FILED
United States Court of Appeals
Tenth Circuit

August 10, 2021

Christopher M. Wolpert
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

TAJUDDIN ASHAHEED,

Plaintiff - Appellant,

v.

THOMAS E. CURRINGTON,

Defendant - Appellee.

INSTITUTE FOR JUSTICE; CATO INSTITUTE; MUSLIM ADVOCATES,

Amici Curiae.

No. 20-1237

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:17-CV-03002-WJM-SKC)

David M. Shapiro, Roderick & Solange MacArthur Justice Center, Chicago, Illinois (David A. Lane and Andrew McNulty, Kilmer, Lane & Newman, Denver, Colorado, with him on the briefs), for Plaintiff – Appellant.

Joshua J. Luna, Assistant Attorney General, (Philip J. Weiser, Attorney General, with him on the brief), State of Colorado, Denver, Colorado, for Defendant – Appellee.

Jaba Tsitsuashvili, Keith Neely, and Anya Bidwell, Arlington, Virginia, filed an amicus curiae brief on behalf of Plaintiff – Appellant for the Institute for Justice.

Clark M. Neily III and Jay R. Schweikert, Washington, District of Columbia, filed an amicus curiae brief on behalf of Plaintiff – Appellant for the Cato Institute.

Matthew W. Callahan, Washington, District of Columbia, filed an amicus curiae brief on behalf of Plaintiff – Appellant for Muslim Advocates.

Before **MATHESON**, **MURPHY**, and **MORITZ**, Circuit Judges.

MATHESON, Circuit Judge.

Tajuddin Ashaheed wears a beard because he is Muslim. He arrived at the Colorado Department of Corrections ("CDOC") Denver Reception and Diagnostic Center (the "Center") to serve a short sentence for parole violations. The Center's policies required inmates to shave their beards at intake but exempted those like Mr. Ashaheed who wear beards due to their religion. Mr. Ashaheed alleged that he repeatedly invoked this exemption, but Sergeant Thomas Currington, motivated by anti-Muslim animus, forced him to shave his beard.

Mr. Ashaheed sued Sergeant Currington under 42 U.S.C. § 1983, alleging claims for violations of the First Amendment Free Exercise Clause and Fourteenth Amendment Equal Protection Clause. Sergeant Currington moved to dismiss both claims based on qualified immunity and failure to state a claim. The court granted the motion and dismissed the case with prejudice.

Mr. Ashaheed appeals. Exercising jurisdiction under 28 U.S.C. § 1291, we reverse.

I. BACKGROUND

A. *Factual History*

Mr. Ashaheed's second amended complaint ("SAC") alleged as follows.

Mr. Ashaheed has practiced Islam for decades. He follows the "'Sunnah' practice of leaving one's beard to grow" and believes shaving his beard would "violate[] a core tenet of his faith." App. at 205.

CDOC has long been aware of Mr. Ashaheed's faith. In 1993, while serving a sentence with CDOC, he "signed a written declaration of his religious affiliation." *Id.* CDOC updated his inmate file to document his faith. It then provided a Qur'an and a prayer rug to him. He "participated in religious practices . . . consistently throughout his time at CDOC and thereafter." *Id.* Mr. Ashaheed wore a beard while serving this sentence.

In 2014, Mr. Ashaheed started a four-year prison sentence with CDOC. His inmate file "was updated and continued to document his Muslim faith," and he "continued devotional practice of his religious faith." *Id.* He was paroled in March 2016.

In July 2016, Mr. Ashaheed arrived at the Center to serve a short sentence for parole violations. An intake officer interviewed Mr. Ashaheed, verified his religious affiliation, and updated his inmate file to reflect his continued Muslim adherence. Because Mr. Ashaheed's 1993 declaration was still on file, "[t]he intake officer did not require Plaintiff Ashaheed to sign a form declaring his religion." *Id.* at 206.

After the intake interview, Mr. Ashaheed showered, submitted to a physical examination, and dressed. The Center's policies required inmates' beards to be shaved at intake, but they "provide[d] an exemption for inmates who wear a beard based on religious tenets." *Id.* Sergeant Currington nevertheless ordered Mr. Ashaheed "to submit to having his beard shaved." *Id.* at 207. Mr. Ashaheed explained to him "that he is a

practicing Muslim and that shaving his beard would violate a core tenet of his faith." *Id.* Sergeant Currington replied that Mr. Ashaheed "must have a 'full beard' in order to 'qualify' for the religious exemption." *Id.* The religious exemption in the Center's beard-shaving policy, however, did not require Mr. Ashaheed to have a full beard.

Mr. Ashaheed told Sergeant Currington "that he is physically unable to grow a full beard, reiterated that his beard is worn for religious practices, and stated that his religious affiliation is documented in his CDOC file." *Id.* Sergeant Currington "replied that he 'didn't want to hear about it.'" *Id.* He then threatened that Mr. Ashaheed "would be 'thrown in the hole'"—solitary confinement—if he did not agree to be shaved. *Id.* Mr. Ashaheed "submitted to having his beard shaved by the inmate barber." *Id.* at 208. He felt "dehumanized" and "humiliated" because "his faith ha[d] been disrespected." *Id.*

Mr. Ashaheed averred that "no other inmate[s] had their religious freedom infringed upon by Currington." *Id.* He alleged that "[o]ther non-Muslim inmates were allowed to keep items of religious significance such as crosses, bibles and small wedding rings and only Ashaheed was singled out by Currington to be treated differently from any other inmate of a different religion." *Id.* Mr. Ashaheed further stated that at CDOC and the Center, there was a "pattern and practice of substantially burdening and interfering with Muslim inmates' ability to freely practice their religion, including, but not limited to, publicly demeaning Muslim practices, culturally isolating Muslim inmates, and generally fostering an environment in which the practice of Islam is burdensome to Muslim inmates." *Id.* at 209. He alleged that shaving him "advanced no penological interest of the CDOC or Defendant Currington." *Id.* at 208.

B. *Procedural History*

1. First Amended Complaint and Its Dismissal

Mr. Ashaheed's first amended complaint ("FAC") alleged § 1983 claims against Sergeant Currington under the Free Exercise Clause and the Equal Protection Clause, and a claim for violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. §§ 2000cc to 2000cc-5.[1] Sergeant Currington moved to dismiss. The district court dismissed Mr. Ashaheed's RLUIPA claim with prejudice, and his § 1983 claims without prejudice.

2. SAC and Its Dismissal

The SAC alleged free exercise and equal protection claims under § 1983. Sergeant Currington moved to dismiss. The district court dismissed both claims with prejudice. On the free exercise claim, the court bypassed the first element of qualified immunity and held Mr. Ashaheed had not identified Supreme Court or Tenth Circuit case law clearly establishing that Sergeant Currington violated his free exercise rights by forcing him to shave his beard. On the equal protection claim, the court held Mr. Ashaheed had not stated a claim because he had not plausibly alleged facts showing that he was treated differently from similarly situated non-Muslim inmates.

The district court entered final judgment. Mr. Ashaheed timely appeals.

[1] Mr. Ashaheed's original complaint sued Sergeant Currington as a John Doe. That complaint is not relevant to our analysis.

II. DISCUSSION

Our following discussion concludes that the district court erred when it granted Sergeant Currington qualified immunity on the free exercise claim and dismissed the equal protection claim.[2]

A. *Free Exercise Clause Claim*

When a defendant in a § 1983 action raises a qualified immunity defense, the plaintiff bears the burden of overcoming it. *Sawyers v. Norton*, 962 F.3d 1270, 1282 (10th Cir. 2020). To do so on a motion to dismiss, a plaintiff must (1) plead facts demonstrating the defendant violated a federal constitutional or statutory right, and (2) show that the right was clearly established at the time of the defendant's conduct.

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[2] Mr. Ashaheed also argues he brought a distinct religious liberty claim under *Turner v. Safley*, 482 U.S. 78, 89 (1987). In *Turner*, the Supreme Court adopted rational-basis scrutiny for constitutional claims by inmates. *Id.* at 89. It justified this approach on the need to defer to prison management of day-to-day operations. *See id.* at 84-89. The Court initially treated *Turner* as establishing a "unitary . . . standard for reviewing prisoners' constitutional claims," *Shaw v. Murphy*, 532 U.S. 223, 229 (2001), that "applies to all circumstances in which the needs of prison administration implicate constitutional rights," *Washington v. Harper*, 494 U.S. 210, 224 (1990). But in *Johnson v. California*, 543 U.S. 499, 509-15 (2005), the Court clarified that *Turner* applies "*only* to rights that are inconsistent with proper incarceration," i.e., those "privileges and rights [that] must necessarily be limited in the prison context." *Id.* at 510 (quotations omitted).

Mr. Ashaheed has forfeited any argument that he alleged a *Turner* claim by failing to say so in response to Sergeant Currington's motion to dismiss the SAC. And he waived it here by failing to argue the district court plainly erred by not considering whether he alleged a *Turner* claim. *See In re Rumsey Land Co.*, 944 F.3d 1259, 1271-72 (10th Cir. 2019). Also, Mr. Ashaheed has inadequately briefed *Turner* on appeal. *See Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019).

Further, *Turner* does not apply. The Center's religious exemption in its beard-shaving policy determined that Mr. Ashaheed's right to wear a beard based on his faith did not have to "be limited in the prison context" and was consistent with institutional needs. *See Johnson*, 543 U.S. at 510.

Pearson v. Callahan, 555 U.S. 223, 232 (2009); *Doe v. Woodard*, 912 F.3d 1278, 1289 (10th Cir. 2019).

The district court erred when it granted qualified immunity to Sergeant Currington on the free exercise claim on the ground that Mr. Ashaheed "ha[d] failed to establish that [his] right to maintain his beard was clearly established." App. at 283.

Although the court addressed only the second element of qualified immunity—clearly established law, we also address the first—constitutional violation—because Sergeant Currington argues it presents an alternative ground to affirm and because our discussion informs our analysis of clearly established law. *See Richison v. Ernest Grp.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (court of appeals may consider alternative grounds for affirmance not passed upon by the district court).

1. **Legal Background**

The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend I. It protects against government regulation of religious belief or conduct and has been applied to the states through the Fourteenth Amendment's Due Process Clause. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

The Supreme Court's free exercise cases primarily address laws that burden religious exercise. A law that is "neutral" and "generally applicable" is constitutional if it is rationally related to a legitimate government interest. *Brown v. Buhman*, 822 F.3d 1151, 1160 n.5 (10th Cir. 2016); *see Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1876 (2021); *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 877-79 (1990). A

law that is not "neutral" or "general[ly] applicab[le]" is unconstitutional unless it is "narrowly tailored to advance" "a compelling government interest." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah* (*Lukumi*), 508 U.S. 520, 531 (1993); *see Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam).

This case, however, is not about a law that burdens religion, but rather about a detention officer's refusal to apply a religious exemption in a beard-shaving policy. It is therefore about executive action, and we have held that "the First Amendment applies to exercises of executive authority no less than it does to the passage of legislation." *Shrum v. City of Coweta*, 449 F.3d 1132, 1140 (10th Cir. 2006); *see Sause v. Bauer*, 138 S. Ct. 2561, 2562-63 (2018) (police officers who ordered a person to stop praying might have violated her free exercise rights); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1293-99 (10th Cir. 2004) (reviewing executive action under the Free Exercise Clause).

We further have held that executive action "motivated by [the plaintiff's] religious commitments" is "not neutral" and is "a violation of his clearly established constitutional rights under the Free Exercise Clause," even if not "motivated by overt religious hostility or prejudice" or "animus." *Shrum*, 449 F.3d at 1144-45 (quotations omitted); *see Janny v. Gamez*, --- F.4th ----, 2021 WL 3439009, at *16-17 (10th Cir. Aug. 6, 2021) (finding a free exercise violation because of "non-neutral coercion or compulsion" by an executive actor who was not motivated by animus). "[W]here government bodies discriminate out

of 'animus' against particular religions, such decisions are plainly unconstitutional." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1260 (10th Cir. 2008).[3]

2. **Analysis**

a. *Constitutional violation*

Mr. Ashaheed alleged that:

- He told Sergeant Currington he was Muslim, that shaving his beard would violate his Muslim faith, and he was entitled to the religious exemption in the Center's beard-shaving policy. App. at 206-07.
- Sergeant Currington implausibly told him he had to have a "'full beard' in order to 'qualify' for the religious exemption." *Id.* at 207.
- When Mr. Ashaheed continued to press to keep his beard, Sergeant Currington responded dismissively and threatened to place him in solitary confinement. *Id.* at 207.
- Sergeant Currington allowed non-Muslim inmates to benefit from a policy that allowed them to keep religiously significant personal items. *Id.* at 208.

A jury could infer from these allegations that Sergeant Currington acted because Mr. Ashaheed is Muslim. Sergeant Currington's refusal to follow the Center's beard-shaving policy and grant Mr. Ashaheed a religious exemption, when he previously accommodated the religious needs of non-Muslims under the Center's personal-effects policy, shows that he burdened Mr. Ashaheed's religion in a discriminatory and non-neutral manner.

[3] Intentional discrimination involves an intent to treat a group differently. Animus is hostility toward a group. *See Hassan v. City of New York*, 804 F.3d 277, 297-98 (3d Cir. 2015), *as amended* (Feb. 2, 2016). Intentional religious discrimination can but need not include animus or hostility toward religion. *Shrum*, 449 F.3d at 1145; *see Janny*, 2021 WL 3439009, at *17.

Beyond intentional discrimination, the complaint alleged that Sergeant Currington acted with anti-Muslim animus. We recognize that alleging and proving animus are two different things, but if Mr. Ashaheed can prove his allegations, particularly those alleging Sergeant Currington's dismissive attitude, threats, and differential treatment of non-Muslims, a reasonable jury could find religious animus.

Although "[v]iolations of the . . . Free Exercise Clause[] are generally analyzed in terms of strict scrutiny," "where governmental bodies discriminate out of 'animus' against particular religions, such decisions are plainly unconstitutional." *Colo. Christian Univ.*, 534 F.3d at 1260, 1266.[4] After all, government action motivated by religious animus cannot be "narrowly tailored to advance" "a compelling governmental interest." *See Lukumi*, 508 U.S. at 531.

Shrum v. City of Coweta, 449 F.3d 1132 (10th Cir. 2006), provides helpful comparison and support for the foregoing analysis. Officer Rex Shrum sued Chief of Police Derrick Palmer after being forced out of the Coweta Police Department. *Id.* at 1134-35. Officer Shrum, who served as a minister outside of work, presented evidence on summary judgment that Chief Palmer had rearranged his work schedule to conflict

[4] Similarly, in *Masterpiece Cakeshop*, the Supreme Court—after finding that executive conduct by the Colorado Civil Rights Commission was hostile to religion—invalidated the Commission's rulings without a strict scrutiny analysis. 138 S. Ct. at 1731-32; *see id.* at 1734 (Gorsuch, J., concurring) (explaining that the "judgmental dismissal of a sincerely held religious belief . . . cannot begin to satisfy strict scrutiny"); Leslie Kendrick & Micah Schwartzman, *The Etiquette of Animus*, 132 Harv. L. Rev. 133, 152-53 (2019) (observing that after finding hostility against religion, the *Masterpiece Cakeshop* Court did not perform a strict scrutiny analysis, "[p]erhaps . . . because acting with religious animus can never be justified").

with his ministerial duties and had refused to allow him to trade shifts with another officer to resolve the conflict. *Id.* at 1135-36, 1140, 1144.

The district court found a constitutional violation. *Id.* at 1139-40. Chief Palmer disagreed because the collective bargaining agreement ("CBA") permitted the shift assignments. *Id.* at 1143-45. But we said the evidence showed "that the decision was not merely a neutral application of the [CBA's provisions]." *Id.* at 1144. Chief Palmer also argued he did not act out of religious prejudice, but rather pursued "an entirely secular end: [He] wanted to force Officer Shrum out, and making him choose between his duties as a police officer and his duties as a minister was the method at hand." *Id.* But we said "the Free Exercise Clause is not limited to acts motivated by overt religious hostility or prejudice." *Id.*; *see Hassan*, 804 F.3d at 309.[5]

Sergeant Currington's alleged conduct went much further than Chief Palmer's. He acted not only counter to Center policy, but also—unlike Chief Palmer—out of "overt religious hostility or prejudice." *See Shrum*, 449 F.3d at 1144. *Shrum* thus underscores that Mr. Ashaheed pled a constitutional violation.

Sergeant Currington's counterarguments are unpersuasive.

First, he argues a jury could infer he forced Mr. Ashaheed to shave his beard because he was mistaken about the Center's religious exemption policy. *See* Aplee. Br. at 23-24, 29-31. But we are required to draw inferences in favor of Mr. Ashaheed at this

[5] *See also* Laurence H. Tribe, *American Constitutional Law* §§ 5-16, at 956 (3d ed. 2000) ("[A] law that is not neutral or that is not generally applicable can violate the Free Exercise Clause without regard to the motives of those who enacted the measure.").

juncture, and the allegations support an inference of intentional discrimination motivated by animus.

Second, he relies on *Holt v. Hobbes*, 574 U.S. 352, 365-66 (2015), where the Supreme Court held that "prisons have a compelling interest in the quick and reliable identification of prisoners, and . . . acknowledge[d] that any alteration in a prisoner's appearance, such as by shaving a beard, might . . . have at least some effect on the ability of guards or others to make a quick identification." Sergeant Currington suggests his actions furthered such an interest. *See* Aplee. Br. at 34-36. But the Center's religious exemption policy effectively determined that any interest it had in requiring prisoners to shave did not justify restricting the free exercise rights of prisoners who wear beards for religious reasons. Sergeant Currington does not explain how his violating that policy could serve a compelling state interest. Also, Mr. Ashaheed's plausible allegations of animus make Sergeant Currington's actions "plainly unconstitutional." *Colo. Christian Univ.*, 534 F.3d at 1260.

Sergeant Currington violated the Center's rules and burdened Mr. Ashaheed's religious exercise. As alleged, he engaged in intentional religious discrimination with anti-Muslim animus. His conduct went beyond the free exercise violation we found in *Shrum*. The SAC pled a constitutional violation.

b. *Clearly established law*

Mr. Ashaheed argues the district court erred when it held that any violation of his free exercise right was not clearly established. Sergeant Currington contends the court correctly granted him qualified immunity because there was no factually similar or

identical Supreme Court or Tenth Circuit case to this one. We agree with Mr. Ashaheed. The constitutional violation alleged here was clear beyond debate.

i. Legal background

"A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (quotations omitted). "A Supreme Court or Tenth Circuit decision on point or the weight of authority from other courts can clearly establish a right." *A.N. ex rel. Ponder v. Syling*, 928 F.3d 1191, 1197 (10th Cir. 2019) (quotations omitted). "The dispositive question in all cases is whether 'the violative nature' of the particular conduct at issue is clearly established." *A.N.*, 928 F.3d at 1197 (quoting *Mullenix*, 136 S. Ct. at 308).

The Supreme Court has said that "the clearly established right" for a qualified immunity analysis "must be defined with specificity." *City of Escondido v. Emmons*, 139 S. Ct. 500, 503 (2019) (per curiam). But it has said that "a case directly on point" is not necessary if "existing precedent [has] placed the statutory or constitutional question beyond debate." *White v. Pauly*, 137 S. Ct. 548, 551 (2017) (per curiam) (quotations omitted); *see Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018) (per curiam). Also, "general statements of the law" are "not inherently incapable of giving fair and clear warning to officers," *see White*, 137 S. Ct. at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)), as long as the "unlawfulness" of an action is "apparent," *id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)).

A general rule can serve as clearly established law when it states "the contours of [a] constitutional transgression" in a "well[-]defined" or "well-marked" manner without leaving a "vaguely-defined legal border." *Janny*, 2021 WL 3439009, at *22.[6] For example, we have said it was clearly established that:

- When a prison official uses excessive force "maliciously and sadistically for the very purpose of causing harm," the use of force violates a prisoner's Eighth Amendment right to be free from cruel and unusual punishment. *DeSpain v. Uphoff*, 264 F.3d 965, 978-80 (10th Cir. 2001) (quotations omitted).

- Officers' "knowing or reckless use of a false confession would violate the Fourth Amendment." *Sanchez v. Hartley*, 810 F.3d 750, 759 (10th Cir. 2016).

- Under the Equal Protection Clause, officers cannot deny citizens police protection because of their race or national origin. *Gamel-Medler v. Almaguer*, 835 F. App'x 354 (10th Cir. 2020) (unpublished) (cited for persuasive value under Fed. R. App. P. 32.1; 10th Cir. R. 32.1(A)).[7]

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[6] By contrast, some constitutional transgressions "cannot be reduced to a neat set of legal rules," *District of Columbia v. Wesby*, 138 S. Ct. 577, 590 (2018) (quotations omitted), particularly when determining whether there is a constitutional violation is a fact-intensive inquiry that requires resolving "relevant ambiguities," *see Colbruno v. Kessler*, 928 F.3d 1155, 1165 (10th Cir. 2019).

For example, the Supreme Court has said that "specificity is especially important in the Fourth Amendment [excessive force] context," where "it is sometimes difficult for an officer to determine how the relevant legal doctrine . . . will apply to the factual situation the officer confronts." *Mullenix*, 136 S. Ct. at 308 (quotations and alteration omitted); *see Wesby*, 138 S. Ct. at 590 (similar principle for Fourth Amendment probable cause determinations); *Redmond v. Crowther*, 882 F.3d 927, 938-39 (10th Cir. 2018) (similar principle for Eighth Amendment excessive force). This is especially so when "police officers are . . . forced to make split-second judgments . . . about the amount of force that is necessary." *Kisela*, 138 S. Ct. at 1152 (quotations omitted).

[7] The panel said, "[I]t cannot be argued that a reasonable officer would not be aware such conduct is at odds with the Constitution's guarantee of equal protection. . . . Because [the plaintiff] must prove purposeful (i.e., intentional) discrimination to state a viable claim, the need for a factually symmetrical case to put Defendants on notice their

- Under the Equal Protection Clause, we "prohibit[] intentional, arbitrary and unequal treatment of similarly situated individuals under the law." *A.N.*, 928 F.3d at 1198 ("This rule is not too general to define clearly established law because the unlawfulness of Defendants' conduct follows immediately from the conclusion that this general rule exists and is clearly established." (quotations and alteration omitted)).

- "A state actor violates the Free Exercise Clause by coercing or compelling participation in religious activity against one's expressly stated beliefs." *Janny*, 2021 WL 3439009, at *22.[8]

The circumstances of each qualified immunity case remain relevant to whether a reasonable officer would be on notice that conduct is unconstitutional. But, as this listing of cases shows, "'[g]eneral statements of the law' can clearly establish a right for qualified immunity purposes if they apply with obvious clarity to the specific conduct in question." *Halley v. Huckaby*, 902 F.3d 1136, 1149 (10th Cir. 2018) (quotations omitted).

The Supreme Court also has said that courts may find a violation of a clearly established law when a defendant's conduct is so obviously unlawful that factually similar or identical precedent is unneeded. For example, in *Taylor v. Riojas*, 141 S. Ct. 52, 53 (2020) (per curiam), the Court addressed an Eighth Amendment claim challenging conditions of confinement. Despite the lack of factually identical or similar precedent,

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conduct violates the law is reduced." *Gamel-Medler*, 835 F. App'x at 357 n.7 (citing *Ramirez v. Dep't of Corrs.*, 222 F.3d 1238, 1243-44 (10th Cir. 2000)).

[8] As cases on this list demonstrate, we have accepted general statements of law as clearly established when the unlawfulness of an action "depends on the actors' unconstitutional motive." *See Crawford-El v. Britton*, 523 U.S. 574, 581-82 (1998) (quotations omitted). The SAC here alleged animus-based intentional discrimination.

the Court rejected qualified immunity for the defendant, reasoning that given "the particularly egregious facts" and "extreme circumstances" of Mr. Taylor's case, "any reasonable officer should have realized that Taylor's conditions of confinement offended the Constitution." *Id*. at 53-54.[9]

ii. Application

When Sergeant Currington ignored the Center's religious exemption and forced Mr. Ashaheed to shave his beard, he violated clearly established law.

[9] Cases from this court finding a violation of clearly established law along similar lines include:

- *Cortez v. McCauley*, 478 F.3d 1108, 1118-19 (10th Cir. 2007) (en banc) – We held that "[e]ven without prior case law on point," reasonable officers should be "on reasonable notice" that "unsubstantiated double-hearsay originating from a two-year-old, standing alone, does not give rise to probable cause" justifying a seizure.

- *Casey v. City of Federal Heights*, 509 F.3d 1278, 1281, 1285 (10th Cir. 2007) – We found officers had violated clearly established law by tackling, tasing, knocking to the ground, and beating a plaintiff who had committed a minor misdemeanor "in a particularly harmless manner." The victim had not resisted, attempted to flee, or posed a safety risk. *Id.* at 1281-82.

- *McCoy v. Meyers*, 887 F.3d 1034, 1041, 1052-53 (10th Cir. 2018) – We found officers had violated clearly established law by repeatedly striking and using a carotid restraint against a person who was handcuffed with his arms behind his back, had his feet zip-tied together, was not resisting, and was regaining consciousness. We observed that "[e]ven assuming that our previous cases were not sufficiently particularized to satisfy the ordinary clearly established law standard, ours is the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear even though existing precedent does not address similar circumstances." *Id.* at 1053 (quotations omitted).

We have said "it is clearly established that non-neutral state action imposing a substantial burden on the exercise of religion violates the First Amendment." *Shrum*, 449 F.3d at 1145. As alleged, Sergeant Currington's actions went even further. He not only intentionally discriminated against Mr. Ashaheed's religion, but also did so with animus. And "[w]here governmental bodies discriminate out of 'animus' against particular religions, such decisions are plainly unconstitutional." *Colo. Christian Univ.*, 534 F.3d at 1260; *see Lukumi*, 508 U.S. at 546 ("A law that targets religious conduct for distinctive treatment or advances legitimate governmental interests only against conduct with a religious motivation will survive strict scrutiny only in rare cases.").[10]

The foregoing free exercise law precepts were not too general to provide fair warning to a reasonable officer in Sergeant Currington's position. He did not have to resolve "relevant ambiguities." *See Colbruno*, 928 F.3d at 1165. It was not difficult for him "to determine how" these rules "appl[ied] to the factual situation [he] confront[ed]." *See Mullenix*, 136 S. Ct. at 308 (quotations omitted). As the cases listed earlier show, defining clearly established law at this level of generality is not unusual when the unlawfulness of an action "depends on the actors' unconstitutional motive." *See Crawford-El*, 523 U.S. at 581-82 (quotations omitted). Anti-Muslim animus is plainly an unconstitutional motive. Sergeant Currington's alleged actions and intent also present

[10] In this analysis, "[o]ur review is not limited to the opinions cited by [Mr. Ashaheed]." *Williams v. Hansen*, --- F.4th ----, 2021 WL 3116955, at *2 (10th Cir. July 21, 2021).

"the rare obvious case, where the unlawfulness of the officer's conduct is sufficiently clear." *McCoy*, 887 F.3d at 1053 (quotations omitted).

Finally, a reasonable jury could find that the free exercise violation alleged here went further than the one in *Shrum*. There, even though the defendant's personnel actions did not violate the CBA and the plaintiff did not allege religious prejudice, we still found the "constitutional violation was clearly established." *Shrum*, 449 F.3d at 1145. Here, Mr. Ashaheed alleged a policy violation and religious prejudice, placing the "constitutional question" even further "beyond debate." *White*, 137 S. Ct. at 551.

The applicable law provided Sergeant Currington with unambiguous "fair and clear warning." *Id.* at 552 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). The unlawfulness of his conduct was "apparent." *Anderson*, 483 U.S. at 640. Under the allegations in the SAC, Sergeant Currington committed a violation of clearly established Free Exercise Clause law.

B. ***Equal Protection Clause Claim***

The district court held Mr. Ashaheed had failed to state an equal protection claim. We disagree.[11]

[11] We recognize that Mr. Ashaheed's free exercise and equal protection claims for intentional religious discrimination largely overlap. *See Ashcroft v. Iqbal*, 556 U.S. 662, 675-77 (2009) (describing a religious discrimination *Bivens* claim brought by a federal pretrial detainee as alleging a violation of "the First and Fifth Amendments," and proceeding to treat it as a single claim); *Morris Cnty. Bd. of Chosen Freeholders v. Freedom from Religion Found.*, 139 S. Ct. 909, 909 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari) ("governmental discrimination against religion . . . violates the Free Exercise Clause and the Equal Protection Clause"); *Colo. Christian Univ.*, 534 F.3d at 1266-67 (observing that religious discrimination claims can arise under the Free Exercise Clause or Equal Protection Clause); *Fields v. City of Tulsa*, 753

"We review de novo a district court's decision to grant a motion to dismiss for failure to state a claim. We accept all well-pleaded factual allegations in the complaint as true, and we view them in the light most favorable to the nonmoving party." *Sinclair Wyo. Refin. Co. v. A & B Builders, Ltd.*, 989 F.3d 747, 765 (10th Cir. 2021) (citation, quotations, and alterations omitted). "A complaint must allege facts sufficient to state a plausible claim for relief on its face." *Id.* "[A] plaintiff must plead 'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Acosta v. Jani-King of Okla., Inc.*, 905 F.3d 1156, 1158 (10th Cir. 2018) (quoting *Iqbal*, 556 U.S. at 678).

1. **Legal Background**

"The Equal Protection Clause of the Fourteenth Amendment provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.'" *A.N.*, 928 F.3d at 1196 (quoting U.S. Const. amend. XIV, § 1). This is "essentially a direction that all persons similarly situated should be treated alike." *A.M. ex rel. F.M. v. Holmes*, 830 F.3d 1123, 1166 (10th Cir. 2016) (quotations omitted).

An equal protection claim may challenge legislation or the conduct of individual state actors. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 130-31 (1994); *Home Tel.*

F.3d 1000, 1012 (10th Cir. 2014) (holding that religious discrimination claims under the Free Exercise Clause and Equal Protection Clause were duplicative); *see also Eulitt ex rel. Eulitt v. Maine*, 386 F.3d 344, 354 (1st Cir. 2004) (arguing that *Locke v. Davey*, 540 U.S. 721, 720 n.3 (2004), held that separate free exercise and equal protection analyses were unneeded in religious discrimination cases). We nonetheless address the equal protection claim here because it was dismissed on a different ground than the free exercise claim.

& Tel. Co. v. City of L.A., 227 U.S. 278, 287-88 (1913). It "may be asserted with respect to a group or a 'class of one.'" *A.N.*, 928 F.3d at 1196 (quoting *A.M.*, 830 F.3d at 1166).[12] The former is more common and concerns a "governmental classification[] that affect[s] some groups of citizens differently than others." *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 601 (2008) (quotations omitted). One "who alleges [such] an equal protection violation has the burden of proving the existence of purposeful discrimination" causing an adverse effect. *McCleskey v. Kemp,* 481 U.S. 279, 292 (1987) (quotations omitted); *see Washington v. Davis*, 426 U.S. 229, 238-40 (1976); *Roe ex rel. Roe v. Keady*, 329 F.3d 1188, 1191-93 (10th Cir. 2003).

Discriminatory intent can be proved directly or circumstantially. *See SECSYS, LLC v. Vigil*, 666 F.3d 678, 686 (10th Cir. 2012) (opinion of Gorsuch, J., with Brorby, J., and Murphy, J., concurring in the result). Direct proof is showing that "a distinction between groups of persons appears on the face of a state law or action." *Id.* at 685. Circumstantial proof is showing that the plaintiff was treated differently from similarly situated persons who are "alike in all relevant respects." *Requena v. Roberts*, 893 F.3d 1195, 1210 (10th Cir. 2018) (quotations omitted). As the Supreme Court said in *Washington v. Davis*, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts." 426 U.S. at 242.

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[12] "The paradigmatic 'class of one' case, . . . sensibly conceived, is one in which a public official, with no conceivable basis for his action other than spite or some other improper motive (improper because unrelated to his public duties), comes down hard on a hapless private citizen." *Jicarilla Apache Nation v. Rio Arriba Cnty.*, 440 F.3d 1202, 1209 (10th Cir. 2006) (quotations omitted); *see A.M.*, 830 F.3d at 1166-67.

Once a plaintiff shows discriminatory intent and an adverse effect, a court reviews the government action under the appropriate level of scrutiny. *See Free the Nipple-Fort Collins v. City of Fort Collins*, 916 F.3d 792, 798-99 (10th Cir. 2019). When, as here, a claim involves a suspect classification or a deprivation of a fundamental right such as free exercise of religion, strict scrutiny applies. *See Fisher v. Univ. of Tex. at Austin*, 570 U.S. 297, 310 (2013); *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1210 (10th Cir. 2002). When a claim implicates a quasi-suspect classification, intermediate scrutiny applies. *See Price-Cornelison v. Brooks*, 524 F.3d 1103, 1109-10 (10th Cir. 2008). Otherwise, rational-basis scrutiny applies. *See Romer v. Evans*, 517 U.S. 620, 631 (1996); *Dalton v. Reynolds*, 2 F.4th 1300, 2021 WL 2641859, at *5 (10th Cir. June 28, 2021).

2. **Analysis**

Mr. Ashaheed sufficiently stated a group-based equal protection claim.[13] The SAC adequately alleged that Sergeant Currington harmed Mr. Ashaheed, with discriminatory intent against Muslims. Mr. Ashaheed averred that Sergeant Currington treated him differently from similarly situated non-Muslim prisoners who were allowed to benefit from a prison policy allowing them to keep religious items. Sergeant Currington's purported excuse as to why he thought Mr. Ashaheed was not entitled to an

[13] Mr. Ashaheed alleged that he was entitled to an exemption and that Sergeant Currington denied the exemption because Mr. Ashaheed is "a member of a discrete minority of Muslim inmates" and "because of his sincerely held religious beliefs." App. at 211. The claim is group-based because it "is based on [his] membership in an identifiable group." *Teigen v. Renfrow*, 511 F.3d 1072, 1083 n.6 (10th Cir. 2007).

exemption and his dismissive, threatening attitude also support an inference of discriminatory intent.

Mr. Ashaheed's equal protection claim triggers strict scrutiny because it alleged (1) a deprivation of free exercise, a fundamental right, *Cantwell*, 310 U.S. at 303; *see Fields*, 753 F.3d at 1012; and (2) a religious classification, which is suspect, *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010). Sergeant Currington bears the burden of proof on strict scrutiny, *see Fisher*, 570 U.S. at 310, under which "discrimination can be justified only if it is narrowly tailored to achieve a compelling state interest," *Colo. Christian Univ.*, 534 F.3d at 1266. Nothing in the SAC suggests Sergeant Currington can meet this burden, and he has not attempted to argue otherwise.

Sergeant Currington contends the non-Muslim prisoners referred to in the SAC were not similarly situated because they benefited from a policy allowing them to keep personal religious items, as opposed to beards. We find this distinction immaterial. In the equal protection context, a person is similarly situated to others if they are alike in "all relevant respects"—not all respects. *See Requena*, 893 F.3d at 1210 (quotations omitted).[14] We do not find a meaningful distinction between a prisoner who invokes a policy-based religious exemption to a beard-shaving requirement and prisoners who seek

[14] *See also Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 8 (1st Cir. 2001) ("[T]he test is whether a prudent person . . . would think [of the persons as] roughly equivalent . . . . [T]he 'relevant aspects' are those factual elements which determine whether reasoned analogy supports, or demands, a like result. Exact correlation is neither likely nor necessary, but the cases must be fair congeners." (quotations omitted)).

to keep religious items under a policy. Mr. Ashaheed's burden is to allege facts that "nudge [his] claims across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Mr. Ashaheed has more than met that burden.

Sergeant Currington also argues Mr. Ashaheed has not alleged more than "intent as volition or intent as awareness of consequences." Aplee. Br. at 20 (quoting *Iqbal*, 556 U.S. at 676). But as we have discussed, Mr. Ashaheed has alleged facts from which a reasonable jury could infer that Sergeant Currington acted because Mr. Ashaheed is Muslim.

For these reasons, Mr. Ashaheed has adequately alleged a group-based equal protection claim.[15]

III. **CONCLUSION**

We reverse and remand.

[15] Sergeant Currington urges us to affirm the district court's dismissal of Mr. Ashaheed's equal protection claim on the alternative ground that he is entitled to qualified immunity. Although the district court addressed qualified immunity on the free exercise claim (albeit only as to the second element), the court did not address qualified immunity on the equal protection claim. We therefore decline to reach this issue. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below.").