No. 21-6507

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

DAVID RICHARDSON,

Plaintiff-Appellant,

v.

HAROLD CLARKE et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA 3:18-cv-0023-HEH-EWH

PLAINTIFF-APPELLANT'S REPLY BRIEF

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Defendants' Answering Brief ("AB") argues that (1) the district court was proper in granting Defendants' summary judgement on Richardson's Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA") claims; (2) that Richardson's ADA damages claim was properly dismissed because Title II of the ADA does not abrogate state sovereign immunity in the context of Richardson's claims and; (3) that the district court was correct in dismissing Richardson's RLUPIA claims that the Virginia Department of Correction ("VDOC") impermissibly burdened his religious activity when it denied him the ability to wear a kufi in certain parts of their facilities. These arguments are incorrect and should not prevail before this Court.

First, the district court erred in granting summary judgement for Defendants on Richardson's ADA and RA claims for injunctive relief because the district court improperly discounted evidence submitted by Richardson that established a disputed issue of material fact. Defendants' arguments that Richardson's evidence was properly credited, or was plainly contradicted by the record, are not supported by the record before this Court. Defendants' additional arguments – that Richardson received reasonable accommodations from VDOC and did not properly identify the specific additional accommodation he required – are similarly unsupported and are more properly issues to be decided by a trier of fact.

Second, the district court erred in granting Defendants' motion to dismiss Richardson's ADA claims on state sovereign immunity grounds. Defendants are incorrect in their argument that Richardson did not plead conduct that actually violated the Fourteenth Amendment with his ADA claim. He did just that when he pled violations of his Eighth Amendment rights. The improper dismissal of his Eighth Amendment claim for injunctive relief by the district court does nothing to address his claim for damages and the district court's non-merits determination does nothing to cure the actual underlying constitutional violations that occurred. Notwithstanding Richardson's well-pled Eight Amendment claim, Defendants are plainly incorrect that, even absent a companion constitutional violation, Title II does not abrogate state sovereign immunity in the prison context. It does, and this Court's holding in *Constantine* decides this case.

Finally, the district court erred in dismissing Richardson's RLUPIA claims. Defendants argue that the RLUPIA claims are moot because of a recent change in VDOC policy and that, even if the claims were not moot, that Richardson's religious practice was not burdened when he was disallowed from wearing a kufi during meals and in other areas within VDOC facilities. Defendants misunderstand mootness doctrine. The Supreme Court and this Court have made clear that simple voluntary cessation by a Defendant is not sufficient to moot a case. Here Defendants were required to present evidence recognizing the illegality of their

policy or any commitment to refrain from re-enacting the policy after the conclusion of this litigation. They presented none. Defendants are also mistaken in their argument that preventing Richardson from wearing a kufi in certain areas of VDOC facilities did not burden his religious practice. It did, as he alleged in his complaint, and Defendants' brief fails to grapple with the ample case law and arguments Richardson presented in his favor in his Opening Brief ("AOB").

I. The district court erred in granting summary judgement for Defendants on Richardson's ADA and RA claims for injunctive relief.

On summary judgment the district court dismissed Richardson's ADA claims[1] for injunctive relief.[2] This dismissal was in error because the district court did not appropriately credit the evidence that Richardson, a *pro se* plaintiff, submitted which established disputes of material fact necessary to be adjudicated at trial. Defendants make two arguments in support of their contention that the district court properly credited Richardson's evidence at summary judgement and thereby properly dismissed his ADA claims. First, they argue that the district court

[1] For the purpose of this section "ADA claims" refers to both Richardson's claims under the ADA and Rehabilitation Act which were dismissed at summary judgement.

[2] The district court previously, and improperly, *see infra* Sec. II-B, dismissed Richardson's claim for damages under the ADA at the motion to dismiss stage by holding that Title II of the ADA does not abrogate state sovereign immunity for Richardson's claims. This left only his claims for injunctive relief live at summary judgement.

properly credited Richardson's submissions when the court cited those submissions in dismissing Richardson's claim. AB 23. Second, they argue that any material dispute of fact raised by Richardson's evidence is overcome by the evidence presented by Defendants at summary judgement to such a degree that it renders Richardson's evidence "a visible fiction". *Id*. Defendants also argue that they did, in fact, reasonably accommodated Richardson's disability. However, all of Defendants' arguments fail and the issues raised are better addressed by the district court at trial.

A. Richardson's evidence was not properly credited, nor does it meet the narrow "visible fiction" standard necessary to discount his evidence at summary judgement.

Defendants first attempt to rehabilitate the district court's improper discrediting of Richardson's evidence by noting that the district court cited Richardson's summitted documents in granting summary judgement for Defendants. AB 23 (*citing* JA 230, 231). But these citations do not speak to the weight the district court gave Richardson's submissions nor its analysis. Defendants point to the district court's first citation of Richardson's documents, JA 230, as evidence that his documents were credited, but this portion of the opinion simply contains a sentence acknowledging that Richardson submitted documents. JA at 230 ("In response, Richardson submitted his own declarations."). The second and final citation by Defendants, JA 231, is also a short statement that "Richardson

has severe hearing and vision problems.". JA 231. These statements do acknowledge the submission of evidence to be sure.[3] But Richardson did not argue that the district court did not acknowledge the evidence he submitted, he argues that the court improperly discredited it. *See* AOB 32-41. As Richardson argued in his Opening Brief, the district court did not grapple with the substance of the evidence submitted, give it due credibility, afford it the liberal construction required for *pro se* litigants, or read the record in the light most favorable to Richardson, the non-moving party. *Id*. Richardson made numerous submissions rebutting Defendants' claims and evidence. For example, and contrary to Defendants' contentions, Richardson explained the precise nature of his disabilities, proposed accommodations, and offered viable explanations of his behaviors. JA 152-3. But none of these submissions were substantively discussed or given appropriate weight under the summary judgement standard.

Defendants alternatively argue that Richardson's claims are a "visible fiction" and are discredited by video evidence and his own filings. AB 23-24. They therefore argue that Richardson's evidence follows into a narrow exception to the ordinary standards of summary judgement and should not be given weight. But the

[3] Although the district court also improperly declined to even consider Richardson's numerous memoranda that were sworn to under penalty or perjury. JA 230; *Willard v. IRS*, 776 F.2d 100, 102 n.3 (4th Cir.1985) (holding that at summary judgement, unsworn declarations "made under penalty of perjury[] are permitted in lieu of affidavits".).

relied on exception established in *Scott v. Harris* is inapplicable here. 550 U.S. 372 (2007). This Court has clarified that "*Scott* is the exception, not the rule." *Harris v. Pittman*, 927 F.3d 266, 276 (4th Cir. 2019), cert. denied, 140 S. Ct. 1550 (2020) (declining to discount a plaintiff's evidence under *Scott*); *see Blaylock v. City of Phila*., 504 F.3d 405, 414 (3d Cir. 2007) (refusing to extend *Scott* to evidence in form of police photographs that fail to depict "all of the defendant's conduct and all of the necessary context"); *see also Witt v. W. Va. State Police, Troop 2*, 633 F.3d 272, 277 (4th Cir. 2011) (holding *Scott* inapplicable to soundless video that does not capture key disputed facts).

Here the video evidence simply shows Richardson using a "JPay terminal" with another prisoner. JA 238. Neither this nor Richardson's activities in this case facially discredit his claims. In fact, the submissions that Richardson presented to the district court at summary judgement provide ample explanation for the behavior depicted in the video. In his filings Richardson details that he has been using JPay terminals since 2014 and has memorized its core functions. JA 209. He also describes how he often requests assistance from other prisoners and is adept at lip reading allowing him to understand those not proficient in American Sign Language ("ASL"). JA 152, 189. This evidence contradicts the conclusions Defendants' and the district court draw from the video and other evidence and takes this case well beyond the narrow exception created by *Scott* reserved for

cases where plaintiffs are unquestionably contradicted by submitted evidence. At the summary judgement stage, when inferences must be drawn in favor of the non-moving party, Richardson's competing evidence establishes an issue of material fact for trial. The issue of what the evidence means is for a trier of fact, but that process was short-circuited when the district court erred by failing to fully consider and discounting the credibility of Richardson's submitted evidence and Defendants' arguments to the contrary are unavailing.

B. The question of whether Richardson was provided a reasonable accommodation for his disabilities is appropriate adjudicated by a trier of fact.

Defendants also argue that they did, in fact, accommodate Richardson's disabilities and, as such, no reasonable accommodation was denied. They cite a series of accommodations that VDOC made to Richardson's disabilities. AB 26-28. To be sure, VDOC did make accommodations of some of Richardson's disabilities over a long period of time, but Richardson's pleadings, and the record, demonstrate that some of Richardson's disabilities were not reasonably accommodated as his condition began to worsen. JA 152, 209.

Defendants further argue that Richardson's claim fails because he failed to specifically articulate required accommodations. But the record demonstrates that Richardson repeatedly requested numerous specific accommodations. *Id*.

Regardless, Defendants' arguments improperly shift the burden to Richardson to request all accommodation with specificity. But such a high showing is not required of obviously disabled plaintiffs. Besides its prohibition of disability-based discrimination, the ADA imparts an affirmative obligation upon public entities to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless [they] can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity." 28 C.F.R. § 35.130(b)(7); see *Smith-Berch, Inc. v. Baltimore Cty., Md.*, 68 F. Supp. 2d 602, 621 (D. Md. 1999). A plaintiff with a qualifying disability does not need to request an accommodation if the substantial limitation on a major life activity is obvious. *See Brady v. Wal-Mart Stores, Inc.*, 531 F.3d 127, 135 (2d Cir. 2008) (explaining in the Title III context that "an employer has a duty reasonably to accommodate an employee's disability if the disability is obvious—which is to say, if the employer knew or reasonably should have known that the employee was disabled"); *see also Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1197 (10th Cir. 2007) (applying the same rule in the Title II context); *Duvall v. County of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) (same); *Chisolm v. McManimon*, 275 F.3d 315, 330 (3d Cir. 2001) (same); *Cadena v. El Paso Cty.*, 946 F.3d 717, 724 (5th Cir. 2020) (citations omitted) ("For [an ADA] claim, a plaintiff must show that the

entity knew of the disability and its consequential limitations, either because the plaintiff requested an accommodation or because the nature of the limitation was open and obvious."). Here, Richardson has numerous allegations and submissions regarding his disabilities. JA 11-60, 152, 209. He is "obviously" disabled as contemplated by the regulations, and Defendants are aware of as much from their various interactions with Richardson. Richardson has further communicated when prior accommodations were no longer viable and his health continued to deteriorate. JA 152. The obviousness of Richardson's disability and his actual communications about his required accommodations render Defendants' arguments deficient.

Defendants attempt to litigate the facts of whether they accommodated Richardson sufficiently, but this is the improper forum for their factual arguments. Reasonableness of accommodation requires an "individualized inquiry must be made to determine whether a specific modification for a particular person's disability would be reasonable under the circumstances ..." *PGA Tour, Inc. v. Martin*, 532 U.S. 661, 688 (2001). The issue on appeal is whether the district court erred in determining that there was no issue of material fact that would allow Richardson's claim to survive summary judgement. There is such a dispute still live in this case. To the extent that Defendants argue that they provided the required reasonable accommodations, and that Richardson is due no relief, or that

Richardson's latter request for accommodation are unreasonable, those arguments should be presented on remand as the matter progresses.

II. The district court erred in dismissing Richardson's ADA claim for damages on state sovereign immunity grounds.

Defendants argue that Richardson's damages claim under the ADA are barred by state sovereign immunity.[4] They first argue that Richardson did not plead conduct that actually violated the Fourteenth amendment, and second that such a pleading is necessary because, absent a companion constitutional violation, Title II does not abrogate state sovereign immunity because it is not congruent and proportional to the harms Congress sought to address in the prison context. Both of Defendants' arguments fail.

First, Richardson did plead conduct that actually violated the Fourteenth Amendment when he pled his Eight Amendment claim for damages and injunctive relief. That claim was improperly dismissed by the district court because of a determination that there was no viable prospective relief that could be granted. The

[4] Defendants also argue that the Court independently dismissed Richardson's ADA claims on their merits, obviating any need to address the sovereign immunity question. This misunderstands the order of operations taken by the district court below. The district court in the first instance dismissed Richardson's ADA damages claim at the motion to dismiss stage. The district court then later dismissed Richardson's claims for injunctive relief under the ADA on summary judgement. While the latter dismissal was also improper, *see infra* at Sec. B-II, it has no bearing on the question of whether his damages claims were properly dismissed earlier on state sovereign immunity grounds.

district court never addressed the retrospective harm that Richardson had suffered, and importantly, never opined on the merits of the underlying violation. As such, even if the dismissal was proper, it was not on grounds that questions whether conduct occurred that actually violated the Fourteenth Amendment. The claim need not be live for the conduct to have occurred, and the test under *United States v. Georgia* is whether conduct actually violated the Fourteenth amendment, not whether relief is appropriate for a constitutional pleading. 546 U.S. 151 (2006). Second, even if Richardson did not allege conduct that actually violated the Fourteenth Amendment his ADA damages claim would still survive. Title II independently abrogates state sovereign immunity in the prison context. Defendants' arguments that Title II fails the congruence and proportionality test cannot be squared with this Court's decision in *Constantine* which held that Title II abrogated state sovereign immunity in the education context where the rights at issue are afforded lower protection and violations subject to less scrutiny.

A. Richardson did complain of conduct that actually violates the Fourteenth Amendment.

As stated in the opening brief: Richardson pled conduct that actually violated the Fourteenth Amendment when he pled that VDOC violated his rights under Eighth Amendment. AOB 29-31. In response Defendants merely restate the district court's flawed reasoning that because Richardson's complaint applied mostly to violations that occurred at GCC rather than DCC. AB 35. This argument

fails for two reasons. First, it fails because it misinterprets Richardson's Eighth Amendment claim as seeking solely injunctive relief, instead of both injunctive relief and damages. Richardson sought both by complaining about both past violations at GCC and seeking prospective relief against ongoing violations at DCC. JA 47. The dismissal of the Eighth Amendment claims on the ground that prospective relief is unavailable entirely ignored the damages relief sought and was, therefore, inappropriate. Second, dismissal on the grounds that no prospective relief is available is entirely irrelevant to the question of whether VDOC's actions actually violated the Fourteenth Amendment for the purpose of the *Georgia* analysis. The question under *Georgia* is whether there was an actual violation of the Fourteenth Amendment, not whether that harm is redressable. *Georgia*, 546 U.S. at 159. The district court dismissed the claim without conducting a determination on merits of the claims regarding GCC. JA 83. This error prevented the district court from properly evaluating whether there was an actual violation of the Fourteenth Amendment that was pled with Richardson's ADA claim. Richardson did plead such a claim, JA 47, and this Court should remand to the district court to determine whether that pleading suffices allege conduct that actually violated the Fourteenth Amendment.

B. Even if Richardson did not plead conduct that independently violated the Fourteenth Amendment, Title II of the ADA abrogates state sovereign immunity in the prison context.

Defendants ask this Court to hold what no post-*Georgia* circuit court has ever held: that Title II does not abrogate state sovereign immunity in the prison context. They argue that Title II does not pass the congruence and proportionality test in the prison context. In making their argument Defendants essentially ignore this Court's holding in *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474 (4th Cir. 2005). But *Constantine* decides this case. There, this Court firmly established that Title II abrogates state sovereign immunity even in the education context where the rights at issue are afforded less constitutional protection than those at play in the prison context. *Nevada Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003) (holding that "[b]ecause the standard for demonstrating the constitutionality of [a heightened scrutiny test] is more difficult to meet than the Court's rational-basis test, it is therefore easier for Congress to show a pattern of state constitutional violations which congruent and proportional legislation might address.").

Defendants present no doctrinal reason why the logic of *Constantine* should not hold with even more force here. Instead, Defendants raise a series of policy considerations claiming that if Title II applies to the prison context it would expose VDOC to overwhelming liability and redefine constitutional rights. AB 42-43. But the spectre of claims envisioned by Defendants does not hold up to scrutiny. Defendants admit, as they must, that plaintiffs already have the ability to exact

substantial changes from facilities through injunctive relief. There is no reason why a damages remedy would expand rights beyond the claims already allowed Title II for injunctive relief. And, there is no reason why Title II application should be out of keeping in the prison context when it is not in the education context, *Constantine*, 411 F.3d 474, or the pre-trial detention context. *See Zemedagegehu v. Arthur*, 2015 WL 1930539, at *1 (E.D. Va. Apr. 28, 2015) (holding that Title II of the ADA does abrogate state sovereign immunity for a pre-trial detainee denied ASL services).

The Ninth Circuit, the only Circuit to squarely address the question, has held that Title II categorically abrogates state sovereign immunity for over twenty years and has not experienced the hypothetical problems raised by Defendants. *See Dare v. California*, 191 F.3d 1167, 1173–75 (9th Cir. 1999) ("[I]n enacting Title II of the ADA, Congress validly abrogated state sovereign immunity pursuant to its Fourteenth Amendment powers"); *see also Phiffer v. Columbia River Correctional Institute*, 384 F.3d 791, 792–93 (9th Cir. 2004) (reaffirming *Dare*). Since *Dare*, district courts in the Ninth Circuit have been able to well apply Title II in all contexts, including the post-*Georgia* prison context. *See e.g*. *Bacon v. Dzurenda*, No. 2:18-cv-00319-JAD-NJK, 2019 U.S. Dist. LEXIS 206649, at *5-6 (D. Nev. Nov. 8, 2019) (denying sovereign immunity and citing *Phiffer* in prison case); *Washington v. Cal. Dep't of Corr. & Rehab*., No. CV 19-169-VAP (KK), 2019

U.S. Dist. LEXIS 41865, at *21 (C.D. Cal. Mar. 14, 2019) (denying sovereign immunity defense); *Oberpriller v. Cal. Dep't of Corr. & Rehab*., No. C 10-3782 CW (PR), 2011 U.S. Dist. LEXIS 100392, at *9 (N.D. Cal. Sep. 7, 2011) (same).

The only case offered by Defendants in support of their proposition is *Chase v. Baskerville* 508 F. Supp. 2d 492 (E.D. Va. 2007). AB 41. But this district court case is not controlling, and this Court should decline to adopt its flawed analysis. In reaching its conclusions the *Chase* court heavily relied on *Miller v. King* 384 F.3d 1248 (11th Cir. 2004). But *Miller*'s central holding was vacated following the Supreme Court's decision in *United States v. Georgia*, and its reasoning should not be adopted here. *Miller v. King* 449 F.3d 1149, 1152 (11th Cir. 2006). This Court should instead follow its reasoning in *Constantine* and hold that Title II is a congruent a proportional response to the discrimination and violations legion in the prison context.

III. Richardson's RLUIPA claim is not moot, and he has shown that VDOC's previous religious head covering policy was a substantial burden on his religious exercise.

Defendants' religious head covering policy violated the Religious Land Use and Institutionalized Persons Act ("RLUIPA") because Richardson's religious exercise to wear a kufi at all times was substantially burdened when he was restricted from wearing it in the most pivotal areas of the prison, meaning he had to choose between his religious practice and everyday necessities such as

meals. AOB 10 –18. Instead of grappling with the ample case law presented in the opening brief that establishes that restrictions on religious head coverings in prisons substantially burdens religious freedom, Defendants present misguided arguments about mootness and the scope of injunctions under the Prison Litigation Reform Act (PLRA). In doing so, Appellees rely solely on out-of-circuit precedent while simultaneously ignoring Supreme Court precedent and case law within this Circuit that exhibits that an injunction is not only appropriate, but necessary, in this case. AB 45 –49.

A. Richardson's RLUIPA claim is not moot because the Defendants have not met the heavy burden of showing that they will not reinstate their previous religious head covering policy.

Defendants make the same argument on appeal that failed before the district court: Richardson's RLUIPA challenge is moot because the VDOC amended its policy to allow religious head coverings throughout the prison in December 2020, following the initiation of this case. AB 48. Defendants exclusively rely on case law in the Third and Ninth Circuits to argue that the Court is unable to issue an injunction because Richardson can currently use a kufi. AB 54 –56.

Defendants incorrectly place the burden on Richardson to show that the Defendants will not reinstate the policy. AB 46-49. The Supreme Court has established that a *defendant,* not the plaintiff, has the '"heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected

to start up again." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *United States v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)). The defendant's voluntary cessation of a challenged practice moots an action "only if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.* (emphasis added). This Circuit has clarified that "[c]ourts require 'clear proof' that an unlawful practice has been abandoned for a claim to be moot. *Porter v. Clarke*, 923 F.3d 348, 364–65 (4th Cir. 2019). Furthermore, blanket assurances are not a substitute for actual evidence establishing that the practice has been terminated "once and for all." *Gentry v. Robinson*, 837 F. App'x 952, 958-59 (4th Cir. 2020).

Defendants simply rely on the fact that VDOC's policies currently allow religious head coverings throughout the prison to assert that Richardson no longer has a viable RLUIPA claim, without addressing the possibility of a future violation. AB 47 –49. Yet, this Circuit has repeatedly held that a current policy is not enough evidence to show the claim is moot. In *Wall v. Wade* for example, a plaintiff challenged the prison's policy of requiring an indicium of faith for participation in Ramadan practices. 741 F.3d 492, 495 –96 (4th Cir. 2014). The prison changed its Ramadan policy to remove this requirement, but the Court held that the issue was not moot because the new policy was not sufficient to show that

VDOC would not reinstate the policy following completion of the lawsuit. *Id.* at 498. The Court found that even though a systemwide policy change memo was issued to address the claim brought by the plaintiff, the plaintiff's claim was not moot because the memo itself did not recognize the previous unlawful nature of the policy nor provided an agreement that it will not engage in the previous unlawful policies again in the future. *Id.* at 497 –98; *see also Burke v. Clarke*, 842 F. App'x 828, 835-36 (4th Cir. 2021) (finding that a challenge to VDOCs grooming policy was not moot because VDOC retained their authority to change the policy, did not disclaim their previous policy as illegal, and changed their religious grooming policies about every three years).

Like *Wall*, nothing in the October 22, 2020 memo shows that the Defendants are barred from implementing the previous religious head covering policy. JA 138. It does not recognize the illegality of the previous policy nor gives any assurances that the current policy will be permanent. *Id.*

Even after the district court noted that Defendants have provided no evidence whatsoever to show they will not revert back to their pre-2020 policy, JA 243, Defendants give no further support in their Answering Brief to show that they will not repeat past policies. AB 46 –49. Defendants only provide a one-sentence justification that "[t]here is no indication in the record or elsewhere that VDOC intends to revert back to its prior policy or that the change in anyway related to

Richardson's litigation." AB 55.[5] Yet, Defendants must provide affirmative evidence to show they cannot or will not return to their old policies upon termination of litigation—relying on the fact that there is currently "no evidence" that VDOC intends to return to their old policies is not enough.

Instead, Defendants show no recognition of the illegality on their previous head covering practices and rely on their assertions that Richardson has not shown his religious practice was burdened since it was limited to "only certain areas of the prison." AB 58. In *Porter v. Clarke,* this Court recognized that when Defendants show "no repentance" for previous illegal policies, this suggests that they may feel free to return to previous iterations of their policy, removing the possibility that the issue is moot. 923 F.3d 348, 366 (4th Cir. 2019), as amended (May 6, 2019). Here, Defendants' justification of their clearly illegal policies exemplifies the likelihood that they may feel emboldened to return to their old policies.[6]

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[5] It is also noteworthy that VDOC's head covering policy was changed after initiation of this suit. JA 138. This Circuit has noted that a change in policy after the commencement of a suit may imply that Defendants could return to their policies because the policy change may have been motivated by current litigation. *See Porter v. Clarke*, 923 F.3d 348, 364–65 (4th Cir. 2019) (The Court "must guard against attempts to avoid injunctive relief 'by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption.")

[6] This Court has stressed that if the appellate court is in doubt as to the subject of mootness, it may be best for the district court to make such determinations, since the possibility of reinstating a policy and its implementation often includes finding of facts that the appellate court may not be poised to perform. *See Gentry v. Robinson*, 837 F. App'x 952, 958-59 (4th Cir. 2020) (holding that even when

B. Defendants' arguments that equitable relief is barred by the PLRA is misguided because precedent in this Circuit has established that a current and ongoing rights violation is not necessary to issue an injunction.

Defendants attempt to distract the Court by arguing that the Court can only issue an injunction for a "current and ongoing" violation of a right under the PLRA, making an injunction in this case improper because Richardson can currently wear his kufi. AB 48 –49. This is plainly incorrect under this Circuit's precedent. Defendants rely on out-of-circuit precedent including *Hallett v. Morgan*, 296 F.3d 732 (9th Cir. 2002) as a basis for their argument. AB 48. This Circuit has held that it will not follow *Hallet*'s interpretation of the PLRA to require a current and ongoing rights violation to issue an initial injunction. *Porter*, 923 F.3d at 366–67. This Court explained, "[s]pecifically, *Hallett's* reference to 'current and ongoing' violation—a phrase that does not appear in the text of Section 3626(a)(1)—appears to derive from Section 3626(b)(3)…By its plain terms, Section 3626(b)(3) addresses the termination of prospective relief, not the initial imposition of such relief, which is … governed by Section 3626(a)(1)." *Id.* Under *Porter*, the fact that VDOC currently allows religious head covering does

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defendants assured at oral argument that the VDOC would not reinstate a beard grooming policy, the issue should be remanded to the district court because it involves factual questions which the district court was "better positioned" to determine the scope of the defendant's commitment). Given that the district court has already held that the issue is not moot, JA 243, this Court should remand and allow the claim to proceed.

not affect the ability of the Court to issue an injunction because this is not a case terminating an injunction under Section 3636(b)(3) and this Circuit does not interpret the PLRA to require a current and ongoing violation to issue initial prospective relief. Thus, the Court "should not construe a statute to displace courts' traditional equitable authority absent the clearest command or an inescapable inference to the contrary." *Id.* at 368.

Relatedly, Defendant's reliance on the Third Circuit's decision *in Para-Professional* ignores this Court's interpretation of the PLRA under *Porter*. In *Para-Professional*, a group of prisoners challenged terminating a previously issued injunction barring the closing of a jailhouse lawyering clinic. *Para-Pro. L. Clinic at SCI-Graterford v. Beard*, 334 F.3d 301, 304 (3d Cir. 2003). Importantly, the court analyzed whether there was a current and ongoing violation as it was relevant to 18 U.S.C. § 3626(b)(3) of the PLRA which dictates termination of an injunction, not 18 U.S.C. § 3626(b)(1), which applies to the initial issuance of prospective relief. *Id.* at 305– 306. Ultimately, the Court found that there was no ongoing violation of the plaintiff's rights, and it terminated the injunction. *Id.* at 306. At issue here is the initial issuance of prospective relief under 18 U.S.C. § 3626(b)(1), not the termination of an injunction, therefore Defendant's reliance on *Para-Professional* is not relevant to this case.

In addressing Defendants' arguments on their face, Richardson's request for injunctive relief satisfies the PLRA's requirement that injunctive relief is narrowly tailored and extends no further than necessary. Richardson requested that the district court enjoin Defendants from disallowing wearing a kufi in all areas within VDOC facilities. JA 35. The requested relief does not extend to all possible head coverings and does not require broad systemic changes that would be particularly burdensome to VDOC, as evident in VDOC's current policy that allows religious head coverings to be worn in all areas of the prison. Richardson is requesting the limited relief necessary to guarantee that his rights of religious exercise will not be violated with each new wave of policy changes that VDOC undergoes or with every transfer of facility. Thus, even using Defendant's reasoning, the injunction is sufficiently narrowly tailored.

C. Richardson has shown that the Defendants' policy violated RLUIPA because it created a substantial burden on his religious exercise. Defendants do not address the relevant case law establishing Richardson's RLUIPA claim nor show how their policy is the least restrictive means to achieve a compelling interest.

Defendants argue that Richardson did not sufficiently plead the basic requirements of a RLUIPA claim and that the Opening Brief does this for the first time. AB 52. This is unfounded. As explained in the opening brief, to determine whether Richardson has established a prima facie RLUIPA claim, the Court must

analyze whether (1) the burdened activity is 'religious exercise,' and if so whether (2) the proposed burden is substantial. *See Couch v. Jabe*, 679 F.3d 197, 200–01 (4th Cir. 2012). Defendants make arguments that Richardson's religious exercise is not substantially burdened, but in doing so they attempt to smuggle in improper questions as to the sincerity of Richardson's beliefs. There is no dispute that Richardson has clearly expressed his sincere belief that he must wear his kufi *at all times*. JA 22; *See also* JA 105 ("Williams understands that Richardson claims that it is his sincere religious belief that he wear his kufi, a religious head covering*, in all areas* of Deerfield") (emphasis added). As the record evidence reflects, Richardson's religion requires him to wear a kufi not only at certain times of day or in some areas of the prison, but at *all times*. To question whether Richardson's religion allows him to take off his kufi in some, pivotal areas of the prison impermissibly questions the sincerity of his belief. Defendants go so far as to argue that "support is silent on his religious beliefs and practices" (AB 54), but Courts may not question the significance of a religious practice. *Smith v. Ozmint*, 578 F.3d 246, 251 (4th Cir. 2009). Given, RLUIPA's broad construction of religious exercise, Richardson's asserted need to wear his kufi at all times qualifies as valid religious exercise. *See Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006) ("RLUIPA broadly defines 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'")

As such, Richardson has met his burden of showing that the Defendants policy substantially burden's this sincerely held religious belief. AOB 10–19. Because Richardson considers it his religious obligation to wear his head covering at all times, any restriction in the time and place to wear a kufi is a burden. *See Pevia v. Hogan*, 443 F. Supp. 3d 612, 638 (D. Md. 2020) (The mere fact that the policy "requires action or inaction, in violation of a sincerely held religious belief, amounts to a 'substantial burden' on the exercise of religion."). Defendants attempt to gloss over the restriction as "only" limited to a few areas, AB 51, but they fail to capture that these areas—the dining hall, the visiting room, the administrative building, and the designated program locations—are pivotal areas that are necessary for the daily functioning of an incarcerated individual.[7]

Defendants fail to respond, or even mention, any of the case law presented in the Opening Brief that illustrate why any restrictions on head coverings, even restrictions in certain areas of a prison or for limited time periods, amount to a substantial burden. AOB 12–16. Defendants again refer to language in *Krieger* to

[7] Because this policy applies to other areas of the prison such as the administrative building where most legal filings are done, the consequence of the policy also implicates other key rights, such as Richardson's right to petition the court. *See Kirby v. City of Elizabeth City*, 388 F.3d 440, 448 (4th Cir. 2004) (quoting U.S. Const. amend. I) ("the First Amendment protects the right 'to petition the Government for a redress of grievances'"); *Turner v. Safley*, 482 U.S. 78, 84 (1987) ("[P]risoners retain the constitutional right to petition the government for the redress of grievances.").

support their contentions that Richardson has not properly explained why his religious exercise is burdened, AB 51–52, but they don't grapple with the Opening Brief's discussion of the key distinctions between the cases— in *Krieger* there were other alternative means to practice the plaintiff's religious activity whereas here, Richardson has no other means to exercise his religious practice; he must wear his kufi at all times or else violate his religious beliefs. AOB 16–17. This burden is further exacerbated where he is subject to disciplinary sanction if he refuses to remove his head covering in areas where it is prohibited. AOB 16.

Since Richardson has shown a prima facie case that VDOC's policy substantially burdens his religious exercise, "the government shall bear the burden of persuasion on any element of the claim…[i]n particular the government must prove that the burden in question is the least restrictive means of furthering a compelling government interest." *Lovelace v. Lee*, 472 F.3d 174, 185 (4th Cir. 2006). Defendants have included nothing in their Answering Brief nor in their Memorandum in Support of Motion for Summary Judgement to argue that the policy is justified by a compelling government interest and is the least restrictive means. AB 45–55, JA 115–121. This is not surprising—they are unable to contend that restrictions on kufis in some areas of the prison are necessary because VDOC currently has a policy which allows kufis in all areas of the prison. JA 133. This exemplifies that there is no compelling government interest—not even purported

security interests—that justify the restriction.[8] Furthermore, the new policy illustrates that least restrictive means of managing head coverings in the prison is to allow kufis in all areas of the prison. Thus, Defendants have not met their burden of showing that the previous religious head covering policy was the least restrictive means of achieving a compelling state interest.

CONCLUSION

For the foregoing reasons and the reasons stated in Richardson's opening brief, this Court should reverse the errors of the district court and remand for further proceedings.

Respectfully Submitted,

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[8] The district court found that the Defendant's purported security concerns were rationally related to their previous head covering policy under a *Turner v. Safley* analysis, but never discussed whether the security concerns met the requirements under RLUIPA. JA 249-51. These analyses cannot be considered parallel because RLUIPA requires a '"more searching standard' of review of free exercise burdens than the standard used in parallel constitutional claims: strict scrutiny instead of reasonableness." *Lovelace v. Lee*, 472 F.3d 174, 186 (4th Cir. 2006).

CERTIFICATE OF COMPLIANCE

I hereby certify that Plaintiff-Appellant's Reply Brief meets the applicable type-volume limits. The brief was produced on a computer using Microsoft Word. The brief was produced in Times New Roman font size 14. The brief is 6,472 words long, not including words excluded by rule 32(f) and is therefore in compliance with rule 32(a)(7)(B)(i).

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CERTIFICATE OF SERVICE

I certify that, pursuant to Federal Rule of Appellate Procedure 31, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF system on November 8, 2021.

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