**NONPRECEDENTIAL DISPOSITION**
To be cited only in accordance with FED. R. APP. P. 32.1

# United States Court of Appeals

**For the Seventh Circuit**
**Chicago, Illinois 60604**

Submitted December 21, 2022*
Decided March 2, 2023

**Before**

ILANA DIAMOND ROVNER, *Circuit Judge*

MICHAEL Y. SCUDDER, *Circuit Judge*

AMY J. ST. EVE, *Circuit Judge*

No. 21-2154

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| JEREMY T. GREENE, *Plaintiff-Appellant*, | Appeal from the United States District Court for the Western District of Wisconsin. |
| *v.* | No. 18-cv-116 |
| MARK TESLIK, et al., *Defendants-Appellees*. | William M. Conley, *Judge*. |

**O R D E R**

Jeremy Greene, a Protestant prisoner in Wisconsin, contends that his warden and other staff violated federal law and his First Amendment rights by denying his requests for prayer oil, while providing the same oil to Muslim and Pagan prisoners. The district court entered summary judgment for the defendants, relying on the doctrine of

* We have agreed to decide the case without oral argument because the briefs and record adequately present the facts and legal arguments, and oral argument would not significantly aid the court. FED. R. APP. P. 34(a)(2)(C).

qualified immunity and concluding that the law did not clearly establish at the time Greene requested the oil that this differential treatment was unconstitutional. We agree with most but not all of the district court's reasoning and thus affirm in part and vacate in part.

**I**

A

Relaying the facts in the light most favorable to Greene, the nonmovant at summary judgment, see *Thomas v. Martija*, 991 F.3d 763, 767 (7th Cir. 2021), we begin with the religious-item policies of the Wisconsin Department of Corrections. The Department allows prisoners to possess certain items for religious use based on the prisoner's self-designated religious group. The policy in effect at the time identified seven groups: Catholic, Eastern Religion, Islamic, Jewish, Native American, Pagan, and Protestant. When staff at the Columbia Correctional Institution denied Greene's request for prayer oil in 2013, the Department maintained a chart listing those items preapproved for members of each group to possess for personal religious use. The policy allowed Muslim and Pagan prisoners to possess scented oils but did not afford the same accommodation to prisoners of any other religious groups, including Protestants. Department policy also created a process for evaluating requests from prisoners for religious items not preapproved for their religious group.

Greene tried in 2013 to buy some frankincense-scented oil from the Columbia commissary. He wanted it "for use as prayer oil/anointing oil, because it's something that I use as a Christian." A commissary officer refused to sell the oil to Greene because the Department's policy did not allow Protestants to possess scented oils for personal religious use. Greene responded by informally seeking approval from the prison's chaplain, Mark Teslik, supporting his request with citations to passages in the Bible. Chaplain Teslik likewise pointed to the policy and denied the request. A supervisor agreed with Chaplain Teslik's decision.

Greene then filed a formal grievance. A complaint examiner recommended dismissing the grievance based on the Department's policy. Warden Michael Meisner reviewed and dismissed the grievance, and upon appeal, another examiner urged dismissal for a different reason—Greene had not exhausted his administrative remedies. The examiner noted that, to request approval to obtain property for personal religious use that is not on the Department's preapproved list, Greene had to submit a specific form for that purpose. Because Greene had failed to use the proper paperwork, a Department administrator dismissed his administrative appeal.

Greene reacted by submitting the proper form and asking Chaplain Teslik that "all Christians [] be allowed to purchase the same 'religious oils' that Muslim/Pagan inmates [we]re allowed to purchase." Greene stated that Christians use these oils "to heal from sickness, consecrate items/areas/oneself before God," and fast. Chaplain Teslik recommended denying the request because, in his view, Protestants use the oils for "hygienic practice not a ritualistic practice." His supervisor, Melissa Schueler, agreed.

Greene's request then went to the religious-practices committee, which reviews supervisors' recommendations for prisoners' religious-items requests. The committee's coordinator, Kelli Willard-West, also recommended denial based on the Department's policy. West observed not only that the Department developed the policy "with consultation from Protestant [] spiritual advisors," but also that Greene gave "no indication that fragranced oil is required or holds spiritual properties for his personal beliefs and practices." She suggested that, instead of using fragranced oil, Greene consider using baby oil as a substitute, if consistent with prison security considerations. Warden Meisner, as final decision maker, accepted the recommendation and denied Greene's request. Greene appealed Warden Meisner's decision, and after another round of reviews, a Department administrator upheld the warden's decision, ending the appeals in late 2013.

Three years later, the Department changed its policy. Any prisoner may now use prayer oil with frankincense (among other scents). But all indications are that Greene has not sought to buy prayer oil since then. Indeed, he states that he never learned of the new policy until summary judgment.

B

Greene then turned to federal court for relief. He sued the Department's staff involved in rejecting his requests for access to scented oils, contending that, by rejecting him and other Christians the prayer oils allowed to Muslims and Pagans, the defendants violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), see 42 U.S.C. § 2000cc-1, and his rights under the First Amendment, see *id*. §§ 1983, 1985, 1986.

The district court dismissed the claims under § 1985 and § 1986 because the named defendants were part of the same agency and could not have unlawfully conspired. The court also denied Greene's request for recruited counsel, reasoning that his filings showed that he understood the facts and applicable law, demonstrated diligence, and therefore was capable of litigating the case.

Following discovery, the defendants moved for summary judgment. They contended that Greene's RLUIPA claims were moot because the statute permitted only injunctive relief and the Department's new policy affords Greene access to the oils he seeks for personal religious use. For the constitutional claims, the defendants primarily argued that they limited the use of prayer oils for security reasons: the proliferation of the scented oils could mask contraband, spark a fire, and cause slips or medical problems. And, the defendants added, based on the general absence of the ritualistic use of prayer oils among most Christians, denying them the oils did not substantially burden their religious practices.

The district court determined that the RLUIPA claims were indeed moot and therefore proceeded to assess Greene's constitutional claims under § 1983 and qualified immunity. It acknowledged that Greene raised a triable question on whether his religious practices were substantially burdened by the denial of scented oil. But the defendants' security rationales, the district court reasoned, outweighed his rights. The security concerns justified the ban because the high number of Christians in the Department's custody could provide a permissible secular justification for favoring some religions over others. Because, in the district court's view, no case had resolved that question, the doctrine of qualified immunity shielded the defendants from liability.

**II**

A

On appeal Greene first argues that his RLUIPA claim is not moot because he seeks injunctive relief to receive natural (not scented) oil, which is still not available at his prison. RLUIPA authorizes only injunctive relief against state officials, see *Sossamon v. Texas*, 563 U.S. 277, 288 (2011); *Grayson v. Schuler*, 666 F.3d 450, 451 (7th Cir. 2012), and the only request for such relief that Greene made in the district court (and exhausted administratively, as 42 U.S.C. § 1997e(a) requires) was for the same scented prayer oils that other prisoners received. Greene does not deny that he now has access to those oils (and has had access since 2016 though he never ordered them). Nor does he argue that the defendants are likely to rescind access. See *EEOC v. Flambeau, Inc.*, 846 F.3d 941, 949 (7th Cir. 2017). On these facts, his request for an injunction is moot.

B

Greene next contends that, by denying his request in 2013 for the same prayer oil allowed to Muslims and Pagans, the defendants violated his rights under the Free Exercise Clause of the First Amendment. This constitutional provision protects

prisoners from substantial burdens to their religious practices that are not rationally justified by a legitimate penological interest. *Thompson v. Holm*, 809 F.3d 376, 379 (7th Cir. 2016). But we need not answer whether Greene was substantially or unjustifiably burdened when the defendants denied him prayer oil because we agree with the district court that the doctrine of qualified immunity prevents liability on the Free Exercise Clause claim.

To counter the defense of qualified immunity, a plaintiff must show that the constitutional right at issue was "clearly established" at the time of the alleged violation. *Kemp v. Liebel*, 877 F.3d 346, 351 (7th Cir. 2017). In 2013, a "substantial burden" under the Free Exercise Clause was a particular one that made practicing faith "effectively impracticable." *Eagle Cove Camp & Conference Ctr., Inc. v. Woodboro*, 734 F.3d 673, 680, 682 (7th Cir. 2013), *abrogated by Schlemm v. Wall*, 784 F.3d 362, 364 (7th Cir. 2015). Greene cites no case (nor can we find one) clearly establishing that denying access to a prayer accessory akin to a scented oil makes the practice of religion effectively impracticable. Qualified immunity was therefore appropriate. See *Kemp*, 877 F.3d at 353 (ruling that qualified immunity was proper because plaintiffs cited no cases holding that denying a person access to "congregate worship or study" violates the Free Exercise Clause).

C

Greene also claims that the defendants violated the Establishment Clause of the First Amendment. The Establishment Clause "prohibits the government from favoring one religion over another without a legitimate secular reason." *Kaufman v. McCaughtry* (*Kaufman I*), 419 F.3d 678, 683 (7th Cir. 2005). "Prisons cannot discriminate against a particular religion 'except to the extent required by the exigencies of prison administration.'" *Maddox v. Love*, 655 F.3d 709, 719–20 (7th Cir. 2011) (citation omitted).

The defendants do not dispute that their rules regarding prayer oils favored the faiths of Muslim and Pagan prisoners over others, but they argue that the discrimination was lawful because they feared that if Christians, with their sizable adherents, were allowed prayer oils, this might have created security concerns that would not arise when only Muslims and Pagans, with fewer numbers, use them. But this defense requires a factual inquiry into how many Christians wanted to use prayer oils then. See *Schlemm*, 784 F.3d at 365–66. In another case of religious liberty in Wisconsin's prisons, we rejected as unsubstantiated at summary judgment a similar fear that, in granting one prisoner access to a desired religious item, the prison would receive similar demands from other prisoners, yielding "crippling" results. *Id.* at 365. As

we underscored in *Schlemm*, the prison must estimate "the costs of accommodating other inmates' requests (should any be made)" for the religious item. *Id.* at 366.

To this point in the litigation, the defendants have made only unsupported assertions that the oil poses a safety risk as it relates to masked contraband, fires, slips, and illnesses. The defendants do not estimate how many (if any) other Christians in 2013 might have requested scented oil for religious uses. The chaplain's view—that such use by Christian prisoners is atypical—suggests that the answer is very few, which cuts against the institution's safety concern.

Furthermore, if oil were truly dangerous, as the defendants renew on appeal, we would expect to see a categorical ban of all forms of oil. Yet the defendants freely admit that all prisoners have access to baby oil, which itself contains a distinct scent. Of course, prisoners who abuse their ability to possess prayer oil could justifiably lose their access to it. But on this record, the defendants have not demonstrated that small amounts of oil pose a large risk that necessitated denying prayer oil to people of some faiths and not others. Because the defendants did not come forward with anything more than unsupported assertions that allowing Christian prisoners like Greene to possess prayer oil posed a safety risk, the reality of that risk cannot be resolved at summary judgment. See *id.* at 365–66.

The defendants' other contentions lack merit. They posit that most Protestants typically use scented oils for "hygiene," not worship, and thus that the "[Department] believed prayer oil was not essential for Greene." That is not a valid defense against Greene's Establishment Clause claim. "Religious belief must be sincere to be protected by the First Amendment, but it does not have to be orthodox." *Grayson*, 666 F.3d at 454. And the defendants do not contest that Greene sincerely wanted the scented oil, as he says, "to heal from sickness" and "consecrate items … before God." The defendants also argue that "caselaw required [prayer oil] be made available to Muslim and Pagan inmates." That may be true, but the caselaw also holds that if an item is permissible for Muslims and Pagans to use for religious purposes, it ought to be permissible for Christians too. See *id.* at 455; *Kaufman I*, 419 F.3d at 683.

We come then to the defendants' invocation of qualified immunity. As they did in responding to the Free Exercise claim, the defendants contend that in 2013 it was not clearly established that, by denying Greene prayer oil, they would substantially burden his religion. See *Mullenix v. Luna*, 577 U.S. 7, 11 (2015). But that is not the right inquiry under the Establishment Clause. It has long been clearly established that "the Establishment Clause may be violated even without a substantial burden on religious practice." *Kaufman v. Pugh*, 733 F.3d 692, 696 (7th Cir. 2013) (citing *Kaufman I*, 419 F.3d at

683). It thus "could not reasonably be thought constitutional," *Grayson*, 666 F.3d at 455, for prison staff to treat prisoners differently based on their religion—unless they present evidence that Greene was insincere or a security threat. See *id.* (rejecting qualified-immunity defense where that evidence was lacking). The defendants did not do so.

**III**

We close by resolving a few procedural matters.

Greene attempts to revive his conspiracy claims under § 1985 and § 1986. He insists that the intra-corporate-conspiracy doctrine, which provides that no unlawful conspiracy occurs when agents of the same legal entity make agreements in their official capacities, does not apply here. *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1867–68 (2017). Greene is mistaken: The rule applies to claims against "large bureaucratic agencies" like the Department, including in the § 1985 context. See *Wright v. Ill. Dep't of Child. & Fam. Servs.*, 40 F.3d 1492, 1508 (7th Cir. 1994). The same applies to claims under § 1986, which are derivative of claims under § 1985. See *Ennin v. CNH Indus. Am., LLC*, 878 F.3d 590, 597 (7th Cir. 2017).

Next, Greene argues that the district court abused its discretion by denying his motions for the appointment of counsel. But in the pretrial phase of the case, the rulings were reasonable because Greene competently litigated it, understood the applicable legal standards, had sufficient access to legal resources, and could research and prepare filings. See *Pruitt v. Mote*, 503 F.3d 647, 654 (7th Cir. 2007) (en banc).

Finally, we observe that the remand is narrow, despite the shortcomings of the record we just described. First, the remand is limited to only the defendants responsible for rejecting Greene's request that, as a Protestant, he be allowed prayer oil on the same terms as Muslims and Pagans. See *Gonzalez v. McHenry County*, 40 F.4th 824, 828 (7th Cir. 2022). Those are Chaplain Teslik, his supervisor Melissa Schueler, the coordinator of the religious-practices committee Kelli Willard-West, and Warden Meisner. They had the authority to support or accept Greene's request, and each of them refused his request. But the defendants who handled Greene's appeals and grievances cannot be found liable because generally "[r]uling against a prisoner on an administrative complaint does not cause or contribute to the violation." *George v. Smith*, 507 F.3d 605, 609 (7th Cir. 2007).

Second, any potential recovery is limited to nominal damages only. Under 42 U.S.C. § 1997e(e), Greene may not recover compensatory damages for emotional or mental injuries from a constitutional violation unless a physical injury also occurred,

*Calhoun v. DeTella*, 319 F.3d 936, 941 (7th Cir. 2003), and none is even alleged. Also, nothing in the record suggests that the defendants behaved with the state of mind that would warrant punitive damages. See *Thompson*, 809 F.3d at 381. In addition, because Greene already has access to the prayer oil that he was denied, injunctive relief is unavailable, eliminating any other practical relevance of the proceedings going forward. In these circumstances, the parties have every incentive to come together and resolve this matter expeditiously by settlement.

We AFFIRM the district court's judgment in all respects except that we VACATE the judgment as to Teslik, Schueler, Willard-West, and Meisner on Greene's § 1983 Establishment Clause claim and REMAND for further proceedings consistent with this order.