Wall's statements concerning his faith, Wade declared "That don't mean anything to them," and told Stallard and Selyers to remove Wall from the Ramadan list. JA139.

B. Wall Files Grievances Requesting Permission to Participate In Ramadan

After being removed from participation by Wade, Stallard, and Selyers, Wall filed an informal grievance explaining again that his religious materials were lost and requesting an explanation. JA139. Wade responded by stating that either Wall did not have items or refused to present them and therefore would remain off the Ramadan participation list. JA139. Wade did not address Wall's claims that his belongings had been lost. JA139. Wall filed another informal grievance a few days later and received the same response. JA139. As Ramadan began, Wall attempted to save his breakfast in his cell and eat it after sundown, however, he was prohibited from saving the food and subject to sanctions for his effort. JA139. Wall then filed an emergency grievance, but was again rebuffed. JA139-40. Finally, Wall filed two formal grievances. JA139-40.

C. Rowlette Refuses To Put Wall Back On The Ramadan List

In response to the formal grievances, Assistant Warden Robert Rowlette and Wade approached Wall to discuss the matter while Wall was in the shower area. JA30, JA139-40. Rowlette asked if Wall would like to be put back on the Ramadan list provided that Rowlette could verify that Wall had truly lost his belongings. JA140. Not having the court disposition with him at the time, Wall replied that he would like to be put back on the list but that he would also like an explanation as to why he was removed in the first place. JA140. Rowlette replied "Okay," and then walked away while Wall shouted that he wanted to participate in Ramadan. JA61-62, JA140. Later, Wall received a written response to his formal grievance signed by Chief Warden Tracy Ray that claimed Wall had responded to Rowlette's offer with "No, I will pursue this matter in court." JA140. Wall remained unable to participate in Ramadan. JA140. Wall appealed this decision to the Regional Director John Garman disputing Rowlette's version of events and his appeal was denied, citing the same statement as grounds for keeping Wall's name off the Ramadan participation list. JA48-49.

D. Procedural History

As a result, Wall filed suit against Wade, Rowlette, Ray, Stallard, Selyers, and others, (collectively the "Red Onion Officials" or "Defendants"), for violations of the Act and under 42 U.S.C. § 1983, in their official and individual capacities.

JA9, JA27. Wall's final amended complaint was accepted by the court in November of 2011. In February, Wall filed and served interrogatories, and requests for production and requests for admissions. *See e.g.* JA5-6. The Defendants sought and were granted a protective order allowing them not to respond to Wall's discovery requests. JA6, JA106. The Defendants then filed a motion for summary judgment and Wall responded. JA67, JA109. Within days of filing his response to the motion for summary judgment, Wall was transferred out of Red Onion to another prison. JA135.

The district court, without a hearing, granted the Defendants' motion for summary judgment. JA137. It ruled that Wall's claims for injunctive relief under the Act and the First Amendment were moot, because Wall's transfer to Wallens Ridge made it impossible for the court to provide equitable relief. In a footnote, the court stated that even if Wall were transferred back to Red Onion, his claims would be moot because the policy had been rescinded. JA142 n.12. The district court also found that Eleventh Amendment immunity protected the Defendants from monetary relief in their official capacities, and qualified immunity protected them in their individual capacities. JA144-46. Wall filed a motion for reconsideration and an appeal. JA7, JA148. During the time immediately following the case, Wall was transferred back to Red Onion, and filed a second

motion for reconsideration due to his changed circumstances. JA150, JA154. The district court summarily denied both motions. JA157. This appeal followed.

SUMMARY OF ARGUMENT

This Court should hold that summary judgment was wrongly granted to the Red Onion Officials, and remand this case for a trial. First and foremost, Wall's claims under the Act are not moot. He has been transferred back to Red Onion, so the principal rationale for the district court's finding of mootness no longer is supported by the facts. And the district court erred when, in a footnote, it determined that Red Onion's voluntary cessation of its Ramadan policy mooted the claims for injunctive relief. The Supreme Court and this Court have both held that when there is a voluntary cessation of a policy, a heavy burden is placed on the party asserting mootness to prove that there is no reasonable expectation that the policy will be put back in place or that the infringement of the right will be repeated. Defendants do not meet that heavy burden here because they have presented no facts regarding its reason for ending the policy and offer no evidence to show that the policy will not be reinstated or the wrong will not be repeated. Under this Court's precedent, a party asserting mootness by voluntary cessation must present supporting facts to meet its heavy burden of proving the behavior is not likely to recur. The Red Onion Officials presented *no* evidence here. Thus,

Wall's request for injunctive relief was not moot and the merits of Wall's claims must be addressed.

Additionally, Defendants' denial of Ramadan meals violates Wall's First Amendment free exercise right. Whether Wall's right to free exercise have been violated is analyzed under the four factor test articulated in *Turner v. Safley*, 482 U.S. 78 (1987). "First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it." *Id*.; *see also Lovelace v. Lee*, 472 F.3d 174, 200 (4th Cir. 2006). Next, the court must determine if there exist "alternative means of exercising the right that remain open to prison inmates." *Id*. The court then considers the potential impact of the desired accommodation on the prison staff and other prisoners "and on the allocation of prison resources generally." *Id*. Finally, the court must look at the "existence of obvious, easy alternatives" which can serve as "evidence that the regulation is not reasonable, but is an 'exaggerated response.'" *Id*.; *Lovelace*, 472 F.3d at 200.

While it may be that the Red Onion Officials had some reason to implement a policy of requiring the presentation of physical objects representing one's faith, the other factors, and particularly, the third and fourth *Turner* factors weigh heavily against Defendants. Defendants had many easy alternatives such as verifying past observation of the Ramadan fast or simply accepting the documents

that Wall offered, such as the state court judgment showing Wall had lost his belongings. Additionally, allowing an individual with a sincerely held religious belief the opportunity to actively participate in the dietary observation of that faith along on the same schedule as many other inmates would not negatively impact staff, other prisoners or prison resources in any significant way.

Furthermore, the Red Onion Officials are not entitled to qualified immunity. To determine eligibility for qualified immunity, the court must determine whether a right was clearly established and that an objectively reasonable officer would know the action taken to be unlawful. The establishment of the right to participate in Ramadan is clear and is not questioned by Defendants. Under this Court's precedent, an objectively reasonable officer should have known that requiring only physical tokens of an inmate's faith was not sufficient justification to deny Wall his right to participate in Ramadan. Therefore, for all these reasons, as discussed in further detail below, this Court should reverse the District Court's ruling and remand the case for further proceedings.

ARGUMENT

I. UPON WALL'S RETURN TO RED ONION, WALL'S REQUEST FOR INJUNCTIVE RELIEF AGAINST THE RAMADAN POLICY WAS NO LONGER MOOT

Wall's move back to Red Onion makes his claim for equitable relief justiciable once again, regardless of the fact that in the interim time, Red Onion may have changed its Ramadan policy. Under the mootness doctrine "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971). Thus, the doctrine prevents courts from hearing cases where a decision would not affect the parties, either positively or negatively. *De Funis v. Odegaard*, 416 U.S. 312, 316 (1974). The District Court's grant of summary judgment as to Wall's claim for equitable relief is a question of law this Court reviews de novo. *See Henry v. Purnell*, 652 F.3d 524, 531 (4th Cir. 2011). A grant of summary judgment is only appropriate "if taking the evidence and all reasonable inferences drawn therefrom in the light most favorable to the nonmoving party, 'no material facts are disputed and the moving party is entitled to judgment as a matter of law.'" *Id.*, (quoting *Ausherman v. Bank of Am. Corp.*, 352 F.3d 896, 899 (4th Cir. 2003)).

Applying this only in its most general terms, the district court stated that even if Wall were transferred back to Red Onion, his request for equitable relief would be mooted, because Red Onion voluntarily ceased the policy in question.

JA142 n.12. However, in cases of voluntarily cessation, Supreme Court and Fourth Circuit precedent require a much deeper analysis. In *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1953), the Supreme Court held that in cases regarding the voluntary cessation of a policy, the defendant bears the burden to establish "that there is no reasonable expectation that the wrong will be repeated." The Court reaffirmed this thirteen years ago, explaining that "[t]he heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. Inc.*, 528 U.S. 167, 189 (2000) (quotations omitted); *see also Lyons P'ship v. Morris Costumes, Inc.*, 243 F.3d 789, 800-801 (4th Cir. 2001) (referring to the burden on defendants as "heavy" and finding that the defendants did not meet that burden). This standard prevents the government from changing its policy in order to moot litigation while leaving open the opportunity to change the policy back after proceedings conclude.

To overcome this heavy burden, the Red Onion Officials must establish that, "(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, *and* (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979). Defendants must show both that there is no

reasonable expectation that the misconduct or violation will happen again, and that intervening events have completely eliminated the violation's effects. *Id*.

Defendants presented no evidence sufficient to support a finding mootness. Defendants cannot, therefore, meet their burden to prove that there is no reasonable expectation of recurrence. Under this Court's precedent, this first prong is fulfilled when the person affected has been removed from the situation, *Simmons v. Marsh*, 917 F.2d 23 (4th Cir. 1990) (finding that since the plaintiff voluntarily resigned from her job with the offending company, the case was moot), when the program that caused the violation is discontinued overall, *Jones v. Poindexter*, 903 F.2d 1006, 1009 (4th Cir. 1990) (holding that the illegal execution of a state court judgment was unlikely to happen again), or when the state has tacitly conceded that the statute or rule being enforced is unconstitutional, and has stopped enforcing it, *Telco Communications, Inc. v. Carbaugh*, 885 F.2d 1225, 1230-1231 (4th Cir. 1989). In all of these cases there is some substantial evidence or reason to believe that the alleged violation will not recur; however, none of this evidence is present in this case.

If fact, the Red Onion Officials do not present any evidence in this case that the policy has been rescinded or is no longer in effect. The district court garners information about a potential policy change from another case altogether. JA142 n.12 (citing *DePaola v. Wade*, No. 7:11–cv–00198, 2012 U.S. Dist. LEXIS 44340,

*7-*10 (W.D.V.A. Mar. 30, 2012)). In that case, the court stated that the Virginia Department of Corrections created a memo in response to a request for clarification of their policy, explaining that the Department would no longer require inmates to show sincere religious belief through their possession of religious items. *DePaola*, 2012 U.S. Dist. LEXIS 44340 at *7. Noticeably absent from *DePaola* is any indication as to the reason for the shift in department policy. Nothing filed by the Defendants in this case clarifies that point further. Without any indication of why the policy was abrogated and nothing to indicate that it will not be reenacted apart from a statement found in *DePaolo* that the possession of religious items in no longer required, the Red Onion Officials have fallen well short of meeting their "heavy burden." There is nothing beyond a statement in another case that the policy is not currently in effect. This does nothing to provide a *reasonable expectation* that the policy will be reinstated in the future. As the Red Onion Officials have not alleged facts necessary to meet their heavy burden, the district court's finding of mootness should be reversed, and Wall's claim for equitable relief be allowed to proceed.

The District Court referred in passing to one decision of this Court which stated that the "voluntary cessation doctrine does not apply where there is no reasonable expectation that the wrong will be repeated," *Incumaa v. Ozmint*, 507 F.3d 281, 288 (4th Cir. 2007) (quotations omitted). However, the facts of *Incumaa*

differ significantly from the facts here. In *Incumaa*, a prisoner was placed into the Maximum Security Unit because of bad behavior. *Id.* at 282. The Maximum Security Unit in the prison did not allow prison inmates access to written materials through the mails. The prisoner sued, claiming this violated his First Amendment rights. *Id.* By the time the case was appealed, he was no longer in the Maximum Security Unit. *Id.* The panel in that case found the case moot because it was unlikely the prisoner was removed from Maximum Security in anticipation of litigation, as he was removed for cessation of bad behavior, and that this circumstance is "is not the kind of 'voluntary cessation' that the exception covers." *Id.* at 288. *Incumaa* is clearly distinguished from Wall's circumstances because participation in Ramadan is not dependent on Wall's disciplinary record and it is highly likely, not unlikely, that Wall will observe in Ramadan in the future. Participation in a yearly religious practice will most assuredly come again, and Wall's participation in Ramadan is not tied to anything other than his sincere adherence to the Muslim faith. Therefore, the narrow exception found in *Incumaa* does not apply here.

II. RED ONION'S RAMADAN POLICY VIOLATED THE FIRST AMENDMENT, AND THE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

A. The Policy Burdened Wall's Sincerely Held Religious Beliefs.

"The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). "The Free Exercise Clause of the First Amendment forbids the adoption of laws designed to suppress religious beliefs or practices." *Morrison v. Garraghty*, 239 F.3d 648, 656 (4th Cir. 2001). This protection extends into the prison context. *Id.* To be entitled to summary judgment, the defendants had to establish that there was no issue of material fact as to whether they violated a clearly established right belonging to Wall. *Lovelace v. Lee*, 472 F.3d 174, 197-99 (4th Cir. 2006); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (when considering a motion for summary judgment the "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). Analysis of whether the Red Onion violated Wall's right to free exercise begins with the question of whether Red Onion substantially burdened Wall's sincerely held religious belief. *Thomas v. Review Bd. of Indiana Employment Sec. Div.*, 450 U.S. 707, 717-18 (1981). If the Court determines that Wall was substantially burdened, the Court must then consider whether the policy is reasonably related to penological

concerns under the four factors first articulated in *Turner v. Safley*, 482 U.S. 78 (1987).

Determining sincerity of belief is a question of fact. *United States v. Seeger*, 380 U.S. 163, 185 (1965) (stating, within the conscientious objector framework, that the "threshold question of sincerity" is "of course, a matter of fact"). "[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas*, 450 U.S. at 714. One does not need to participate in all aspects of a religion in order for their belief to be sincere. *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) ("Religious observances need not be uniform to merit the protection of the First Amendment.").

Wall's Nation of Islam faith is sincerely held as demonstrated by his past successful participation in Ramadan, his inclusion in the Common Fare program, and his repeated requests to participate in Ramadan during the time at issue. *See* JA138-39. Defendants argued that Wall is not sincere simply because he had an opportunity to request new items of his faith after the originals were lost but failed to do so. JA78. However, this argument, like the Ramadan policy itself, attempts to place some additional burden on Wall to obtain specific physical objects to demonstrate his faith and ignores this Court's precedent on what can constitute sincerity. More specifically, the participation in one aspect of a religion should not

be contingent on participation in one other aspect. *Dettmer*, 799 F.2d at 932. Even if Wall *chose* not to have any physical items pertaining to his faith, rather than simply losing them, the Red Onion Officials could not assume he was insincere in his faith. Neither prison administrators nor courts may make blanket assumptions "that lack of sincerity (or religiosity) with respect to one practice of a given religion means lack of sincerity with respect to others." *Lovelace*, 472 F.3d at 188.

A substantial burden is an action that "put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs." *Id*. at 187 (citing *Thomas*, 450 U.S. at 718). As the District Court noted here, Wall "[f]aced with starvation and repeated sanctions for trying to eat during the night, plaintiff ate during the day and violated his religious belief." JA139. Furthermore, the Red Onion Officials conceded that the policy imposed a substantial burden on Wall's faith. JA78. Red Onion's strict Ramadan policy forced Wall to choose between the tenets of his faith and his very survival. JA139. Thus, the policy clearly imposed a substantial burden on Wall's religious exercise and, therefore it must meet the four *Turner* factors to be constitutionally permissible.

B. Red Onion's Policy On Its Face Is Not Reasonable Under The *Turner* Factors.

While the district court cites the *Turner* factors, it does not actually apply them. Instead, it moves on to state that the Red Onion Officials are entitled to qualified immunity because "reasonable officials under the circumstances . . .

would not have understood that their conduct of asking for evidence of religious sincerity violated the First Amendment." JA145. That misses the issue. There is no prohibition on asking for evidence of sincerity, but given the fact that the *Turner* factors are clearly established law, no reasonable officials would pursue such evidence in a way that obviously violates them. And to the extent that Red Onion Officials violated Wall's rights as addressed by the *Turner* factors, they are liable for their failure to adhere to the constitutional requirements laid out by the Supreme Court.

Applying the *Turner* factors, a court first asks "whether there is a 'valid, rational connection' between the prison regulation . . . and the interest asserted by the government." *Lovelace*, 472 F.3d at 200. Second, it asks if there exist "alternative means of exercising the right that remain open to prison inmates." *Turner*, 482 U.S. at 90. Finally, the Court looks at the desired accommodation and determines (1) "what impact the desired accommodation would have on security staff, inmates, and the allocation of prison resources" and (2) "whether there exist any 'obvious, easy alternatives' to the challenged regulation or action." *Lovelace*, 472 F.3d at 200 (citing *Turner*, 482 U.S. at 89-92).

There may be some connection between asking for physical items as proof of an inmate's faith and reducing the cost associated with accommodating certain religious practices. Such a policy will eliminate those—and any associated costs—

who have sincere religious beliefs but for whatever reason do not possess or maintain physical items demonstrating their specific faith. This is even more true at Red Onion where prisoners are severely limited in the alternative means available to them to outwardly demonstrate their religious practice. Specifically, because of the level of security at Red Onion, inmates may not participate in group religious services. JA138 n. 3; JA74. Inmates only have access to religious services on closed circuit television. JA75. Thus, regardless of how devout Wall might be, the Red Onion Officials chose to ignore the few outward and obvious manifestations of Wall's faith to prohibit him from observing Ramadan.

The third and fourth *Turner* factors—the impact of the desired accommodation would have and whether there exist any obvious, easy alternatives—are very revealing here and weigh heavily against the Red Onion Officials. On these two factors *Mosier v. Maynard*, 937 F.2d 1521 (10th Cir. 1991), is instructive. In *Mosier*, a prisoner requested an exemption from the prison's grooming code due to his Native American beliefs. *Id*. at 1522-23. Several levels of prison officials denied his request because he did not have outside, nonfamily references vouching for the sincerity of his belief. *Id*. at 1523. The Tenth Circuit expressed its concern that "[t]he prison's policy of denying the sincerity of a prisoner's religious beliefs unless he submits reputable nonfamily references vouching for sincerity represents a very limited approach to this

question of fact [sincerity of belief]." *Id.* at 1527. The *Mosier* Court further stated that "[w]hile there may be a logical connection between the policy and the likely goal of insuring that exemptions reflect sincere beliefs, it is not clear if the policy accommodates [the] personal nature of belief and the primacy of personal statements and conduct." *Id*. The Court also questioned whether "the alternative suggested by plaintiff, consideration of his sincerity evidence without the outside references, could accommodate him at *de minimis* cost to the penological objectives of the prison." *Id*. Ultimately, the Tenth Circuit reversed the district court's grant of summary judgment and remanded stating "we think that [the] plaintiff has raised a genuine issue of material fact about the reasonableness of the exemption policy and its application." *Id*.

Likewise, in the instant case, the requested accommodation is an obvious and easy alternative. The Red Onion Officials argue that "there is no other alternative" to their policy of "requir[ing] Muslim offenders to produce Islamic materials when requested to demonstrate sincerity of belief." JA76. In fact, however, Red Onion's own guidance document says nothing about requiring physical Islamic items as proof of an inmate's faith. Instead, it provides several alternatives to Red Onion's policy including "[Nation of Islam] services at previous assignments, or past Ramadan/Month of Fasting involvement." JA88. Wall presented the Red Onion Officials with documents and evidence tending to

prove the sincerity of his faith, however, these were repeatedly ignored and dismissed. JA29, JA138-39. The Red Onion Officials had alternatives to their unnecessarily strict policy—which their own guidance documents identified—yet they refused to employ these obvious and easy alternatives to consider Wall's sincerity of belief.

Furthermore, these accommodations would not inconvenience prison staff, inmates, or overly burden their resources. The Red Onion Officials stated that "if [RED ONION] were to permit Ramadan participation by all [RED ONION] offenders who simply signed up for Ramadan, it would have a significant and burdensome impact on prison resources and staff." JA76. The Red Onion Officials mischaracterize the accommodation that Wall requests. Far from arguing that Red Onion should allow anyone to participate in Ramadan who simply signs up, regardless of sincerity, Wall argues that *he* should have been allowed to participate because *he* sufficiently proved his sincerity. *See e.g.* JA32.[1] However, because of the incredibly narrow parameters set on what constitutes sincere faith set by the Red Onion Official, only accepting physical objects establishing ones faith, Wall was precluded from observing Ramadan according to his sincere beliefs. Simply accepting any or all of Wall's ample proof—evidence of lost

[1] While Wall's pleadings may not be expertly drafted, "however inartfully pleaded . . . we hold [the pro se plaintiff] to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

belongings, participating in common fare, evidence of his past participation in Ramadan—in line with their own guidance documents, would result in no more than a nominal additional burden on staff, inmates, or prison resources beyond the hundreds of other inmates who were allowed to observe Ramadan.

C. The Prison Officials' Application Of The Ramadan Policy Was Not Reasonable Under The *Turner* Factors.

On an as applied challenge, as with the Act, the First Amendment only punishes intentional conduct. *Lovelace*, 472 F.3d at 201. Otherwise, the actions of prison officials are held to the same *Turner* standard as the policy itself. *Id.* at 200. As with the analysis of the policy on its face, discussed above, the actions of the Red Onion Officials were not reasonable under the *Turner* factors. Their refusal to accept Wall's proof that he was sincere in his faith when it was an easy and obvious alternative to their overly restrictive policy would not burden staff, inmates, or prison resources. Furthermore, as established in above, Wall pled sufficient facts such that a reasonable fact-finder could conclude that the prison officials acted intentionally in depriving Wall of his First Amendment rights.

Neither the District Court nor the Red Onion Officials in their motion for summary judgment considered whether Red Onion's Ramadan policy violated the First Amendment as applied. Such an oversight was error. Furthermore, the court's grant of summary judgment was inappropriate on the First Amendment

claim because of the significant factual dispute as to whether Rowlette and Wade acted intentionally in precluding Wall from participating in Ramadan. JA140.

D. Red Onion Prison Officials Are Not Entitled to Qualified Immunity.

Qualified immunity is designed to protect government officials "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982) (internal quotation marks and cites omitted). Considering qualified immunity on summary judgment, courts first look to whether the facts, taken in the light most favorable to the plaintiff, show that Red Onion officials violated Wall's constitutional or statutory rights. *Id.*; *see also Anderson*, 477 U.S. at 255 (all inferences to be drawn in the non-moving party's favor at the summary judgment stage). Courts also determine whether the right was "clearly established," such that "[t]he unlawfulness of the action [was] apparent when assessed from the perspective of an objectively reasonable official charged with knowledge of established law." *Lopez v. Robinson*, 914 F.2d 486, 489 (4th Cir. 1990). "The fact that an exact right allegedly violated has not earlier been specifically recognized by any court does not prevent a determination that it was nevertheless "clearly established" for qualified immunity purposes." *Pritchett v. Alford*, 973 F.2d 307, 314 (4th Cir. 1992). Instead, a clearly established right may be one that is "manifestly included within more general applications of the core constitutional

principle invoked." *Id*. Appellate courts review decisions on qualified immunity *de novo. Elder v. Holloway*, 510 U.S. 510, 516 (1994).

As discussed above, Wall pled facts establishing a constitutional violation under the Free Exercise Clause. Wall also pled sufficient facts to allow a reasonable fact-finder to decide that the Red Onion Officials acted intentionally in depriving Wall of his right to participate in Ramadan and thus supports an as applied challenge. Wall's right to participate in Ramadan was clearly established as Fourth Circuit has stated, "[u]nder both the Free Exercise Clause and RLUIPA in its most elemental form, a prisoner has a 'clearly established . . . right to a diet consistent with his . . . religious scruples,' including proper food during Ramadan." *Lovelace*, 472 F.3d at 198-99 (quoting *Ford v. McGinnis*, 352 F.3d 582, 597 (2d Cir. 2003)). Furthermore, "[a] prison official violates this clearly established right if he intentionally and without sufficient justification denies an inmate his religiously mandated diet." *Id*. at 199.

A reasonable prison official would also have known that requiring physical items and *only* physical items as proof of an inmate's faith was not sufficient justification for denying Wall's right to participate in Ramadan. This Court has held that failure to follow one aspect of a religion cannot be the sole metric for determining whether an inmate is sincere enough to engage in other aspects. *Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986) ("Religious observances

need not be uniform to merit the protection of the first amendment."); *see also Thomas*, 450 U.S. at 714 ("[R]eligious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection."). Moreover, there is evidence that the Red Onion Officials may have intentionally misrepresented conversations with Wall concerning his desire to participate in Ramadan. JA140.

The district court stated that Red Onion officials are entitled to qualified immunity because "reasonable officials under the circumstances existing at the [Red Onion] in 2010 would not have understood that their conduct of asking for evidence of religious sincerity violated the First Amendment." JA145. However, the district court mischaracterizes Wall's claim as attacking Red Onion's ability to ask for *some* evidence of religious sincerity. On the contrary, Wall argues that Red Onion's policy and its application are simply too restrictive on what inmates can use to prove their faith, requiring *specific* evidence of religious sincerity.

Red Onion's applied policy set a high threshold for proving sincerity, as it excluded even a devout inmate with (1) a recorded history of observing Ramadan, (2) prior approval for a special diet to accommodate his faith, and (3) evidence that his belongings, including his religious belongings, were lost by the prison system itself. The Red Onion Officials applied their policy in such a way that failure to follow one practice (possessing a Quran or prayer rug) is used to preclude the

inmate from engaging in another practice (fasting during Ramadan). Then the Red Onion Officials mischaracterized Wall's statement to make it appear as if he, himself elected not to participate. This is clearly established as impermissible under Fourth Circuit case law and any reasonable officer would have known such actions were impermissible. *See Lovelace*, 472 F.3d at 188 ("Such an inmate's right to religious exercise is substantially burdened by a policy, like the one here, that automatically assumes that lack of sincerity (or religiosity) with respect to one practice means lack of sincerity with respect to others."). Therefore, defendants were not entitled to summary judgment on either the question of mootness or their qualified immunity and the trial court ruling should be reversed.

CONCLUSION

For the reasons stated above, the district court's grant of summary judgment in defendants' favor should be reversed and the case remanded for further proceedings.

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument.

Respectfully Submitted

/s/ Tillman J. Breckenridge
Tillman J. Breckenridge
REED SMITH LLP
1301 K Street, NW
Suite 1100, East Tower
Washington, D.C. 20005
202-414-9200
tbreckenridge@reedsmith.com

Robert M. Luck III
REED SMITH LLP
901 East Byrd Street
Suite 1700
Richmond, VA 23219
804-344-3400

Patricia E. Roberts
WILLIAM & MARY LAW SCHOOL APPELLATE AND SUPREME COURT CLINIC
P.O. Box 8795
Williamsburg, VA 23187-8795
757-221-3821

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains [*5,880*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

   [ ] this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2007*] in [*14pt Times New Roman*]; *or*

   [ ] this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

Dated: May 6, 2013

/s/ Tillman J. Breckenridge
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 6th day of May, 2013, I caused this Brief of Appellant and Joint Appendix to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Michael H. Brady
Earle D. Getchell, Jr.
OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
(804) 786-7240

Counsel for Appellees

I further certify that on this 6th day of May, 2013, I caused the required copies of the Brief of Appellant and Joint Appendix to be hand filed with the Clerk of the Court.

/s/ Tillman J. Breckenridge
Counsel for Appellant