NO. 14-10186

IN THE
SUPREME COURT OF THE UNITED STATES

ISRAEL BEN-LEVI,

PETITIONER

v.

CHAPLAIN BETTY BROWN,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. WHETHER THE FOURTH CIRCUIT ERRED IN RULING AS A MATTER OF LAW THAT RESPONDENT BROWN'S DENIAL OF PETITIONER'S REQUEST FOR JEWISH BIBLE STUDY WITHOUT A QUORUM OR QUALIFIED TEACHER DID NOT VIOLATE PETITIONER'S FIRST OR FOURTEENTH AMENDMENT RIGHTS WHERE THE RECORD IS UNDISPUTED THAT THE DENIAL WAS BASED UPON INFORMATION PROVIDED BY RELIABLE AUTHORITIES ON THE JEWISH FAITH, DID NOT SUBSTANTIALLY BURDEN PETITIONER'S RIGHT TO PRACTICE HIS RELIGION, AND WAS REASONABLY RELATED TO LEGITIMATE INSTITUTIONAL INTERESTS?

LIST OF PARTIES

Petitioner:	Israel Ben-Levi
Respondent:	Chaplain Betty Brown

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OPINIONS BELOW

The opinion of the Fourth Circuit, Court File No. 14-7908, wherein summary judgment was affirmed in favor of Respondent Brown, is an unpublished opinion reported at *Ben-Levi v. Brown*, 600 Fed. Appx. 899, 2015 U.S. App. LEXIS 7256, 2015 WL 195130 (4th Cir. May 1, 2015). The order of United States District Court Judge Fox, Court File 5:12-CT-3192-F, wherein Judge Fox dismissed Petitioner's claims for declaratory and injunctive relief and Petitioner's claims pursuant to the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a), is not published or reported. The order of Judge Fox wherein he granted summary judgment in favor of Respondent Brown as to Petitioner's individual capacity claims for monetary damages pursuant to 42 U.S.C. § 1983 is reported at *Ben-Levi v. Brown*, 2014 U.S. Dist. LEXIS 175040 (E.D.N.C. December 18, 2014).

JURISDICTION

The Fourth Circuit affirmed summary judgment in favor of Respondent Brown in an unpublished per curiam opinion on 1 May 2015. Petitioner is attempting to invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law." U.S. Const. amend. XIV sec. 1.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress, except that in any action taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia." 42 U.S. C. § 1983

"No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest." Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a)

STATEMENT OF THE CASE

A. Procedural History:

Israel Ben-Levi ("Petitioner"), appearing herein *pro se* and *in forma pauperis*, is a prisoner in the custody of the Division of Adult Correction, a division of the North Carolina Department of Public Safety ("NCDPS") (formerly North Carolina Department of Correction). On 4 October 2012, Petitioner initiated this action by filing a Complaint in the United States District Court for the Eastern District of North Carolina (Western Division), Court File No. 5:12-

CT-3192-F. (D.E. 1).[1] In the Complaint, Petitioner named Chaplain Betty Brown ("Respondent" or "Respondent Brown") as a Defendant.[2] (D.E. 1). Respondent Brown is the Director of Chaplaincy Services for NCDPS. (D.E. 1; D.E. 42-2 at ¶ 4).

In his Complaint, Petitioner asserts that his constitutional rights were violated in 2012 while he was in custody at Hoke Correctional Institution when his request for a quiet room in which to conduct Jewish bible study with two other inmates was denied. (D.E. 1). On 30 July 2013, Respondent Brown filed a Motion to Dismiss all claims. (D.E. 23). In support of her Motion, Respondent Brown relied upon the allegations of Petitioner's Complaint, documents attached to or subsequently filed by Petitioner in support of his Complaint, and the following documents submitted by Respondent Brown with her Motion: (1) NCDPS's Procedure and Policy entitled "Religious Services" (in effect in 2012); and (2) the relevant portion of NCDPS's Religious Practices Resource Guide and Reference Manual regarding authorized practices for inmates of the Jewish faith. (D.E. 24-2, 24-3).

On 25 February 2014, Senior United States District Court Judge James C. Fox ("Judge Fox") provided Notice to the Parties that Respondent's Motion to Dismiss was being converted to a Motion for Summary Judgment. (D.E. 30). On 7 March 2014, Petitioner filed an unsworn affidavit (with no attachments) in response to Respondent's Motion wherein he reasserted the allegations and arguments in his Complaint. (D.E. 32). In his affidavit, Petitioner indicated that

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[1] Documents filed with the United States District Court are designated by their docket entry number denoted as "D.E. __". Documents filed with the Fourth Circuit are denoted as "Doc. No. __".

[2] "Chaplain Akbar" was also named as a Defendant in the Complaint. (D.E. 1). On 3 April 2013, Judge James C. Fox dismissed all claims against Chaplain Akbar pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). (D.E. 12).

he was no longer at Hoke Correctional Institution but had been transferred, as of that time, to Wake Correctional Center. (D.E. 32).

On 19 March 2014, Judge Fox denied Respondent Brown's Motion for Summary Judgment without prejudice as to Petitioner's 42 U.S.C. § 1983 claims against Respondent Brown in her individual capacity for monetary damages. (D.E. 33). Judge Fox held that insufficient evidence existed at the time to allow him to conclude as a matter of law that questions of fact did not exist as to whether Respondent's denial of Petitioner's request for a quiet room to conduct Jewish bible study substantially burdened Petitioner's exercise of religion and whether said denial was reasonably related to a legitimate penological interest. (D.E. 33).

In his 19 March 2014 Order, Judge Fox granted Respondent Brown's Motion for Summary Judgment as to Petitioner's § 1983 claims against her in her official capacity for declaratory and injunctive relief on the grounds that Petitioner was no longer housed at the alleged offending facility referred to in the Complaint and, therefore, Petitioner's claims were moot. (D.E. 33). Judge Fox also granted Respondent Brown's Motion as to Petitioner's claims asserted pursuant to the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1(a). (D.E. 33). Judge Fox held that RLUIPA does not authorize claims for monetary damages and that Petitioner's claims for declaratory or injunctive relief became moot when he was transferred to another facility. (D.E. 33).

On 2 September 2014, Respondent Brown filed a supplemental Motion for Summary Judgment as to Petitioner's remaining § 1983 claims against her in her individual capacity for monetary damages asserting qualified immunity as to these claims. (D.E. 42). Respondent Brown supported her Motion with sworn Affidavits including an Affidavit wherein she explained

NCDPS's policy and procedure regarding the authorization of religious practices for members of the Jewish faith and the basis for NCDPS's denial of Petitioner's request. (D.E. 42-2).

Petitioner filed a "Motion of Opposition to Defendant's Motion for Summary Judgment" on 14 October 2014 and a "Reply" in opposition to Respondent's Motion on 12 November 2014. (D.E. 49, 54). Plaintiff did not oppose Respondent Brown's Motion with sworn Affidavits, nor did he attach any documents to his filings in opposition to it. (D.E. 49, 54). By the time Petitioner filed the above-noted documents in opposition to Respondent's Motion for Summary Judgment, he had been transferred again and was in custody at Alexander Correctional Institution. (D.E. 49, 54).

On 18 December 2014, Judge Fox granted summary judgment in favor of Respondent Brown as to Petitioner's remaining individual capacity claims for monetary damages. (D.E. 55). In his order, Judge Fox held that the Record established as a matter of law that Respondent Brown did not substantially burden Petitioner's right to practice his faith and, also, that Respondent Brown's actions were reasonably related to legitimate penological interests. (D.E. 55 at p. 7). Judge Fox held that no evidence existed that Respondent Brown intentionally violated Petitioner's rights. (D.E. 55 at p. 8). Judge Fox noted in his order that evidence was presented by Respondent Brown that the accommodations allowed by NCDPS depended upon the faith group involved and were different for dissimilar faith groups. (D.E. 55 at p. 6).

On 31 December 2014, Petitioner filed a Notice of Appeal to the United States Court of Appeals for the Fourth Circuit, Court File No. 14-7908. (D.E. 57). It does not appear from Petitioner's Notice of Appeal and Informal Brief that Petitioner appealed any rulings made by Judge Fox on 19 March 2014 when he dismissed Petitioner's RLUIPA and official capacity

claims. (D.E. 57). In his Informal Brief, filed 12 January 2015, Petitioner identified four issues on appeal. The first three issues involved Petitioner's First and Fourteenth Amendment claims that NCDPS (and its policies) violated Petitioner's rights by failing to provide him with a quiet room for Jewish bible study despite allegedly allowing others to do so. (Doc. No. 7). In his fourth issue, Petitioner argued that Judge Fox did not correctly analyze the relevant factors for a First Amendment free exercise of religion claim set forth in *Turner v. Safley*, 482 U.S. 78, 89 (1987). (Doc. No. 7). Petitioner did not, in his Informal Brief, address RLUIPA or any other rulings made by Judge Fox in his 18 December 2014 Order, including Judge Fox's denial of Petitioner's Motion for Counsel or Judge Fox's rulings regarding pending discovery motions. (Doc. No. 7).

On 1 May 2015, the Fourth Circuit affirmed Judge Fox's rulings in an unpublished per curiam opinion. (Doc. No. 10; D.E. 62). In its opinion, the Fourth Circuit stated without elaboration that it reviewed the record and found no reversible error. (Doc. No. 10 at p. 2; D.E. 62).

On 11 June 2015, Petitioner filed the instant Petition for Writ of Certiorari with the Supreme Court of the United States. Petitioner did not serve Respondent Brown's counsel with the Petition. In his Petition, Petitioner argues that the Fourth Circuit and Judge Fox erred in granting and affirming summary judgment in Respondent Brown's favor and ruling that Respondent Brown did not substantially interfere with his right to practice his faith. Petitioner asserts that other faith groups are allowed to meet without having a community volunteer present. Petitioner also claims that Judge Fox did not appropriately address the *Turner v. Safley* factors in his 18 December 2014 order.

On 8 September 2015, the Clerk of Court for the Supreme Court of the United States requested a response to the Petition from Respondent Brown. For the reasons set forth below, Respondent Brown respectfully requests that the Petition for Writ of Certiorari before the Court at this time be denied.

B. Summary of Facts in Record:

The facts of this case as developed by the sworn Affidavits and other documents in the Record are as follows:

The process for authorizing religious practices at NCDPS facilities is set forth in NCDPS Policy and Procedure, Chapter H, Section .0100, entitled "Religious Services" ("the Policy"). Pursuant to the Policy, the Director of Chaplaincy Services is involved in formulating and providing professional supervision of chaplaincy services. (D.E. 24-3; Policy § 0101(a)). The Director also maintains the North Carolina Prisons Religious Practices Resource Guide and Reference Manual which identifies authorized religious practices for the inmate population. (D.E. 24-3, Policy § .0101(d)). The Religious Practices Resource Guide and Reference Manual ("RPM" or "Religious Practices Manual") includes a list of faith groups and practices recognized and authorized by NCDPS and a "brief description of the basic beliefs, authorized practices, worship procedures and authorized religious items associated with each faith." (D.E. 24-3; Policy § .0103(c)). In her Affidavit, Respondent Brown explains:

> While it is not an exhaustive dissertation of those recognized faith practices, the RPM does provide important basic information about them. It explains the basic doctrinal precepts of each recognized faith group, describes their means of expression, and sets out approved practice and means and methods of worship. It details whether a particular faith group's practice is required of its adherents, or whether it is optional.

(D.E. 42-2 at ¶ 15).

Pursuant to the Policy, "regular population inmates are allowed to attend any corporate worship service held at the facility." (D.E. 24-3, Policy § .0106(b); D.E. 42-2 at ¶ 6). "Any inmate may privately pray, meditate, and study scriptures or religious literature in his or her cell or other designated area as long as the inmate does not interfere with other inmate(s) . . . security, or operational management." (D.E. 24-3 Policy, § .0106(d); D.E. 42-2 at ¶ 7). The Policy provides that "no inmate shall exercise religious authority over any other inmate(s)." (D.E. 24-3, Policy § .0107; D.E. 42-2 at ¶ 11). "No inmate shall be recognize[d] as clergy . . . and shall not be permitted to function as such." (D.E. 24-3, Policy § 0107). The Policy provides that inmates are not allowed to organize or conduct group meetings without prior approval. (D.E. 24-3, Policy § 0107; D.E. 42-2 ¶ 11).

Requests to engage in religious practices not identified in the Religious Practices Manual must be approved by NCDPS's Religious Practices Committee ("the Committee"). (D.E. 24-3, Policy § .0108(b); D.E. 42-2 at 13). Numerous factors are taken into account by the Committee when it considers a request including "whether the requested practice or paraphernalia has a recognized role in the particular faith," whether the practice "conflict[s] with valid penological considerations such as order, security, operation, safety, effect on inmate relationships, etc.," "availability of staff, departmental and community resources," and "duplication of existing services." (D.E. 24-3; Policy § 0108(b); D.E. 42-2 at ¶ 12). Before a religious practice is authorized, the Committee conducts research which includes consulting with other correctional departments and recognized authorities within the faith group "to determine the tenets of the faith practice, the requirements of the faith practice, and how best to accommodate those

practices without endangering the health and safety of staff or other inmates, without interrupting prisons operations and without squandering monetary or personnel resources." (D.E. 42-2 at ¶ 23).

In her Affidavit, Respondent Brown explains that the determination of whether a requested religious practice will be authorized at NCDPS depends upon the faith group involved. "While some faith practices may require corporate group worships, others may not. Some faith practices are required of an adherent, while others are not, such that different accommodations are made for dissimilar groups." (D.E. 42-2 at ¶ 16).

In 2012, Petitioner was housed at Hoke Correctional Institution ("Hoke"). While at Hoke, Petitioner made a request to officials at the facility and, ultimately, to Respondent Brown to be allowed to meet in a quiet room and conduct Jewish bible study with two other inmates as dictated by Jewish rabbinical practices. (D.E. 1-1; D.E. 42 at ¶ 18). In response to his request, Petitioner was informed that in order for a study group to take place, a quorum (also referred to as a minyan) of ten adult Jewish males was required. (D.E. 24-1; D.E. 42 at ¶ 19). Petitioner was informed that the quorum requirement could be waived in the prison setting if the service or study was led by a Rabbi or other qualified clergy community volunteer. (D.E. 24-1).

As is set forth in Respondent Brown's Affidavit and the Religious Practices Manual, Judaism has, at all relevant times for this case, been an approved religion at NCDPS facilities. Authorized practices for members of the Jewish faith include the recognition of certain holidays, a special diet, and the right to possess various religious items. (D.E. 24-2 at p. 3). NCDPS also allows private worship for members of the Jewish faith. (D.E. 24-2 at p. 3).

Regarding formal or corporate worship, the Religious Practices Manual provides: "A quorum (minyan) of ten (10) adult Jews is usually required to hold a formal Jewish worship service, but this requirement may be waived in a prison setting when led by a Rabbi." (D.E. 24-2 at p. 3; D.E. 42-2 at ¶ 14). Respondent Brown states that before the requirement of a quorum was imposed at NCDPS, the Religious Practice Committee consulted with Rabbis, experts, and practitioners of Judaism. (D.E. 42-2 ¶ 23). "The requirements for formal and other types of Jewish worship services, like Torah/Talmud study, or as referred by the Plaintiff as 'Jewish Bible study', were matters discussed with a Rabbi." (D.E. 42-2 at ¶ 23 fn. 4).

In her sworn Affidavit, Respondent Brown discusses, in detail, NCDPS's justification for denying Petitioner's request. NCDPS's denial was based upon information provided by outside expert consultants regarding tenets of the Jewish faith and penological interests. Regarding outside sources, Respondent Brown states, specifically, that they relied on publications and statements of Rabbi (Chaplain) Gary Friedman of the Jewish Prisoner Services International who has served on and chaired correctional organizations and committees and has testified as an expert in court cases and legislative hearings. (D.E. 42-2 at ¶¶ 20, 24). Respondent Brown personally exchanged emails with Rabbi Freidman and he advised her regarding the "requirements for Torah and Talmud study sessions." (D.E. 42-2 at ¶ 24). Rabbi Friedman indicated that a "minyan is required for formal worship service (that includes Torah reading, memorial prayers, etc.) to be conducted" but is not required for "Torah/Talmud study" conducted by a qualified teacher. (D.E. 42-2 at ¶ 20). Information provided by Rabbi Friedman provided as follows: "In any case, somebody who is not qualified would not be permitted to lead Torah study in the community because it is so complex." (D.E. 42-2 at ¶ 20).

Based on the information provided by Rabbi Friedman, Respondent Brown was of the opinion at all relevant times that NCDPS's requirement of a quorum, Rabbi, or other qualified community volunteer to lead Jewish bible study was in conformity with the "requirements, practices and tenets of Judaism." (D.E. 42-2 at ¶ 24). The requirement of a Rabbi or qualified community volunteer to oversee study groups served multiple purposes such as ensuring the "purity of the doctrinal message and teaching." (D.E. 42 at ¶ 26). The presence of a Rabbi also made sure that one inmate did not assume a position of power over another inmate. (D.E. 42-2 at ¶ 26).

In her Affidavit, Respondent Brown discusses the penological justifications for NCDPS's denial of Petitioner's request to meet in a private room without a quorum or qualified clergy volunteer present. Security issues exist when inmates gather together in a room without supervision. (D.E. 42-2 at ¶¶ 20-22, 26). Concerns have been raised in the past of inmates engaging in gang activity under the guise of being members of the same religious faith group engaged in religious practices. (D.E. 42-2 at ¶¶ 20-22, 26). In her Affidavit, Respondent Brown refers to budgetary, staff, and resource constraints which come into play when small groups of inmates request to meet together. (D.E. 42-2 at ¶¶ 23, 26).

While acknowledging that fewer outside volunteers exist to aid the Jewish inmate population, Respondent Brown regularly conducts searches for and has solicited volunteers for the Jewish inmate population. (D.E. 42-2 at ¶ 28). Inmates are also allowed to seek and request permission for a particular qualified volunteer to assist with services. (D.E. 42-2 at ¶ 28). In his filings in this case, Petitioner acknowledges that he was informed by officials at Hoke Correctional that they would transfer him to another facility in order to assist him with his

request. (D.E. 6-1). Petitioner has been transferred on two occasions. (D.E. 32, 54, 59).

Significantly, in 2015, in response to difficulties that NCDPS was experiencing securing outside community volunteers for certain faith groups and, in part, in response to a complaint filed by an inmate of the Messianic Jewish faith regarding his inability to conduct services without an outside volunteer,[3] NCDPS amended its "Religious Services" Policy and now allows inmates to lead services when outside volunteers cannot be found, assuming no other institutional or security concerns exist. A copy of this new Policy ("the Amended Policy") is included as Exhibit A in the Appendix.[4] The Amended Policy went into effect in July of 2015 and provides: "If a facility chaplain or community volunteer is not available for a specific minority faith group and there is sufficient offender interest (10 or more designated faith group members), an "Inmate Faith Helper" may be considered to assist with facilitation of a religious service or program." (Amended Policy § .0107 (b)). The Amended Policy defines the Inmate Faith Helper as one who "[a]cts as a facilitator for services of a specific faith group, according to the tenants and authorized practices of the specific faith group as recognized in the religious practices manual." (Amended Policy § .0107(b)(1)(A)).

REASONS FOR DENYING THE PETITION

Compelling reasons do not exist for further review of the Fourth Circuit's decision in this case wherein the court, in an unpublished per curiam opinion, affirmed summary judgment in

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[3] Petitioner refers to this complaint in various pleadings that he filed during the course of this action. This complaint was the subject of a civil action filed in the United States District Court for the Eastern District of North Carolina – *Hodges v. Keller*, Court File No. 5:11-CT-3242-D (E.D.N.C).

[4] The Amended Policy is a public document and can be found on-line at https://www.ncdps.gov/div/Prisons/Policy_Procedure_Manual/H%20_0100_07_07_15.pdf).

Respondent's favor as to Petitioner's claims that his rights were violated in 2012 when NCDPS denied Petitioner's request to participate in Jewish bible study at Hoke Correctional Institution without a quorum or qualified volunteer. The Fourth Circuit's decision does not conflict with decisions of other United States court of appeals or North Carolina's highest appellate court. The decision does not make new law, misstate existing law, or criticize decisions of other circuits. No argument exists that the proceedings below departed "from the usual course of judicial proceedings." U.S. Sup. Ct. Rule 10. The most that Petitioner asserts in his Petition is that the courts below misapplied the law. Misapplication of the law however, even when it occurs, is "rarely" a sufficient justification to allow a petition for writ of certiorari. *Id.*

I. THE NCDPS POLICY CHALLENGED BY PETITIONER WAS RECENTLY AMENDED WHICH NULLIFIES PETITIONER'S ARGUMENTS, TO THE EXTENT HE MADE ANY VALID ARGUMENTS WHICH IS DENIED, IN SUPPORT OF HIS PETITION FOR WRIT OF CERTIORARI.

In July of 2015, the NCDPS Policy at issue in this case was amended and now allows approved inmates to lead worship and religious study groups when outside clergy volunteers are not available. The Policy was amended after Petitioner filed his Petition with this Court. The inability to conduct meetings without an outside volunteer present is a main focus of the Petition. Based upon the recent amendment to the Policy, Petitioner's request for writ of certiorari should be denied as Petitioner's complaints are now moot. A claim becomes moot when subsequent events make it such that an alleged wrongful act is not "reasonably expected" to recur. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). "Withdrawal or alteration of administrative policies can moot an attack on those policies." *Bahnmiller v. Derwinski*, 923 F.3d 1085, 1089 (4th Cir. 1980).

II. PETITIONER'S REQUEST FOR WRIT OF CERTIORARI SHOULD BE DENIED ON THE GROUNDS THAT PETITIONER SEEKS REVIEW OF RULINGS THAT WERE NOT RAISED OR ADDRESSED BELOW.

Respondent Brown objects to this Petition to the extent that Petitioner requests this Court to review issues and rulings that were not raised or briefed in the courts below. This Court has held that issues not properly raised and briefed before the courts below are not proper issues for further review pursuant to 28 U.S.C. § 1954. *Tennessee v. Dunlap*, 426 U.S. 312, 314-316 at n. 2 and n. 3 (1976).

In this case, Petitioner did not address Judge Fox's dismissal of his RLUIPA and official capacity claims in his Notice of Appeal to the Fourth Circuit or in the Informal Brief that he filed with the Fourth Circuit. Petitioner, likewise, does not address these rulings in his Petition for a Writ of Certiorari. Judge Fox's order, wherein he dismissed said claims, is not attached to the Petition. Petitioner also failed to address below, as well as in his Petition, Judge Fox's denial of Petitioner's Motion for Counsel and Judge Fox's rulings regarding pending discovery motions. In his Petition before this Court, Petitioner raises the Eighth Amendment for the first time. Eighth Amendment claims have not been addressed by any court below and were not included in Petitioner's Complaint.

In the event this Court determines that Petitioner's RLUIPA and official capacity claims were within the scope of Petitioner's appeal and instant Petition, which is denied, Respondent Brown requests that the Petition be denied. Compelling reasons do not exist to grant the Petition as to these claims. Petitioner has made no showing that the dismissal of his RLUIPA and official capacity claims conflicts with decisions of other circuit courts or misconstrues any decisions of this Court.

Judge Fox correctly ruled that monetary damages are not allowed in RLUIPA claims. This issue has been settled by this Court. *Sossamon v. Texas*, __ U.S. __, 131 S. Ct. 1651, 1663 (2011). This Court has also held that State officials sued in their official capacities are not "persons" pursuant to 42 U.S.C. § 1983 and thus cannot be held liable for money damages in claims brought pursuant to 42 U.S.C. § 1983. *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 70-71 (1989).

Judge Fox's ruling that Petitioner's RLUIPA and official capacity claims for injunctive and declaratory relief were moot is also correct and supported by the Record. It is undisputed in this case that Petitioner is no longer in custody at Hoke Correctional Institution. Moreover, as is discussed above, the relevant NCDPS policy has been amended.

"[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *U.S. v. Hardy*, 545 F.3d 280, 283 (4th Cir. 2008) (citations omitted). "'The inability of the federal judiciary to review moot cases derives from the requirement of Art. III of the Constitution under which the exercise of judicial power depends upon the existence of a case or controversy.'" *Id.* (citations omitted). In *Rendelman v. Rouse*, 569 F.3d 182 (4th Cir. 2009), the Fourth Circuit stated: "Defendants are correct that, as a general rule, a prisoner's transfer or release from a particular prison moots his claims for injunctive and declaratory relief with respect to his incarceration there." *Id.* at 186.

Based on the above, no justification exists for further review of Judge Fox's dismissal of Petitioner's RULPIA and official capacity claims. To the extent that Petitioner attempted to develop any Record at all regarding alleged unconstitutional conduct, he did so only in connection with Hoke Correctional Institution. Even as to Hoke Correctional Institution,

Petitioner failed to rebut Respondent's sworn Affidavits with the type of evidence required by Fed. R. Civ. P. 56 to overcome summary judgment. Clearly, as to any other facilities, the Record is insufficient as a matter of law to forecast a constitutional claim for injunctive and declaratory relief based upon alleged on-going constitutional violations. The Record is also completely silent as to the effect of the recently amended Policy on Petitioner's ability to practice his faith.

III. COMPELLING REASONS DO NOT EXIST FOR FURTHER REVIEW OF THE RULINGS BELOW WHEREIN SUMMARY JUDGMENT WAS ALLOWED IN RESPONDENT'S FAVOR AS TO PETITIONER'S SECTION 1983 CLAIMS FOR MONETARY DAMAGES.

The rulings made by the District Court and Fourth Circuit, wherein they granted and affirmed summary judgment in Respondent Brown's favor as to Petitioner's individual capacity constitutional claims for monetary damages, are in accordance with this Court's jurisprudence regarding the First and Fourteenth Amendment. Here, too, no argument has been or can be made that the rulings below conflict with decisions of other circuits or that the courts below misapplied the law of this Court so as to justify granting Petitioner's request for a writ of certiorari.

In order to prevail on a First Amendment free exercise of religion claim, an inmate must allege and ultimately establish that an official prison action or policy "substantially burdened" his ability to practice his or her faith.[5] *Hernandez v. Comm'r*, 490 U.S. 680, 699 (1989). If an inmate establishes that a substantial burden has been imposed, the alleged offending policy or practice withstands a First Amendment challenge if it "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. at 89. The standard is one of "reasonableness." *Id.* In *Turner*, this Court set forth four factors which are relevant to the

[5] Respondent Brown does not question the sincerity of Petitioner's beliefs.

determination of whether a particular practice or policy satisfies the reasonableness standard: (1) whether the governmental objective underlying the challenged policy is legitimate, neutral, and rationally related to the objective; (2) whether alternative means exist which allow the inmate to exercise his religious rights; (3) the impact that accommodating the inmate's request would have on other inmates, guards, and the allocation of prison resources; and (4) whether available alternatives exist which accommodate the inmate's rights and satisfy the penological interest. *Id.* at 89-90. In *Turner*, the Court cautioned that the "ready alternatives" test is "is not a 'least restrictive alternative' test.'" *Turner* at 90-91.[6]

In this case, Judge Fox did not err in ruling as a matter of law that Respondent Brown's denial of Petitioner's request for Jewish bible study at Hoke Correctional Institution did not substantially burden his ability to practice his religion. As is set forth in detail in the Summary of Facts, Petitioner's request for a Jewish bible study was not denied per se. Instead, based upon research by Respondent Brown and the Religious Practices Committee, Petitioner was informed that a quorum (minyan) or presence of a qualified clergy volunteer was required before the group could meet. (D.E. 24-1; D.E. 42-2 at ¶ 19). NCDPS's position was based upon its understanding of the basic tenets of the Jewish faith which it obtained through consultations with an established leader of that faith who confirmed that a minyan or qualified Rabbi is required for "Torah and Talmud study". (D.E. 42-2 at ¶¶ 20, 24). In his Petition, Petitioner attempts to create an issue of fact by arguing that there is a difference between worship and study. According to Rabbi

[6] As is set forth above, Petitioner's RLUIPA claim should not be the subject of further review as Petitioner did not brief this issue before the Fourth Circuit or this Court. In Judge Fox's 19 March 2014 order, Judge Fox dismissed Petitioner RLUIPA claim on mootness and other grounds. Neither Judge Fox, nor the Fourth Circuit, analyzed the specific elements of a RLUIPA including the least restrictive alternative test utilized for RLUIPA claims.

Friedman, however, the minyan or qualified teacher requirements apply to Torah and Talmud *study*. (D.E. 42-2 at ¶¶ 20, 24).

Critically, Petitioner has not, at any time during the proceedings in this case, rebutted Respondent Brown's sworn Affidavit with sworn testimony or any documentation from reliable sources or authorities on the Jewish faith disputing NCDPS's understanding that the Jewish religion itself, and not just institutional concerns, requires a quorum or the presence of a qualified teacher for worship or religious study. To the contrary, in one of the few documents filed by Petitioner in this case, the author states that "[i]t is best to pray in a synagogue with a Minyan (a congregation of at least ten adult men)." (D.E. 1-10; Exhibit F).

Accordingly, the Record establishes as a matter of law that Respondent Brown's denial of Petitioner's request did not substantially burden his ability to practice the Jewish faith but, rather, was in line with the tenets of that faith. On this ground, alone, summary judgment was proper. The Record establishes further, however, that legitimate penological interests existed which were reasonably related to NCDPS's requirement of a quorum or qualified clergy volunteer before Jewish bible study could occur at its facilities. Judge Fox did not incorrectly apply the *Turner v. Safley* factors.

In her Affidavit, Respondent Brown discusses security concerns as well as budgetary and resource constraints which factored into NCDPS's denial of Petitioner's requests. (D.E. 42-2 at ¶¶ 20-22, 26). Based on similar concerns, quorum and outside volunteer requirements have been validated by courts when challenged in civil actions. In *Spies v. Voinovich*, 173 F.3d 398 (6th Cir. 1999), for example, the court ruled that the prison policy involved in that case, which required a group of five inmates and the presence of a qualified teacher before a religious

gathering would be allowed, was reasonably related to legitimate penological goals including "maintaining security and allocating prison resources" and avoiding the creation of an "inmate-led power structure" in the prison setting. *Id.* at 405-406. In her Affidavit, Respondent Brown noted that the United States District Court for the Western District of North Carolina issued a ruling in favor of NCDPS where an inmate had challenged NCDPS's requirement that a chaplain or approved community volunteer oversee religious gatherings. (D.E. 42-2 at ¶ 27). *See Griffith v. Bird*, 2009 U.S. Dist. LEXIS 104469 (W.D.N.C Nov. 3 2009), *aff'd*, 410 Fed. Appx. 713 (4th Cir. February 8, 2011) (unpublished opinion attached as Exhibit B in the Appendix).

Judge Fox's order reveals that he considered available reasonable alternatives, another relevant *Turner* factor. In his order, Judge Fox notes that inmates are allowed to engage in private worship, including the study of scriptures, in their cells and are allowed to request that community religious officials be allowed to conduct rites and rituals at the facility. (D.E. 55 at p. 6; D.E. 42-2 at ¶ 6-10). Judge Fox notes further that prison officials at Hoke Correctional Institution agreed to transfer Petitioner to another facility in order to assist him with his request to form a study group in compliance with NCDPS policies. (D.E. at p. 6; D.E. 6-1.). Judge Fox also notes the on-going efforts of Respondent Brown to locate a qualified community volunteer to assist with Jewish services. (D.E. at p. 5; D.E. 4202 at ¶ 28).

Based on the above, compelling reasons do not exist for further review of Petitioner's First Amendment free exercise of religion claim. The same is true regarding Petitioner's Fourteenth Amendment equal protection claim. In his order, Judge Fox referenced Respondent Brown's sworn Affidavit wherein she states that different accommodations are allowed for dissimilar faith groups. (D.E. at p. 6; D.E. 42-2 at ¶ 16). Regarding Petitioner's request, the

requirement of a minyan or qualified teacher to lead study groups was based upon NCDPS's understanding of the tenets of the Jewish faith. (D.E. 42-2 at ¶¶ 20, 24). While Petitioner argues that other faith groups have been allowed to participate in study groups, Petitioner has not presented any evidence that members of his faith group or similar faith groups (i.e. where the tenets of the faith require a minyan or the presence of a qualified teacher) were allowed to meet without a quorum or qualified community volunteer.

In order to establish a question of fact as to an equal protection claim, Petitioner must present reliable evidence to "demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Veney v. Wyche*, 293 F.3d 726, 730-31 (4th Cir. 2002). *See also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985). No evidence of this nature exists in the Record. Judge Fox, therefore, did not err in granting summary judgment in Respondent Brown's favor as to Petitioner's equal protection claim.

Accordingly, compelling reasons do not exist to justify further review by this Court as to any of Petitioner's individual capacity claims against Respondent Brown for monetary damages. This is particularly so when qualified immunity is taken into account. Even if Petitioner's rights were violated at Hoke Correctional Institution, which is strenuously denied, qualified immunity applies. Qualified immunity protects prison officials in the performance of their duties unless they are "plainly incompetent" or "knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

In this case, no argument can be made that Respondent Brown knowingly violated any laws. The Record establishes, instead, that Respondent Brown's actions were based upon

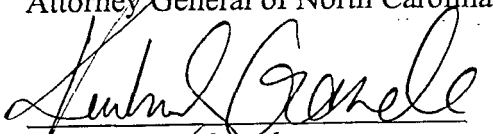
consultations with reliable authorities on the Jewish faith and legitimate penological interests, and that Respondent Brown was reasonable in her belief that her actions were consistent with Petitioner's rights. No evidence of purposeful or intentional discrimination exists. For all of the reasons discussed herein, including qualified immunity, the instant Petition should be denied.

CONCLUSION

Based upon the foregoing reasons and legal authorities, Respondent Chaplain Betty Brown respectfully requests that the instant Petition for Writ of Certiorari be denied and that the Court decline to issue a writ allowing further review in this case.

Respectfully submitted this the 5th day of November, 2015.

ROY COOPER
Attorney General of North Carolina



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CERTIFICATE OF SERVICE

I hereby certify that I have this day served one copy of the foregoing BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on Petitioner by placing a copy of same in the United States mail, first-class, postage pre-paid, addressed as follows:

Israel Ben-Levi
OPUS (DOC) No. 0248366
Greene Correctional Institution
Post Office Box 39
Maury, North Carolina 28554
Pro Se Petitioner

I further certify that I am a member of the Bar of this Court and that I have served all parties required to be served.

This the 5th day of November, 2015.

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NO. 14-10186

IN THE
SUPREME COURT OF THE UNITED STATES

ISRAEL BEN-LEVI,

PETITIONER

V.

CHAPLAIN BETTY BROWN,

RESPONDENT

APPENDIX

Exhibit A: Amended NCDPS Policy "Religious Services" (amended July 2015)

Exhibit B: *Griffith v. Bird*, 2009 U.S. Dist. LEXIS 104469 (W.D.N.C Nov. 3 2009)

EXHIBIT A

.0101 SCOPE

(a) Prisons employs a Director of Chaplaincy Services to formulate and provide professional supervision of chaplaincy services. The Director of Chaplaincy Services provides guidance and assistance for the religious services and programs to all the facilities within Prisons. The Chaplaincy Services Director is familiar with multiple religions, and coordinates those practices within Prisons Policy and Procedures. The Chaplaincy Services Director communicates with religious judicatory leaders, clinical pastoral care supervisors, theological educators, medical, attorneys, prison administrators, legislators, volunteers, inmates and their families. The Chaplaincy Services Director and staff are responsible for coordinating recruitment, screening as the Subject Matter Expert and selection of State-funded, Temporary, Community-Funded and Volunteer Chaplains. The Chaplaincy Services Central office staff provides technical support for the facilities' Clinical Chaplains or other designated staff.

(b) Prisons employs Clinical Chaplains or other designated staff to provide moral, spiritual and pastoral care, and ministerial services to inmates in the custody of the Prisons. Each chaplain is required to maintain the endorsement of his/or her religious body and remain in good standing according to its requirements. A chaplain shall not be required to personally conduct religious services which violate his/her religious body's doctrine or teachings. However, all chaplains or other designated staff will be required to coordinate/or supervise services. All chaplains or other designated staff shall maintain confidentiality i.e. clergy privileged communication, except in cases when there is a threat to safety, security and health of staff, inmates and the general public.

(c) Prisons shall provide access for approved religious services or practices and pastoral care in all prison facilities. Inmate participation shall be voluntary. No inmate shall be subjected to coercion, harassment, or ridicule due to religious affiliation. In the event an inmate reports that he/or she has been subjected to coercion, harassment, or ridicule due to religious affiliation he/or she should report to facility staff.

(d) The Chaplaincy Services Director is responsible for maintaining the Prisons Religious Policy Manual. The manual accommodate the official religions, practices, and authorized religious items for the inmate population. The manual also includes a list of authorized religious items for inmate in restrictive housing (SAFEKEEPERS, RHap, RHdp, HCON, MCON, ICON).

.0102 COMMUNITY-FUNDED AND VOLUNTEER CHAPLAINS

(a) Community-funded chaplains are chaplains funded by community churches or other religious organizations. These chaplains must have the proper credentials and have a signed covenant on file at Chaplaincy Services Central office. These chaplains will be appointed by the Chaplaincy Services Director, subject to the approval of the Director of Prisons. The Director of Prisons may, at will, remove any community-funded chaplain.

(b) Volunteer chaplains must have the proper credentials and have a signed covenant on file at the Chaplaincy Services Central office. These chaplains will be appointed by the Chaplaincy Services Director, subject to the approval of the Director of Prisons. The Director of Prisons may, at will, remove any volunteer chaplain.

(c) All Chaplains (State-funded, Temporary, Community Funded and Volunteers) are required to participate in New Chaplains Orientation and Training. A DVD recording of all recognized faiths and their sacred items are made available for the training of all staff that has direct contact with inmates. Additionally, all Chaplaincy staff and volunteers are required to participate in annual training as outlined by Prisons policy.

(d) All North Carolina Prisons' Covenanted Volunteer and Community-Funded Chaplains will be required to have a picture identification card. The representative's photographs and identification card will be captured through the automated Digital Photo System and/ or Auxiliary Photo Capture Stations.

(e) At the discretion of the Facility Head, the chaplain or other designated staff will have access to all areas of the facility to minster to all inmates.

(f) At the discretion of the Facility Head, relevant contents of prison records may be communicated to a community-funded chaplain by an appropriate staff member when such information is considered essential to the fulfillment of the chaplain's duties. Confidentiality shall be maintained by the chaplain.

.0103 PROCEDURES

(a) Religious practices for inmates other than those in the regular population will be reviewed and approved by the facility head in consultation with the chaplain and Chaplaincy Services Central Office consistent with this policy. Requests for practices exceeding those authorized in H .0106 should be referred to the Religious Practices Committee for final determination.

(b) Inmates who wish to have incorporated a religious practice that is not recognized by Prisons must submit a DC-572 Request for Religious Assistance form to the facility chaplain or other designated staff, who will then consult with the Chaplaincy Services Director regarding the availability of temporary accommodations in conjunction with the facility head or designee. Determinations regarding temporary accommodations are

made on a case-by-case basis and are subject to the operational requirements of each facility.

(c) Specific religious practices policies and procedures are detailed in the Prisons' Religious Practices Reference Manual. This manual includes a list of the current faith practices that are now officially recognized by Prisons. It also includes a brief description of the basic beliefs, authorized practices, worship procedures and authorized religious items associated with each faith. A copy of this manual may be found in the office of the Chaplain or other designated staff

(d) Inmate End of Life Care Protocol

The purpose of this section is to ensure that Prisons staff understand and be consistent in applying the End of Life Protocol procedures. In the last phase of life people seek peace and dignity. To help realize this, every inmate should be able to fairly expect elements of care from physicians, health care institutions, and the Prisons. The nature of dying and death has changed, it is occurring more frequently as a result of chronic illness. The following procedures will be followed for providing End of Life Care:

(1) The Facility

(A) Inmate patient is admitted to an outside facility.

(B) Outside hospital physician/staff will contact the prison facility (medical, facility head, or officer-in-charge) concerning seriously ill designation, or

(C) The Prisons custody staff assigned to the inmate's room will communicate with the OIC that the inmate's condition has downgraded to seriously ill.

(D) The OIC will notify the facility head and the facility chaplain. If the facility chaplain is not available the facility head will instruct the OIC to activate the End of Life Protocol (EOLP) and notify the officer in the inmate's room.

(E) The Prisons custody staff assigned to the inmate's room will request that the hospital nurse contact the hospital chaplain.

(F) The officer assigned to the inmate's room will note the hospital chaplain's name and visit in the activity log.

(G) During regular work hours, the Facility Head shall contact the inmate's next of kin or immediate family or if the Facility Head is not available, the chain of command process is to be used.

(H) All persons granted a visit with the inmate must be cleared through the facility's OIC.

(2) The Community Hospital Chaplain

Pastoral Caregivers provides spiritual support and guidance to ill and dying patients, their families and our staff. Pastoral Caregivers, work closely with physicians, nurses, and North Carolina Prisons. Most hospitals have resources available 24- hours a day, seven days a week to listen, offer prayer, ease stress, and help the inmate and family deal with end-of-life issues. Pastoral Care providers work with patients of all denominations.

(3) The Hospital Chaplain

(A) Will not make any phone calls to an inmate's family members

(B) Will ensure that the inmate's faith and practice are observed.

(C) May provide pastoral care with inmate's family if requested.

(D) No hospital clergy will be allowed to accompany the family members in the inmate's room unless it is approved by the facility head or officer-in-charge.

(e) Inmate Transportation and Religious Items

When being transported by Prisons vehicle, inmates must pack all their personal religious property in their property bag.

.0104 INMATE RELIGIOUS AFFILIATIONS

(a) Inmates shall have the freedom to make a religious commitment, change a religious commitment, or reject religion altogether.

(b) Inmates may request a Declaration of Faith form to register a change in religious affiliation. All requests to change religious affiliation will be reviewed separately. All requests must be completed by the inmate and submitted to the facility chaplain or other designated staff. Any change shall be documented on the inmate's religious preference information in OPUS. The inmate's religious property specific to her/his former religious preference must be sent outside the facility or destroyed according to the inmate preference and facility policy.

.0105 INMATE REQUEST FOR RELIGIOUS ASSISTANCE

(a) An inmate whose religion is not currently recognized by Prisons or whose religious request cannot be met within the framework of existing approved religious services must submit a written request for assistance using the designated DC-572 Inmate Request for Religious Assistance: Fact Sheet form.

(b) The form shall be made available to any inmate, upon request, regardless of custody status. The form must be submitted to the facility chaplain or other designated staff by the inmate. Upon receipt of the completed form, the facility chaplain or other designated staff shall process the inmate's request for religious assistance.

(c) The inmate must provide an authoritative source of information for the requested religion or faith practice to the facility chaplain or designated staff in order to verify the existence of the religion.

(d) The facility chaplain or designee will have 30 days to assist the inmate with the request. Upon completion of the inmate's DC-572, the facility chaplain or other designated staff will create a memorandum detailing the steps taken to provide assistance and shall forward the DC-572, memo, and other pertinent information to the Chaplaincy Services Director. If this step has not been complete within 30 days, the chaplain will send a letter to the inmate, facility head, and the Chaplaincy Services Director advising of the status of the inmate's request.

(e) An inmate's request for religious accommodation shall be evaluated by the Religious Practices Committee within 90 days and the inmate will be notified of the committee's recommendation. The Religious Practice committee will conduct a subject matter review and research the information provided. The committee's recommendation and the DC-572 shall be maintained by the Chaplaincy Services Director. Should the Religious Practices Committee recommend the establishment of policy for a new religious or faith practice, the draft policy will be sent through the normal chain of command for review. Any legal review will be documented and forwarded back to the Prisons for disposition. If this step is not completed within 90 days, the Chaplaincy Services Director will send a letter to the inmate, facility head, the facility chaplain or other designated staff advising them of the status of the inmate's request.

.0106 AUTHORIZED RELIGIOUS PRACTICES

(a) Race, color, creed or national origin shall not be a basis for excluding an inmate from attending any religious service.

(b) Regular population inmates are allowed to attend any corporate worship service held at the facility.

(c) Regular population inmates are allowed to attend any corporate worship service held at the facility.

(d) Due to safety and security concerns, SAFEKEEPERS, inmates in Restrictive Housing (RHap, RHdp, HCON, MCON, ICON) will not be allowed to attend corporate worship services with the general population as outlined in the North Carolina Prisons, Conditions of Confinement policy C.1219 (d).

(e) Any inmate may privately pray, meditate, and study scriptures or religious literature in his or her cell, so long as the inmate does not interfere with other inmate(s), the inmate's assigned program or work assignments, security or operational management.

(f) Upon request, an inmate may be considered for enrollment in religious correspondence courses. An inmate's request to use a foreign language for religious study shall be reviewed on a case-by-case basis.

(g) Clergy and other spiritual advisors may be admitted to visit an inmate at the inmate's request, subject to Prisons policies regarding visitation and coordination of the facility chaplain or other designated staff and approval of the facility head. The Community religious official must have received their credentials from a residential accredited school or an endorsing faith group body.

(h) The facility Chaplain or designated staff may request assistance from a community religious official to perform a wedding, baptism, or other religious rites/rituals subject to Prisons policies regarding visitation policy. The approval will follow the chain of command the facility head.

(i) The Chaplaincy Services Director shall maintain a list of faith groups approved for the use of sacramental wine. Sacramental wine may be approved for religious services. Requests must be made to the facility chaplain or other designated staff and will be reviewed on a case-by-case basis. Only the religious official leading the rite may consume alcohol. Inmates are not allowed to consume ANY alcoholic beverages while in the custody of the Department of Public Safety.

(j) The policies and procedures detailed in the North Carolina Prisons' Religious Practices Reference Manual, and any others authorized by the Religious Practices Committee and the Director of Prisons or designee shall be used to administer all religious practices.

.0107 RELIGIOUS CORPORATE SERVICES

(a) To protect the integrity and authenticity of the beliefs and practices of religious services and programs, a Facility Chaplain or designated staff shall be responsible for the coordination, facilitation, and supervision of inmate religious services and programs.

(b) If a facility chaplain or community volunteer is not available for a specific minority faith group and there is sufficient offender interest (10 or more designated faith group members), an inmate faith helper may be considered to assist with facilitation of a religious service or program. The faith group must be listed in the Religious Practices Manual.

(1) Inmate Faith Helper is defined as:

(A) Acts as a facilitator for services of a specific faith group, according to the tenants and authorized practices of the specific faith group as recognized in the religious practices manual.

(B) Inmate Faith Helper serves as the liaison between the inmate practitioners and facility chaplains or designated staff.

(2) The Chaplaincy Services Central Office shall provide technical support and assistance in the recommendation of inmate faith helpers for minority faith groups.

(3) The procedures for Inmate Faith Helpers are detailed in the Prisons' Religious Policy.

.0108 COMMITTEES

(a) ADVISORY COMMITTEE ON RELIGIOUS MINISTRY IN PRISONS
The Secretary of NC Public Safety hereby establishes the Advisory Committee on Religious Ministry in Prisons for the purpose of serving as a resource for the expansion and strengthening of chaplaincy services and religious activities within Prisons. Committee activities shall be governed by the rules and regulations promulgated by the NC Department of Public Safety. The Committee shall report to the Director of Prisons.

(b) THE RELIGIOUS PRACTICES COMMITTEE
The Director of Prisons or designee shall appoint and may remove at will members of the Religious Practices Committee. Inmate requests for religious practices not officially recognized or approved by Prisons must be approved by the Religious Practices Committee prior to the practice being allowed.

(c) THE CHAPLAINS STEERING COMMITTEE
The Steering Committee is authorized to assist the North Carolina Department of Public Safety with improving chaplaincy services and religious services and programs within Prisons. The committee shall be called the "Chaplains Steering Committee" and shall function through the Chaplaincy Services Director.

George T. Solomon
Director of Prisons

7/7/15
Date

EXHIBIT B

Document: Griffith v. Bird, 2009 U.S. Dist. LEXIS 104469

⟡ Griffith v. Bird, 2009 U.S. Dist. LEXIS 104469

Copy Citation

United States District Court for the Western District of North Carolina, Charlotte Division

November 3, 2009, Decided; November 3, 2009, Filed

3:06CV308-1-MU

Reporter

2009 U.S. Dist. LEXIS 104469 | 2009 WL 3722804

JOSEPH MICHAEL GRIFFITH, Plaintiff, v. S.A. BIRD, et al., Defendants.

Subsequent History: Affirmed by Griffith v. Bird, 2011 U.S. App. LEXIS 2525 (4th Cir. N.C., Feb. 8, 2011)

Prior History: Griffith v. Bird, 2008 U.S. Dist. LEXIS 121204 (W.D.N.C., Mar. 26, 2008)

Core Terms

rights, prison, religious, inmates, summary judgment motion, gather, indifference, deliberate, Default, damages, worship, non-moving, regulation, religion, alleges, vendor

Counsel: **[1]** Joseph Michael Griffith, Plaintiff, Pro se, Maury, NC.

For S. A. Bird, Betty Brown, Defendants: Yvonne Bulluck Ricci, LEAD ATTORNEY, N.C. Department of Justice, Raleigh, NC.

Judges: Graham C. Mullen, United States District Judge.

Opinion by: Graham C. Mullen

Opinion

ORDER

THIS MATTER comes before the Court upon Defendants' Motion for Summary Judgment (Doc. No. 19) filed December 15, 2006; Plaintiff's Motion for Summary Judgment (Doc. No. 31), filed June 20, 2008; and Plaintiff's Motion for Default Judgment (Doc. No. 40), filed April 9, 2009.

FACTUAL BACKGROUND

On July 27, 2006, Plaintiff filed a Complaint pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 2000cc-1 against three individuals [1] alleging that they had violated his rights under the Religious Land Use and Institutionalized Persons Act (RLUIPA) and his First and Fourteenth Amendment rights. More specifically, Plaintiff alleges that he, as a Wiccan, has been denied the right to "peacefully assemble and practice his religion." (Compl. 4.) [2] Plaintiff asserts that while other faiths are allowed to gather to celebrate their religion, Defendants have not allowed Wiccans, and specifically Plaintiff, to so gather. Plaintiff also alleges that he has been denied the religious **[2]** items needed to practice his religion. Plaintiff, among other things, seeks twenty-five thousand dollars in compensatory damages from each defendant and twenty-five thousand dollars in punitive damages from each defendant. Plaintiff also requests a court order granting him the right to freely practice his religion in the chapel.

On December 15, 2006, Defendant Bird, the Clinical Chaplain at Lanesboro Correctional Institution (LCI) and Defendant Brown, the Director of Chaplaincy Services for the Division of Prisons (DOP), filed a Motion for Summary Judgment. (Doc. No. 19.)

ANALYSIS

A. *Summary Judgment Standard*

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment may be granted where "the pleadings, depositions, answers to interrogatories, **[3]** and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact and that

the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Anderson v. Liberty Lobby,* 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett,* 477 U. S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). A genuine issue exists only if "the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson,* 477 U.S. at 248.

In opposing a summary judgment motion, the "non-moving party must do more than present a mere "scintilla" of evidence in his favor. Rather, the non-moving party must present sufficient evidence such that "reasonable jurors could find by a preponderance of the evidence for the non-movant." *Sylvia Dev. Corp. v. Calvert County Md.,* 48 F.3d 810, 818 (4th Cir. 1995)(quoting *Anderson,* 477 U.S. at 249-50). An apparent dispute is "genuine" only if the non-movant's version is supported by sufficient evidence to permit a reasonable jury to find in its favor. *Id.* "If the evidence is merely colorable, or is not significantly probative, summary judgment must be granted." *Anderson,* 477 U.S. at 249.

B. *RLUIPA*

Section 3 of the Religious Land Use and **[4]** Institutionalized Persons Act (RLUIPA) [3] provides that a state shall not impose a substantial burden on the religious exercise of a person confined in one of its institutions, even if it results from a rule of general applicability, unless it is the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. § 2000cc-1(a)(1)-(2). RLUIPA requires the inmate to bear the burden of persuasion concerning the substantial burden element. *Id.* § 2000cc-2(b). If the inmate can meet this requirement, then the burden shifts to the government to show that such a denial furthers a compelling state interest in the least restrictive means. The Supreme Court has noted that Congress "anticipated that courts would apply [RLUIPA's] standard with "due deference to the experience and expertise of prison administrators in establishing necessary regulations and procedures to maintain good order, security, and discipline . . . ." *Cutter v. Wilkinson,* 544 U.S. 709, 125 S. Ct. 2113, 2123, 161 L. Ed. 2d 1020 (2005)(quoting S. Rep. No. 103-111, p. 10 (1993)).

As an initial matter, the Court notes that damages are unavailable to Plaintiff. Individuals sued in their official capacity are not liable for money damages under the RLUIPA. *Madison v. Virginia,* 474 F.3d 118 (4th Cir. 2006). The Fourth Circuit has also recently held that individuals may not be held liable in their individual capacity for damages for RLUIPA claims based upon the Spending Clause. *Rendelman v. Rouse,* 569 F.3d 182, 189 (4th Cir. 2009). While Plaintiff does not specify what constitutional basis for RLUIPA he is proceeding under, because Plaintiff does not assert that the alleged denial of his ability to gather for corporate worship and obtain unidentified Wicca items would "affect commerce with foreign nations, among the several states, or with Indian tribes" *Id.* at 189 this Court finds that Plaintiff is not proceeding on such constitutional basis and his claim for money damages against the defendants in their individual capacities is not authorized by the RLUIPA.

Plaintiff, however, has also requested injunctive relief. After a careful review of the record, this Court concludes that Plaintiff is not entitled to any injunctive **[6]** relief as he has failed

to state a claim against the Defendants. More specifically, Plaintiff has failed to establish that the Defendants acted with the requisite intent.

In order to state a RLUIPA claim against an individual, a plaintiff must establish that they acted with the requisite intent. In the RLUIPA context, the Fourth Circuit has held that such a claim requires more than negligence and is satisfied by intentional conduct. *Lovelace v. Lee,* 472 F.3d 174, 194-95 (4th Cir. 2006). The Fourth Circuit has not yet determined if deliberate indifference [4] is sufficient to state a claim under the RLUIPA. *Id.* at 195.

In the instant case, the uncontroverted evidence establishes that Defendant Bird was not intentionally nor deliberately indifferent to Plaintiff's religious rights. The evidence supports the conclusion that Defendant Bird acted pursuant to Department of Correction (DOC) and Division **[7]** of Prison (DOP) policy. That is, in accordance with DOC and DOP policy, Defendant Bird allowed corporate worship if an approved volunteer was available to supervise the gathering. (Bird Aff. P P 14-15.) Moreover, the evidence supports a conclusion that Defendant Bird actively attempted to recruit a new Wicca volunteer but was unable to locate one. (Bird Aff. P 15.)

Likewise, the record supports a conclusion that Defendant Bird did not intentionally nor with deliberate indifference deny Plaintiff unidentified Wicca items. Defendant Bird sets forth in his affidavit that no Wiccan vendor had been approved as the prison was waiting for tax identification information from the vendor. (Bird Aff. P 6.) Defendant Bird contacted the vendor in an attempt to obtain such information. (Bird Aff. PP 8, 11.)

Moreover, the Court notes that contrary to Plaintiff's bald, unsupported assertion of unresponsiveness, the record supports a conclusion that Defendant Bird promptly responded to Plaintiff's numerous requests. (Bird Aff. and Exs. A -- F.) A review of the contemporaneous log sheet and the Request for Information sheets detailing inmate inquiries to Defendant Bird supports a conclusion that Defendant **[8]** Bird promptly responded to Plaintiff's numerous inquiries in compliance with the manual. Plaintiff simply does not present evidence to establish that Defendant Bird was intentionally or deliberately indifferent to his religious rights. As such, Plaintiff has failed to establish a RLUIPA claim against Defendant Bird.

Likewise, Plaintiff fails to establish that Defendant Brown was intentionally or deliberately indifferent to his religious rights. It appears that the entire extent of Defendant Brown's involvement in this case is her response to a February 2006, letter written by Plaintiff complaining about his inability to purchase religious items and the limited corporate worship opportunities available to him. After investigating Plaintiff's allegations and reviewing applicable DOC and DOP policies, which was written in consultation with a Wicca resource person, Defendant Brown sent Plaintiff a letter explaining that the Wicca faith does not require corporate worship and that he was free to practice Wicca on an individual basis at any time. Defendant Brown also informed Plaintiff that Defendant Bird had made reasonable good faith effort to contact Wiccan vendors but to no avail as of **[9]** the time of the letter. (Brown Apr. 3, 2006, Ltr.) There is no evidence to support a conclusion that Plaintiff interacted at any other time with Defendant Brown. Nor is there any evidence that Defendant Brown had the authority to change the policies set forth in the manual. Consequently, Defendant Brown's

actions do not support a conclusion that she acted intentionally or with deliberate indifference to deprive Plaintiff of his religious rights. As such, Plaintiff has failed to establish a RLUIPA claim against Defendant Brown.

C. *FIRST AMENDMENT CLAIM*

Petitioner also alleges that Defendants' actions violated his rights under the Free Exercise Clause of the Constitution.

The United States Supreme Court has held that a prison regulation that infringes upon a prisoner's constitutional rights is valid if it is reasonably related to legitimate penological interests. *See O'Lone v. Estate of Shabazz,* 482 U.S. 342, 349-50, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987); *Turner v. Safley,* 482 U.S. 78, 89, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987). The use of a rational basis standard "reflects a basic reality of conviction and confinement: Although prisoners are not completely without the Constitution's protection, 'lawful incarceration brings about the necessary withdrawal **[10]** or limitation of many privileges and rights . . . .'" *In re Long Term Administrative Segregation of Inmates Designated as Five Percenters,* 174 F.3d 464, 468 (4th Cir. 1999)(quoting *O'Lone v. Estate of Shabazz,* 482 U.S. 342, 348, 107 S. Ct. 2400, 96 L. Ed. 2d 282 (1987)). Consequently, "once a prison demonstrates that it is pursuing a legitimate governmental objective, and demonstrates some minimally rational relationship between that objective and the means chosen to achieve that objective, we must approve those means." *Id.* at 468-69 (citation omitted).

The Supreme Court has identified four factors relevant to determining whether a prison policy is reasonably related to a legitimate penological interest. First, a regulation must have a logical connection to legitimate governmental interests invoked to justify it. Second, the inmates should have alternative means of exercising their religious rights. Third, accommodating the inmate's religious rights should not severely impact other inmates, prison officials, or the allocation of prison resources generally. Fourth, the existence of obvious, easy alternatives to the policy adopted by the prison may serve to undermine the reasonableness of the policy or regulation. *See O'Lone,* 482 U.S. at 350-53; **[11]** *Turner,* 482 U.S. at 89-91.

In the instant case, Plaintiff argues that the Defendants violated his First Amendment rights by refusing to allow him to engage in corporate worship and refusing to obtain Wicca items for him. Using the factors set forth by the Supreme Court, the Court finds that Plaintiff's claim must fail.

First, the prison policy of requiring an approved volunteer to oversee religious gatherings and the policy of requiring vendors to go through an approval process is rationally related to the legitimate governmental interest of institutional order and security. Second, Wiccans are free to practice Wicca on an individual basis at any time. In addition, Lanesboro offers its Wiccan population the opportunity to gather for eight specific holidays Finally, it is specifically recognized that certain items are permitted to be used by inmates to practice their religion. Thus the prison provides its Wiccan prisoners with an alternative means of exercising their religious rights. Third, allowing prisoners to hold corporate worship without an approved volunteer would greatly impact prison personnel and other inmates. Fourth, Plaintiff offers various alternatives to the prison's policy **[12]** such as having the Chaplain oversee these

weekly gatherings or having a hallway security officer oversee such gatherings. Defendants do not specifically respond to these suggestions. Likely such alternatives are costly as they would require additional staff time. [5] However, such a determination is not dispositive to the overriding issue of whether the regulations at issue are reasonably related to legitimate penological interests. *Turner,* 482 U.S. at 91 (First Amendment analysis not a least restrictive alternative test). Consequently, upon reviewing the record as a whole, the Court finds that the Defendants did not violate Plaintiff's First Amendment rights.

Moreover, even if the *Turner* factors were not satisfied, Plaintiff's Free Exercise claim still fails because he cannot establish that Defendants intentionally violated his Free Exercise rights. *See Lovelace v. Lee,* 472 F.3d 174, 201 (4th Cir. 2006)(only intentional conduct is actionable under the Free Exercise Clause). As set forth previously in this Order, this Court concludes that Plaintiff has not established that either **[13]** Defendant acted intentionally to deprive him of his rights under the Free Exercise Clause of the First Amendment.

D. *EQUAL PROTECTION CLAIM*

Petitioner also alleges that Defendants' actions violated his rights under the Equal Protection Clause of the Constitution.

In order to prevail on his Equal Protection claim, Plaintiff must demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty,* 239 F.3d 648, 654 (4th Cir. 2001). Again, for the reasons previously stated the record does not support a conclusion that either Defendant intentionally violated Plaintiff's rights under the Equal Protection Clause of the Fourteenth Amendment. Rather, it appears that the Defendants were merely following the Religious Practices Manual. Consequently, because Plaintiff cannot establish the requisite intent for an Equal Protection claim, this claim is denied.

E. *MOTION FOR DEFAULT JUDGMENT*

Plaintiff filed a motion seeking a default judgment against Defendants. Plaintiff argues that a default judgment should be entered because Defendants did not respond to his **[14]** Motion for Summary Judgment. The failure to file a response to Plaintiff's Motion for Summary Judgment did not constitute a "failure to defend." Defendants have filed an Answer; a Motion for Summary Judgment, and other documents which clearly evidence a defense against the claims contained in Plaintiff's Complaint. Consequently, Plaintiff's Motion for Default Judgment is denied.

IT IS, THEREFORE, ORDERED that:

1. Defendant's Motion for Summary Judgment (Doc. No. 19) is **GRANTED;**

2. Plaintiff's Motion for Summary Judgment (Doc. No. 31) is **DENIED;**

3. Plaintiff's Motion for Default Judgment (Doc. No. 40) is **DENIED;** and

4. Plaintiff's Complaint (Doc. No. 1) is **DISMISSED.**

Signed: November 3, 2009

/s/ Graham C. Mullen

Graham C. Mullen

United States District Judge

JUDGMENT IN A CIVIL CASE

DECISION BY COURT. This action having come before the Court by motion and a decision having been rendered;

IT IS ORDERED AND ADJUDGED that Judgment is hereby entered in accordance with the Court's November 3, 2009 Order.

Signed: November 3, 2009

Footnotes

1 In an Order dated August 1, 2006, this Court dismissed Defendant Rick Jackson because Plaintiff failed to state a claim against him. In that same Order, this Court also dismissed the North Carolina Department of Corrections from this case on the basis that this entity is not a proper party to a § 1983 lawsuit.

2 All page number references correlate with the Electronic Court Filing numbers generated when a document is filed with the Court.

3 The Supreme Court has ruled that the sections of the RLUIPA increasing the level of protection of prisoner's religious rights do not violate the Establishment Clause. **[5]** *See Cutter v. Wilkinson,* 544 U.S. 709, 125 S. Ct. 2113, 161 L. Ed. 2d 1020 (2005).

4 Deliberate indifference is demonstrated by either an actual intent to cause harm, or reckless disregard of substantial risk of harm that is either known to the defendant or would be apparent to a reasonable person in defendant's position. *Miltier v. Beorn,* 896 F.2d 848, 851-52 (4th Cir. 1990).

5 The record supports a conclusion that the number of declared Wicca inmates at Lanesboro was extremely small.

Content Type: Cases

Terms: 2009 U.S. Dist. LEXIS 104469

Narrow By: -None-

Date and Time: Nov 03, 2015 08:55:18 a.m. EST

Document: Griffith v. Bird, 410 Fed. Appx. 713

Griffith v. Bird, 410 Fed. Appx. 713

Copy Citation

United States Court of Appeals for the Fourth Circuit

January 12, 2011, Submitted; February 8, 2011, Decided

No. 09-8093

Reporter

410 Fed. Appx. 713 | 2011 U.S. App. LEXIS 2525

JOSEPH MICHAEL GRIFFITH, Plaintiff - Appellant, v. S. A. BIRD; BETTY BROWN, Defendants - Appellees, and RICH JACKSON; NORTH CAROLINA DEPARTMENT OF CORRECTIONS, Defendants.

Notice: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Subsequent History: US Supreme Court certiorari denied by Griffith v. Bird, 2011 U.S. LEXIS 6442 (U.S., Oct. 3, 2011)

Prior History: Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. (3:06-cv-00308-GCM). Graham C. Mullen, Senior District Judge. Griffith v. Bird, 2009 U.S. Dist. LEXIS 104469 (W.D.N.C., Nov. 3, 2009)

Disposition: AFFIRMED.

Counsel: Joseph Michael Griffith, Appellant Pro se.

Yvonne Bulluck Ricci, Assistant Attorney General, Raleigh, North Carolina, for Appellees.

Judges: Before NIEMEYER, KING, and SHEDD, Circuit Judges.

Opinion

[713] PER CURIAM:

Joseph Michael Griffith appeals the district court's order denying relief on his 42 U.S.C. § 1983 (2006) complaint. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons **[714]** stated by the district court. Griffith v. Bird, No. 3:06-cv-00308-GCM (W.D.N.C. Nov. 3, 2009). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

Content Type: Cases

Terms: 410 fed appx 713

Narrow By: -None-

Date and Time: Nov 03, 2015 08:54:38 a.m. EST