No.

In the Supreme Court of the United States

HJALMAR RODRIGUEZ, JR., PETITIONER,

v.

EDWARD H. BURNSIDE, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Turner* v. *Safley*, 482 U.S. 78, 89 (1987), this Court held that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." Under *Turner*, "the existence of obvious, easy alternatives" to a challenged prison policy "may be evidence that the regulation is not reasonable." *Id.* at 90. In particular, if a plaintiff "can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interest[s]," the challenged regulation may fail to satisfy the reasonable relationship standard. *Id.* at 91.

The question presented is:

Whether, under *Turner*, a court may only consider proposed alternatives to a challenged policy that would apply on a prison-wide scale, or whether a court may also consider a more narrow alternative that would need only apply to the individual plaintiff.

PARTIES TO THE PROCEEDING

Petitioner, plaintiff in the district court, is Hjalmar Rodriguez, Jr.

Respondents, defendants in the district court, are Edward H. Burnside; Homer Bryson; Bruce Chapman; Eric Sellers; Rodney McCloud; June Bishop; William Powell; Gary Caldwell; Rufus Logan; Frederick Sutton; Pauline Martin; Sharon Lewis; Mary Gore; Lynda Adair; David Butts; Duane Williams; Karen Forts; Darrel Reid; Gregory C. Dozier; Michael Cannon; and Theresa Thornton.

RELATED PROCEEDINGS

United States Court of Appeals for the Eleventh Circuit:

Rodriguez v. *Burnside*, No. 20-11218, 38 F.4th 1324 (11th Cir. June 30, 2022).

United States District Court for the Middle District of Georgia:

Rodriguez v. *Bryson*, No. 5:17-cv-00010 (M.D. Ga. Feb. 25, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Hjalmar Rodriguez, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (App., *infra*, 1a-19a) is reported at 38 F.4th 1324. The opinion of the United States District Court for the Middle District of Georgia (App., *infra*, 23a-26a) is unreported, but available at 2019 WL 13193451. The magistrate judge's report and recommendation (App., *infra*, 27a-102a) is unreported, but available at 2019 WL 13193452.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit issued its opinion on June 30, 2022. On August 24, 2022, that court denied a timely petition for panel rehearing or rehearing en banc. App., *infra*, 20a-22a. On November 2, 2022, Justice Thomas extended the deadline for filing a certiorari petition to and including December 22, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides: "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; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I.

42 U.S.C. § 1983 is set out in the appendix to the petition. App., *infra*, 103a.

INTRODUCTION

In *Turner* v. *Safley*, 482 U.S. 78, 89 (1987), this Court established a framework for considering claims that a prison policy or regulation infringes the constitutional rights of incarcerated persons. In balancing the need to protect fundamental constitutional rights with respect for legitimate concerns of prison administration, this Court recognized that "the existence of obvious, easy alternatives" to a challenged policy "may be evidence that the regulation is not reasonable, but is an exaggerated response to prison concerns." *Id.* at 90. Even where prison officials can articulate a "valid, rational connection" between a challenged regulation and their asserted interests, the regulation may be invalid where an individual "can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interest[s]." *Id.* at 89, 91. For over 30 years, this framework has provided the functional, organizing principle for litigation in the lower courts involving incarcerated persons' constitutional rights.

This case presents critical questions about the proper interpretation of *Turner*, and in particular *Turner*'s continued vitality in setting a constitutional floor against prison policies that constrain the free exercise of religion and other constitutional rights. Petitioner is a devout Muslim man in the custody of the Georgia state prison system. His lawsuit challenges a Georgia prison policy that substantially burdens the exercise of his religious faith by restricting his ability to observe modesty obligations and

certain cleansing rituals that are a prerequisite to offering valid daily prayers. In particular, Georgia has effectively prohibited Petitioner from undertaking the daily *ghusl* cleansing ritual by choosing to house him in a cell without a shower, and then refusing to transport him to shower facilities more than three times per week. Georgia has also required Petitioner to be naked from the waist up when walking to the shower, which violated Petitioner's religious obligation to guard his modesty. In a grievance and subsequent litigation, Petitioner proposed that prison officials house him in one of the available shower-equipped cells—which would have allowed him to undertake his daily religious cleansing ritual, and to avoid modesty concerns associated with shower transport, without interfering with overall prison policies.

Respondents rejected Petitioner's narrow proposed accommodation, and the Eleventh Circuit upheld that approach. To do so, the Eleventh Circuit adopted a novel re-imagination of *Turner* that risks rendering it a dead letter in challenges to prison polices. In particular, the Eleventh Circuit held that *Turner* does not require a prison or court to even *consider* a plaintiff's proposed accommodation, if it would apply only to the individual in question. Rather, in the Eleventh Circuit's outlier view, a *Turner* plaintiff must propose an alternative policy that would apply prison-wide—while also somehow attempting to show that the changed policy would have only *de minimis* effects on prison administration. Remarkably, the Eleventh Circuit excused Respondents from articulating any reason for rejecting the Petitioner's proposed accommodation. And the panel concluded that Respondents

were entitled to qualified immunity, based largely on its flawed reading of *Turner*.

The decision below gets an extraordinarily important question squarely wrong. The Eleventh Circuit has misread this Court's cases and departed from how other circuits have consistently interpreted *Turner*. By excluding individualized accommodations from the *Turner* inquiry altogether, the Eleventh Circuit has stacked the deck against successful *Turner* claims. The decision forces plaintiffs to focus on the very kinds of accommodations (prison-wide changes to policy) that are more likely to burden prison administration and therefore more likely to fail the *Turner* test.

If accepted nationwide, the Eleventh Circuit's ruling would jeopardize the constitutional rights of more than a million imprisoned people. Although Congress enacted statutory protections for religious freedoms in the Religious Land Use and Institutionalized Persons Act, the limitations of that statutory remedy, and the facts of this case, underscore that *Turner* remains a critical bulwark for constitutional rights in the prison context. This Court should grant certiorari and confirm what to date has been a uniform and consistent understanding: that *Turner* allows consideration of individualized, as-applied accommodations no less than prison-wide policy changes. Plenary review is urgently warranted.

STATEMENT

1. Legal Background

"[R]easonable opportunities must be afforded to all prisoners to exercise the religious freedom guaranteed

by the First and Fourteenth Amendment without fear of penalty." *Cruz* v. *Beto*, 405 U.S. 319, 322 n.2 (1972) (per curiam). That rule follows from the bedrock principle that an individual does not forfeit First Amendment protection upon criminal conviction or incarceration. See, *e.g.*, *Bell* v. *Wolfish*, 441 U.S. 520, 545 (1979); *Thornburgh* v. *Abbott,* 490 U.S. 401, 407 (1989). "The continuing guarantee of these substantial rights to prison[ers] is testimony to a belief that the way a society treats those who have transgressed against it is evidence of the essential character of that society." *Hudson* v. *Palmer*, 468 U.S. 517, 523-524 (1984). However, "the Constitution sometimes permits greater restriction of such rights in a prison than it would allow elsewhere," in light of the legitimate penological interests that may be present. *Beard* v. *Banks*, 548 U.S. 521, 528 (2006).

In *Turner* v. *Safley*, this Court established the governing framework for balancing the competing concerns implicated by constitutional challenges to prison policies. A prison policy or practice that restricts constitutional rights must be "reasonably related to legitimate penological interests" and not an "exaggerated response" to those interests. 482 U.S. 78, 87, 89 (1987). Four factors guide the *Turner* inquiry: (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it"; (2) whether "alternative means" of exercising the right "remain open" to people in prison; (3) what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and (4) whether

there are any "obvious, easy alternatives" to the challenged policy, which would suggest that the policy is an "exaggerated response to prison concerns." *Id.* at 89-91. Together, these factors provide a standard of review that is appropriately deferential to the interests of prison administrators, but "not toothless." *Thornburgh*, 490 U.S. at 414 (internal citation omitted). A challenged policy may "fail[]" under the first factor if the "connection between the regulation and the asserted goal is 'arbitrary or irrational.'" *Shaw* v. *Murphy*, 532 U.S. 223, 229-230 (2001) (quoting *Turner*, 482 U.S. at 89-90). And the second, third, and fourth factors underscore that an incarcerated person retains the ability to cast doubt on the interests asserted even where prison officials can articulate a non-arbitrary justification. See *Shaw*, 532 U.S. at 229-230.

Congress has supplemented *Turner*'s constitutional protections in certain areas by directing courts to apply a heightened level of scrutiny to prison policies that burden the religious exercise of institutionalized persons. See Religious Land Use and Institutionalized Persons Act ("RLUIPA"), Pub. L. No. 106-274, 114 Stat. 803 (2000), codified at 42 U.S.C. §§ 2000cc et seq. This statutory protection provides for certain remedies, including injunctive relief. See *Sossamon* v. *Texas*, 563 U.S. 277, 280 (2011) (holding that sovereign immunity bars claims for damages under RLUIPA). But the existence of this statutory remedy does not undermine *Turner*'s continued importance as a constitutional floor for prison policies and practices that burden free exercise rights in prison. See *Beard*, 548 U.S. at 528 (applying *Turner*); *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1894 (2021) (Alito, J.,

concurring in judgment) (noting that RLUIPA is "limited in scope" and "no substitute for a proper interpretation of the Free Exercise Clause").

Courts applying *Turner* follow this Court's direction to "take cognizance of the valid constitutional claims of prison inmates" while also affording deference, in appropriate circumstances, to the experience of prison officials. *Turner*, 482 U.S. at 84-85. This ensures that "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Thornburgh,* 490 U.S. at 407 (quoting *Turner*, 482 U.S. at 84).

2. Factual Background

Petitioner Hjalmar Rodriguez is a devout Sunni Muslim who has identified as such for decades. See App., *infra*, 30a; D. Ct. Doc. 175-3 at 7, 22-24. As required by his faith, Petitioner prays five times per day. App., *infra*, 37a. His faith teaches that whether his prayers are accepted turns on whether he satisfies other requirements; in particular, his prayers are "void" if he fails to perform a cleansing ritual, *ghusl*, daily. *Id.* at 36a-38a. One performs *ghusl* by first completing a shorter cleaning ritual, *wudu*, and then washing each side of the body three times from "head to toe." *Id.* at 37a. The *ghusl* washing requires a "large amount of water" and is therefore typically performed in a shower or bathtub. *Ibid.*

For nearly as long as he has been a practicing Muslim—practically his entire adult life—Petitioner has been held in the custody of the Georgia state prison system. See D. Ct. Doc. 175-3 at 7, 22-24. Petitioner brought this suit to challenge certain policies and

practices used in the Special Management Unit ("SMU") at the Georgia Diagnostic and Classification Prison that prevented him from satisfying his religious obligations. See App., *infra*, 3a-4a.[1]

While other cells in the SMU had in-unit showers, Petitioner was assigned to a cell equipped with a small sink but no shower. App., *infra*, 3a-4a. The sink could not accommodate the amount of water necessary to perform the mandatory *ghusl* ritual; Petitioner could only use the sink to complete the shorter *wudu* washing ritual. *Id.* at 71a. However, "[t]he wudu ritual may not be substituted for the ghusl ritual," and Petitioner was only able to perform *ghusl* when transported to shower facilities by prison officials. *Ibid.* Under the SMU's policies, shower transport was limited to three days per week. *Id.* at 2a-3a. Without daily access to a shower—or other suitable washing facility—Petitioner was unable to perform *ghusl*, rendering his prayers "void." *Id.* at 36a-38a, 71a.

On days when Petitioner was transported to the shower facility, he encountered another burden on his religious obligations. During shower transports, prison officials required incarcerated persons to be naked from the waist up, wearing only shower shoes and underwear. App., *infra*, 3a. Each time Petitioner was made to walk to the shower with his upper body exposed, he was unable to abide by his religious duty to "guard his modesty." *Id.* at 4a, 34a, 68a-69a.

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[1] During the pendency of this litigation, Petitioner was transferred to another facility. App., *infra*, 30a. He remains in the custody of the Georgia state prison system.

3. Procedural Background

In 2016, Petitioner filed a grievance with the prison, raising his concerns about the shower frequency and transport policies. See D. Ct. Doc. 181-18 at 2-3. As an alternative to the restrictive shower policy, he requested that prison officials move him to one of the SMU's available shower-equipped cells. This alternative approach would have avoided both the frequency and modesty concerns associated with the prison's shower transport policy. Petitioner's request was denied without explanation. *Ibid.* He then filed a pro se complaint against prison officials, alleging multiple claims under 42 U.S.C. § 1983 and seeking declaratory, injunctive, and monetary relief. App., *infra*, 4a. As relevant here, Petitioner alleged that Respondents infringed his First and Fourteenth Amendment rights by limiting his shower access and forcing him to violate his religious modesty obligations during the shower transport process. See *id.* at 3a-4a.[2]

In seeking summary judgment, Respondents asserted that the three-showers-per-week policy was in place because ensuring safety and security during transports was "time- and labor-intensive" for corrections officials. See App., *infra,* 8a. They conceded that people assigned to other wings within the SMU "had showers in their cells," and they did not dispute that

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[2] Petitioner also initially alleged violations of RLUIPA. See App., *infra*, 4a. The district court held that these claims were mooted when Petitioner was transferred from the SMU to another facility in 2018. *Id.* at 5a. The transfer did not, however, affect the justiciability of Petitioner's claims for damages under § 1983 based upon the alleged violations of his First Amendment rights. *Id*. at 46a.

housing Petitioner in such a cell would avoid the burdens on his religious exercise. D. Ct. Doc. 175-1 at 5. Respondents did not, however, address Petitioner's request for reassignment to one of those cells or offer any explanation for why they would reject that accommodation. *Ibid*; see also App., *infra*, 11a & n.1, 12a.

A magistrate judge found that Respondents' "refusal to allow [Petitioner] to shower daily substantially burdened his religious exercise." App., *infra*, 71a. The magistrate judge further observed that Petitioner was "religiously obligated to perform the five daily Islamic prayers," but those prayers would be "'void' unless he has performed the ghusl ritual" daily. *Ibid.* "Without daily access to facilities that would allow him to perform ghusl, [Petitioner]'s ability to perform his five daily prayers in the manner mandated by his religion was substantially burdened." *Id.* at 72a.

The magistrate judge concluded, however, that the shower restriction was reasonably related to legitimate security concerns under *Turner*. The magistrate judge reasoned that one alternative approach—leaving Petitioner in his existing cell but transporting him daily to the showers—would require a significant "time and resource expenditure." *Id.* at 72a-73a. Although the magistrate judge acknowledged that there were shower-equipped cells at the SMU, *id.* at 72a n.11, he did not address Petitioner's argument that moving him to one of those cells was a readily available alternative to the prison's shower-transport policy. *Id.* at 72a-73a.

As to Petitioner's modesty concerns, the magistrate judge acknowledged the existence of an established prison policy allowing incarcerated persons to wear a

t-shirt, boxers, and shoes during transport, and found that the prison's practice of departing from that policy for shower transport "imposed a substantial burden on [Petitioner]'s religious exercise." App., *infra*, 35a, 68a-69a. The magistrate judge ultimately upheld that practice, however, under *Turner*.

The district court adopted the magistrate judge's report and recommendation, in pertinent part, over Petitioner's timely objections. App., *infra*, 23a-26a.

After appointing counsel for the first time in this litigation, the Eleventh Circuit affirmed the district court's judgment. App., *infra*, 2a. Petitioner argued that under *Turner*, prison officials had failed to demonstrate that their restrictive shower-transport policy and their practice of housing Petitioner in a showerless cell served any legitimate penological purpose. Appellant's C.A. Br. at 26, 32-33. The Eleventh Circuit acknowledged that under *Turner*, the existence of an "obvious, easy alternative[]" to a challenged prison regulation may suggest that the existing policy is an "exaggerated response" to the stated penological interests. App., *infra*, 7a. The panel also noted Petitioner's proposed alternative of "mov[ing] him to another cell block where the cells contained personal showers."[3] *Id.* at 11a. Although the panel conceded that prison officials "could have" moved him, it rejected this alternative as a purportedly improper

[3] The panel squarely rejected Respondents' suggestion that Petitioner had not preserved this proposed alternative. In the panel's view, Petitioner "sufficiently proposed the daily-shower alternative below, so the officials should have addressed the merits of his argument." App., *infra*, 11a & n.1.

request for "an individual exemption." *Id.* at 11a. In the panel's view, *Turner* requires a plaintiff to identify an alternative policy that "could replace the current one on a prison-wide scale" and prohibits a court from even considering an alternative approach that would only apply on an individual basis. *Id.* at 11a-12a. Under this interpretation of *Turner*, the "fact that the prison could have moved [Petitioner] to a cell where he would not need shower transports," alleviating multiple burdens on his religious exercise without imposing additional obligations on prison resources, did not "suggest that the shower policy itself was irrational" under *Turner*. *Id.* at 11a-12a (citing *Turner*, 482 U.S. at 93). Having decided that Petitioner's individualized alternative was ineligible for consideration under *Turner*, the panel concluded that Respondents need not even "explain their refusal" to move Petitioner to a cell with a shower. *Id.* at 12a.

Relying on this interpretation of *Turner*, the panel also rejected Petitioner's challenge to the prison's transport policy, which burdened his religious modesty obligation by forcing him to walk to the shower naked from the waist up. App., *infra*, 13a-15a. Prison officials justified this policy on the ground that allowing incarcerated persons to wear "full dress" to the showers would increase the risk of hidden contraband. *Id.* at 13a. After reiterating its interpretation of *Turner*—under which a "personal exemption rather than a policy change" could not call into doubt the reasonableness of a prison policy—the panel acknowledged that prison officials could have followed an existing prison policy that would allow Petitioner to wear a t-shirt. *Id.* at 14a. But the panel ultimately

concluded, without further explanation, that it was not "illogical or unreasonable" for prison officials to restrict clothing on the way to the shower, even if they "offer[ed] inmates the comparative dignity and comfort of wearing a shirt" during other activities. *Ibid.*

Finally, the Eleventh Circuit held that even if the prison's shower policies were unconstitutional, Respondents were entitled to qualified immunity. App., *infra*, 15a-16a. The panel rejected Petitioner's argument that the violation was clearly established under *Turner*, again relying on its view that *Turner* does not require justifying or modifying prison policies that burden constitutional rights "to accommodate a prisoner's individual request." *Id.* at 16a (citing *Turner*, 482 U.S. at 90-91).

Petitioner timely sought rehearing en banc, challenging the panel's novel interpretation of *Turner* as requiring a plaintiff to identify a "prison-wide" alternative policy. Petitioner argued that the panel's decision was inconsistent with *Turner* and cases from this Court applying the *Turner* framework. Those decisions contemplate that a plaintiff can prevail on an as-applied challenge under *Turner* that requests an individualized alternative or accommodation to the challenged prison policy. C.A. Reh'g Pet. at 1. The Eleventh Circuit denied rehearing. App., *infra*, 22a.

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's Decision Is Contrary to *Turner* and Its Progeny

Under *Turner*'s four-part framework, a plaintiff may attempt to rebut even a "valid, rational connection" between a challenged policy and a legitimate

penological interest, by pointing to "the existence of obvious, easy alternatives" that do not impinge constitutional rights. 482 U.S. at 89-90. In fact, *Turner* explicitly contemplates that individualized alternatives to challenged policies can properly be part of the constitutional analysis. In particular, this Court explained that "if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights"—"prisoner" in the singular, and using the definite article—"at *de minimis* cost to valid penological interest[s], then the regulation may be unconstitutional." *Id.* at 91.

That *Turner* not only contemplates but *favors* as-applied, individualized alternatives is apparent not only from the text of this Court's decision, but also from the structure of the *Turner* balancing inquiry. In particular, *Turner* directs courts to consider whether "accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff," with the presence of significant spillover effects weighing against the validity of the accommodation. 482 U.S. at 90. Accommodating a plaintiff's constitutional rights by adopting an individualized alternative will generally have a less significant effect on the rest of the prison population and on prison staff, as compared to changing a policy on a prison-wide basis. Put differently, *Turner* structurally favors individualized alternatives through its stated emphasis on avoiding changes in policy that have ripple effects on prison administration.

Similarly, *Turner* directs courts to consider whether there is "an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid

penological interest[s]," and recognizes that the existence of such an alternative is "evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* at 90. This aspect of *Turner* again structurally favors individualized alternatives, which will generally impose less cost on administrators than prison-wide policy changes. The Eleventh Circuit's novel rule that only "prison-wide" alternative policies can even be considered is contrary to the text and structure of *Turner* itself. And the Eleventh Circuit's rule structurally disadvantages plaintiffs seeking to vindicate their constitutional rights because it forces them to propose large-scale changes to the prison—precisely the sort of alternative that *Turner* disfavors.

Even if *Turner* itself were not so abundantly clear on this point, this Court's subsequent cases confirm that courts may appropriately consider individualized alternatives to a challenged prison policy. In *Thornburgh* v. *Abbott*, 490 U.S. 401 (1989), this Court upheld the facial validity of a federal regulation allowing incarcerated persons to receive external publications through the mail without prior approval, but authorizing wardens to reject mailings that they "determined detrimental to the security, good order, or discipline of the institution." *Id.* at 404. Even while upholding the regulation against a facial challenge, this Court was "comforted by the individualized nature of the determinations required by the regulation" and by the fact that "the regulation[] expressly reject[s] certain shortcuts that would lead to needless exclusions," such as establishing lists of prohibited publications. *Id.* at 416-417. This Court then "remand[ed] for an

examination of the validity of the regulations *as applied* to" certain individual publications that prison officials had rejected. *Id.* at 419 (emphasis added).

This Court has never limited plaintiffs to proposing alternatives under *Turner* that would apply prison-wide. To the contrary, in addition to finding "comfort[]" in individualized treatment, this Court has repeatedly emphasized the need to preserve flexibility in prison regulatory schemes and allow for "innovative solutions to the intractable problems of prison administration." *Turner*, 482 U.S. at 84-85, 89; accord U.S. Comm'n on Civil Rights, *Enforcing Religious Freedom in Prison* 31 (2008) (testimony of prison official "not[ing] the lack of any one-size-fits-all policy to inmates' requests for religious accommodation. The specific circumstances of an inmate's religious request will often determine a prison's response."). The Eleventh Circuit's attempt to limit *Turner* to prison-wide alternatives deprives plaintiffs of the opportunity to propose tailored solutions that would minimize ripple effects and costs to prison administration, and that would accordingly have a reasonable chance of success under *Turner*.[4]

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[4] The Eleventh Circuit cited page 93 of this Court's *Turner* opinion to justify excluding individualized alternatives from the *Turner* analysis. App., *infra*, 12a. But neither that page of *Turner* nor any other supports disqualifying individualized alternatives. Remanding the case, this Court made unmistakably clear that it was the lower court's responsibility to determine, under *Turner*, whether "the correspondence regulation *had been applied* by prison officials in an arbitrary and capricious manner." *Turner*, 482 U.S. at 100 (emphasis added).

Moreover, the Eleventh Circuit's holding appears to rest on the erroneous belief that *Turner* forbids as-applied challenges. Specifically, the panel contrasted the First Amendment inquiry under *Turner* with the statutory inquiry under RLUIPA, reasoning that only the latter contemplates as-applied challenges. App., *infra*, 11a ("Under [RLUIPA's] standard (which is stricter on prisons than *Turner*), we assess whether a prison policy *as applied to an individual prisoner* is the 'least restrictive means' of furthering a 'compelling governmental interest.'" (citations omitted)). "*Turner*," the panel here asserted, "makes no comparable, individualized demand," but "only requires [that] a prison's policy * * * be rationally related to a legitimate government interest." *Id.* at 12a. From that mistaken premise, the Eleventh Circuit concluded that plaintiffs "must do more than propose a personal accommodation"; instead, they "must present an obvious alternative policy that could replace the current one on a prison-wide scale." *Ibid.*

The panel's reasoning cannot be squared with this Court's decisions that either expressly contemplated as-applied challenges under *Turner* or remanded with instructions for the lower court to determine under *Turner* whether the challenged policy was unconstitutional *as applied to an individual plaintiff*. In *Turner* itself, this Court upheld the facial constitutionality of a prison mail policy but remanded for consideration of how the regulation in question "had been applied." 482 U.S. at 100. And in *Thornburgh*, this Court upheld the facial constitutionality of a challenged mail policy but remanded "for an examination of the validity of the regulations as applied to" certain

specific publications. 490 U.S. at 419. Finally, in *Overton* v. *Bazzetta*, this Court upheld under *Turner* the facial validity of a prison's policy restricting visitation rights to ten individuals. But this Court acknowledged that if the policy "were applied in an arbitrary manner to a particular inmate, the case would present different considerations." 539 U.S. 126, 137 (2003); accord *Beard* v. *Banks*, 548 U.S. 521, 535 (2006) ("[A]s in *Overton*, we agree that ' * * * we might reach a different conclusion in *a challenge to a particular application of the regulation*.'" (quoting 539 U.S. at 134; emphasis added)).[5]

Turner and its progeny have repeatedly and consistently instructed lower courts to determine whether a prison's *application* of a particular policy to an individual plaintiff bears a rational relationship to legitimate penological interests. Here, the Eleventh Circuit acted contrary to *Turner* and its progeny by refusing to consider that a prison policy had been unconstitutionally applied to a certain plaintiff, and by

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[5] The Eleventh Circuit cited pages 129-130 and 136 of *Overton* as support for disqualifying individualized alternatives from the *Turner* inquiry. App., *infra*, 12a. But in those portions of the *Overton* opinion, this Court recited the facts and later concluded that the plaintiffs had not identified any obvious alternative with *de minimis* cost to valid penological interests, so the issue of whether individualized alternatives per se are properly considered under *Turner* was not presented. 539 U.S. at 136. The fact that *Overton* was a class action, moreover, distinguishes it from the present case insofar as any proposed alternative would not be "individualized" in the same fashion. This Court explained that in the context of a class action, "the individual cases respondents cite[d we]re not sufficient to strike down the regulations as to *all* noncontact visits." *Id.* at 134 (emphasis added).

categorically excluding Petitioner's proposed "individual exemption" from consideration under *Turner*. See Stephanie H. Barclay & Mark L. Rienzi, *Constitutional Anomalies or As-Applied Challenges? A Defense of Religious Exemptions*, 59 B.C. L. Rev. 1595, 1597 (2018) ("[R]eligious exemption requests are just a version of what is generally thought of as one of the most common, modest, and preferred modes of constitutional adjudication: the as-applied challenge."). Artificially limiting the *Turner* analysis to only alternatives that apply "prison-wide" cannot be reconciled with this Court's express approval of as-applied challenges, under which the plaintiff does not object to the policy's facial constitutionality but only to its enforcement against them on the particular facts of their case.

Indeed, the Eleventh Circuit's approach not only departs from *Turner*, but it is impossible to reconcile with this Court's more general preference for as-applied constitutional challenges. See, *e.g.*, *Gonzales* v. *Carhart*, 550 U.S. 124, 167-168 (2007) ("In an as-applied challenge the nature of the [harm to the plaintiff] can be better quantified and balanced than in a facial attack."); *Ayotte* v. *Planned Parenthood of N. New Eng.*, 546 U.S. 320, 329 (2006) ("[T]he normal rule is that partial, rather than facial, invalidation is the required course * * * ."). *Turner* did not disturb this established norm of constitutional adjudication, let alone invert it by *requiring* plaintiffs to bring wide-ranging facial challenges to prison policies or to demand the imposition of changes on a "prison-wide" scale.

The Eleventh Circuit's all-or-nothing, everyone-or-no-one approach perversely forces every plaintiff to seek *maximal* judicial interference in prison administration rather than targeted accommodation of their individual rights. In adopting that approach, the panel not only departed from a basic norm of constitutional adjudication, but it rendered illusory *Turner*'s promise of protection for constitutional rights by forcing plaintiffs to rely on the kind of broad-ranging alternatives that are more likely to burden prison administration and thus fail the *Turner* inquiry.

II. Every Other Circuit to Consider the Question Correctly Applies *Turner* and Considers Individualized Alternatives to Challenged Prison Policies.

All the other circuits faced with this issue have correctly considered as-applied, individualized alternatives to prison policies under *Turner*. In particular, the Third, Fourth, Sixth, and Ninth Circuits all correctly apply *Turner* in this respect. Those courts routinely consider whether a plaintiff's proposed individualized accommodation shows that a challenged prison policy's application is an "exaggerated response" to relevant penological interests.

The Ninth Circuit's approach is illustrative. In *Ward* v. *Walsh*, an Orthodox Jewish man brought a free exercise challenge to a prison's refusal to provide him with kosher meals under a policy that "limit[ed] the accommodation of religious dietary laws to the provision of pork-free diets." 1 F.3d 873, 879 (9th Cir. 1993), *cert. denied*, 510 U.S. 1192 (1994). The district court entered judgment for defendants following a bench trial, but the Ninth Circuit vacated and

remanded. Writing for a unanimous panel, Judge O'Scannlain held that the district court had failed adequately to examine potential alternatives to the meal policy, including the possibility of "provid[ing] a special meal *for one prisoner*." *Id.* at 878 (emphasis added). Following proceedings on remand, the Ninth Circuit reversed the district court's grant of summary judgment for the defendants and remanded with instructions "to fashion an appropriate order requiring [the plaintiff] to be provided a diet sufficient to sustain him in good health without violating the laws of kashruth." *Ward* v. *Hatcher*, 172 F.3d 61, 63 (9th Cir.) (unpublished table), *cert. denied*, 527 U.S. 1009 (1999). In so holding, the Ninth Circuit emphasized that the "record evidence shows that other reasonable alternatives do exist" because the prison could accommodate the plaintiff's individualized meal request by assembling kosher meals from the prison's existing food and utensils. *Ibid.* Further, the court emphasized that the plaintiff could receive individualized treatment without burdening legitimate penological interests, noting that "[the plaintiff] could go through the meal line at the end and receive his meals on disposable plates and eat with disposable utensils." *Ibid.*

Heyer v. *U.S. Bureau of Prisons*, 849 F.3d 202 (4th Cir. 2017), endorses and applies the same principle. In that case, a deaf man argued that the prison's policy of providing him with an obsolete "TTY" keyboard device, rather than a videophone to communicate via American Sign Language, violated his First Amendment expression rights. *Id.* at 207-208. The defendants "insist[ed] that any accommodation should be implemented on what would be a very expensive,

system-wide basis," in which case "it would cost nearly $2 million to install videophones at all * * * institutions." *Id.* at 216. The Fourth Circuit disagreed, explaining that "nothing in the record"—let alone any principle of law announced in *Turner* or its progeny—"indicate[d] why a system-wide solution would be required, and [the plaintiff]'s evidence show[ed] that a videophone could be installed in [his specific prison] at *de minimis* expense to the government." *Id.* at 217. The Fourth Circuit therefore vacated the district court's grant of summary judgment to the defendants and remanded the case for trial, whereupon the defendants agreed to accommodate the deaf man's request by providing him access to a videophone. *Heyer* v. *U.S. Bureau of Prisons*, 984 F.3d 347, 355 (4th Cir. 2021); see also *Jehovah* v. *Clarke*, 798 F.3d 169, 178-179 (4th Cir. 2015) ("[R]evers[ing] the district court's summary dismissal of [a Christian man's] First Amendment wine communion claim" because "[a] reasonable jury could find" that the man's individualized "accommodation to drink wine" was an "alternative * * * so 'obvious' and 'easy' as to suggest that the ban [wa]s 'an exaggerated response'" (citation omitted)), *cert. denied*, 578 U.S. 962 (2016).

The Sixth Circuit takes a similar approach. In *Flagner* v. *Wilkinson*, 241 F.3d 475 (6th Cir.), *cert. denied*, 534 U.S. 1071 (2001), a Hasidic Jewish man challenged a prison's grooming policy, which violated his religious beliefs by requiring him to cut his sidelocks and beard. 241 F.3d at 477-479. The district court denied the defendants qualified immunity on the plaintiff's claims for damages and injunctive relief. *Id.* at 479. The Sixth Circuit reversed in part, but agreed

that the plaintiff could "go[] forward with his *as-applied challenge* to the Ohio prison grooming regulation insofar as he seeks declaratory and injunctive relief." *Id.* at 483 (emphasis added). In response to the dissent's contention that "as-applied" challenges are impermissible under *Turner*, see *id.* at 488 (Nelson, J., dissenting), the majority correctly explained that "controlling Supreme Court precedent"—i.e., *Thornburgh* v. *Abbott*—clearly demonstrates that such challenges are permissible. *Id.* at 483 n.5 (reading *Turner* and *Thornburgh* for the proposition that "plaintiffs may pursue as-applied challenges to facially valid prison regulations."). In the Sixth Circuit's view, having the individual plaintiff "search his own beard" was a viable alternative under *Turner*, and "accommodation of [the plaintiff in that way] did not cause the institution any financial hardship." *Id.* at 486-487. The court therefore remanded the case for further consideration of that alternative. *Id.* at 487; see also *Pollack* v. *Marshall*, 845 F.2d 656, 658-660 (6th Cir.) (considering under *Turner* a plaintiff's proposed individualized alternative to a prison's grooming policy—i.e., wearing a ponytail), *cert. denied*, 488 U.S. 897 (1988).

The Third Circuit has likewise considered individualized alternatives as part of its *Turner* inquiry. In one case, the Third Circuit considered a Buddhist man's proposed individualized alternative to a prison dietary policy. There, the plaintiff challenged the prison's refusal to "provide him with a diet free of meat, dairy products and pungent vegetables" in accordance with his religious beliefs. *Dehart* v. *Horn*, 390 F.3d 262, 265 (3d Cir. 2004). On an initial appeal, the Third Circuit reversed the district court's grant of

summary judgment to the defendants. In so doing, the Third Circuit criticized the district court for not requiring the defendants to explain adequately why they could not accommodate the man via his proposed individualized alternative. See *Dehart* v. *Horn*, 227 F.3d 47, 59 (3d Cir. 2000) (en banc) ("[T]here is an existing administrative process in the institution for serving individually prepared meals and [the plaintiff] has made a *prima facie* showing that this process can accommodate his religious needs with the addition of a cup of soy milk * * * . In such circumstances, *Turner* requires a more thorough analysis of the reasonableness of the restriction imposed on [the plaintiff]'s religious expression."). When the case returned after remand, the Third Circuit considered the burden that accommodating the plaintiff's individualized diet request would impose on the prison, without any suggestion that the plaintiff was limited to presenting a prison-wide alternative. 390 F.3d at 271-272.

In short, every other circuit to consider the question correctly applies *Turner* and considers individualized alternatives to challenged prison policies. The Eleventh Circuit is an outlier, and its holding in this case conflicts with those of other circuits, departs from *Turner* itself, and renders illusory *Turner*'s protections for constitutional rights.

Petitioner's proposed alternative (that he be moved to an available cell equipped with a shower) is, like the plaintiff's proposal in *Hatcher*, a request for "individualized" accommodation using existing prison resources. App, *infra*, 12a. By excluding that kind of alternative at the threshold, the Eleventh Circuit's approach guts *Turner*. Petitioner argued below that

Respondents failed even "to 'explain their refusal' to move him [to a cell with a shower]." *Id.* at 12a. But the Eleventh Circuit exempted Respondents from even having to articulate *why* they could not accommodate his religious practices in that way. Instead, the Eleventh Circuit read *Turner*'s statement that "a prison need not 'shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint'" as excusing Respondents from having to articulate a reason for rejecting the alternative that Petitioner *did* propose. *Ibid.* (citing *Turner*, 482 U.S. at 90-91). If the *Turner* framework is to have any prospective significance in protecting constitutional rights, surely prison officials should at bare minimum be expected to articulate an explanation for a policy that infringes upon those rights, including why they cannot or will not employ readily available, existing alternatives.

III. The Panel's Qualified Immunity Analysis Rests on the Same Misreading of *Turner*.

In addition to concluding that the challenged prison policy was constitutional under *Turner*, the panel held that Respondents were entitled to qualified immunity. In three terse paragraphs, the panel concluded that Petitioner had not shown a clearly established right to exercise his religious beliefs in the requested manner. App., *infra*, 15a-16a. In the panel's view, *Turner* did not draw a clear line between lawful and unlawful policies in this area, and it did not require courts to "fine tune a prison's policy to accommodate a prisoner's individual request." *Id.* at 16a. On that basis, the panel concluded that prison officials

"would be entitled to qualified immunity" even if the challenged shower policy was unconstitutional. *Ibid.*

For at least two reasons, the panel's holding on qualified immunity does not constitute an independent basis to support the judgment below and presents no obstacle to this Court granting review and correcting the Eleventh Circuit's misreading of *Turner*.

First, where "a court of appeals does address both prongs of qualified-immunity analysis"—i.e., where a court addresses both (1) whether an official violated a statutory or constitutional right; and (2) whether that right was "clearly established"—this Court has "discretion to correct * * * errors at each step." *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 735 (2011). That is so even where correcting a particular error is "not necessary to reverse an erroneous judgment," because "doing so ensures that courts do not insulate constitutional decisions at the frontiers of the law from [this Court's] review or inadvertently undermine the values qualified immunity seeks to promote." *Ibid.* The former concern is implicated, as here, "when the constitutional-law question is wrongly decided." *Ibid.* This Court has exercised that discretion to reach—and reverse—both prongs of a lower court's qualified immunity analysis, even where reaching the second part of the analysis would have been unnecessary to affirming or setting aside the judgment below. *Id.* at 735-744; *District of Columbia* v. *Wesby*, 138 S. Ct. 577, 589 (2018); cf. *Camreta* v. *Greene*, 563 U.S. 692, 703-709 (2011) (court can review a constitutional holding even where challenged by an official who prevailed on qualified immunity grounds). Given the Eleventh Circuit's serious misreading of *Turner*, the Court should

exercise this discretion here and correct the panel's errors.

Second, because the panel's qualified immunity analysis is inextricably intertwined with its misreading of *Turner*, the qualified immunity ruling does not independently support the panel's judgment. Immediately before concluding that Petitioner had not shown a violation of a clearly established right, the panel reiterated its erroneous belief that *Turner* does not "ask courts to fine tune a prison's policy to *accommodate a prisoner's individual request*." App., *infra*, 16a (emphasis added). As a result, if this Court were to grant certiorari and confirm that courts should consider individualized alternative policies under *Turner*, this Court would—at a minimum—need to vacate and remand, so that the Eleventh Circuit could reconsider (among other things) its qualified immunity analysis under a proper understanding of *Turner*.[6]

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[6] It is unsurprising that the panel's misreading of *Turner* affected its qualified immunity analysis. As this Court has long acknowledged, the merits and qualified immunity inquiries frequently overlap and it "often may be difficult to decide whether a right is clearly established without deciding precisely what the existing constitutional right happens to be." *Pearson* v. *Callahan*, 555 U.S. 223, 236 (2009) (quoting *Lyons* v. *Xenia*, 417 F.3d 565, 581 (6th Cir. 2005) (Sutton, J., concurring)). It is this very complication that led this Court to allow a "depart[ure] from the general rule of constitutional avoidance" to promote "the development of constitutional precedent * * * especially * * * with respect to questions that do not frequently arise in cases in which a qualified immunity defense is unavailable." *Pearson*, 555 U.S. at 241, 236.

This is familiar ground for this Court, which has not hesitated to grant certiorari to decide one question while ultimately vacating and remanding for a lower court to reconsider other related or interdependent questions. See, *e.g.*, *Maryland* v. *Buie*, 494 U.S. 325 (1990) (vacating state-court application of the Fourth Amendment and remanding for lower court to apply appropriate standard to determine excludability of evidence); *Delaware* v. *Van Arsdall*, 475 U.S. 673 (1986) (vacating state-court Confrontation Clause holding and remanding to determine whether the error was harmless).

There is ample reason to conclude that a remand under a correct reading of *Turner* would result in a favorable outcome for Petitioner. As explained above, the only fair reading of *Turner* and its progeny is that the existence of individualized alternatives can show that a challenged prison policy is not reasonably related to legitimate penological interests. See *supra* § I. Every circuit to have previously considered that question agrees, constituting "a robust consensus of cases of persuasive authority." *al-Kidd*, 563 U.S. at 742 (citation omitted). And here, as in other cases where prison policies have been found invalid under *Turner* due to their effect on constitutional rights, Petitioner has proposed an individualized alternative that is readily available within the prison's existing resources. Indeed, prison officials here failed to offer any justification for refusing to move Petitioner to a shower-equipped cell as a religious accommodation.

IV. The Question Presented Is Important and Recurring.

The question presented is critically important for the more than 1.2 million people currently incarcerated in federal and state prisons nationwide. E. Ann Carson, Bureau of Just. Stats., *Prisoners in 2020—Statistical Tables* 7 (2021). Although this case involves claims of religious free exercise, the *Turner* framework—and the Eleventh Circuit's novel reimagination of the same—applies to nearly all constitutional rights in the prison context. See *Washington* v. *Harper*, 494 U.S. 210, 224 (1990) ("[T]he standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights."); Justin Driver & Emma Kaufman, *The Incoherence of Prison Law*, 135 Harv. L. Rev. 515, 538 (2021) ("courts have applied [*Turner*] to a wide variety of constitutional claims; courts have cited the case over 12,000 times; and prison scholars have 'described [it], fairly, as "the most important and widely used legal standard for evaluating prisoners' rights claims."'" (alteration in original; footnotes and citations omitted). In any event, even focusing just on *Turner*'s application to free exercise claims, the vast majority of incarcerated people are religious. See Off. of the Inspector Gen., *Audit of the Federal Bureau of Prisons' Management and Oversight of Its Chaplaincy Services Program* 1 (2021). The First Amendment's protection for the free exercise of religion "does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life through 'the performance of (or abstention from)

physical acts.'" *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022) (citation omitted).

Turner remains a critical bulwark for the protection of constitutional rights in the prison context. Although RLUIPA provides additional protection for religious exercise in prisons, that statute is not coextensive with the First Amendment and provides only limited remedies. See *supra* pp. 6-7; U.S. Comm'n on Civil Rights, *Enforcing Religious Freedom*, *supra*, at 6-7. Furthermore, as this case demonstrates, it is not uncommon for prison officials to violate an individual's free exercise rights and then avoid accountability by changing the plaintiff's circumstances during litigation, effectively mooting claims for injunctive relief under RLUIPA. The net effect is a serious risk of under-protection of constitutional rights in the prison context. See Steven B. Dow, *Navigating Through the Problem of Mootness in Corrections Litigation*, 43 Cap. U. L. Rev. 651, 671-676 (2015).

This Court in *Turner* struck an appropriate balance between prison administrators' legitimate penological interests and prisoners' constitutional rights. See 482 U.S. at 85 ("Our task * * * is to formulate a standard of review for prisoners' constitutional claims that is responsive both to the 'policy of judicial restraint regarding prisoner complaints and [to] the need to protect constitutional rights.'" (alteration in original; citation omitted)). In striking that balance, *Turner* structurally disfavors the kinds of broader, prison-wide changes that are most likely to impose significant burdens on prison administrators and resources. Perversely, the Eleventh Circuit's re-imagination of *Turner* would prohibit plaintiffs from proposing, and

bar courts from even considering, the kinds of tailored, individualized alternatives that often will protect constitutional rights without materially burdening prison administration. And where a plaintiff does prevail on the merits of a claim, the Eleventh Circuit's rule would compel courts to grant broad relief, even where a narrower remedy would have accommodated an individual plaintiff's rights. Put differently, the Eleventh Circuit's approach skews *Turner*'s balance, improperly and uniformly disadvantages plaintiffs, and, as a result, chills the exercise of constitutional rights.

This case is an appropriate vehicle for the Court to address the question presented. The Eleventh Circuit clearly and expressly rejected Petitioner's proposed alternative on the ground that it was "individualized," holding that under *Turner*, a plaintiff "must present an obvious alternative policy that could replace the current one on a prison-wide scale." App., *infra*, 11a-12a, 14a. The Eleventh Circuit's misreading of *Turner* is squarely presented, and this Court's intervention is urgently warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

APPENDIX A

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 20-11218

HJALMAR RODRIGUEZ, JR.,

Plaintiff - Appellant,

versus

EDWARD H. BURNSIDE, *et al.*,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

D.C. Docket No. 5:17-cv-00010-MTT-CHW

Opinion of the Court

Before JILL PRYOR, GRANT, and MARCUS, Circuit Judges.

GRANT, Circuit Judge:

To test whether a state prison regulation violates an inmate's constitutional rights, courts ask whether the regulation is reasonably related to a legitimate penological interest. That inquiry is intended to ensure that prison officials respect constitutional

boundaries without frustrating their efforts to fulfill the difficult responsibility of prison administration.

Here we consider two Georgia prison policies that control how officers transport inmates to showers, and we ask whether those policies interfere with an inmate's First Amendment right to free exercise of religion. Although the inmate suggests ways the prison could make an exception to accommodate his religious requests, he does not show that the policies were unconstitutional in the first place. And even if they were, qualified immunity would protect the officials because the types of shower rights the inmate seeks are not clearly established. We affirm the district court.

I.

Hjalmar Rodriguez was imprisoned at Hays State Prison after he was convicted of voluntary manslaughter. While he lived there, Rodriguez killed another inmate by stabbing him with a knife during a fight. Understandably concerned that he was a safety risk, prison officials moved him into the Special Management Unit at the Georgia Diagnostic and Classification Prison. That unit handles "offenders who commit or lead others to commit violent, disruptive, predatory, or riotous actions, or who otherwise pose a serious threat to the security of the institution." The unit's rigorous policies reflect the greater risk those inmates pose to prison safety and security.

For most of his time in that unit, Rodriguez was housed in wings with single-occupancy cells. These cells were not equipped with showers, but prison

policy was to escort each inmate to a separate shower three times per week. To ensure safety and security during the shower transports, prison officers in the unit followed a set of strict procedures. To start, each transport required the dedicated attention of between two and five officers. Clothing was also kept to a minimum—inmates could wear only boxers and shower shoes when walking to the shower, and could not bring along any other clothes. Before leaving their cells, inmates handed any necessary items through a cell-door port so that an officer could "thoroughly check" for contraband. Only the bare necessities were allowed—soap and a towel. Once the items were searched, the officers handcuffed the inmate through the door port, opened the door, and finally secured the inmate in leg shackles.

Only then could an inmate be taken to the shower. With yet another step-by-step process, the inmate was unshackled, locked in the shower, and unhandcuffed. After the shower, the process then went in reverse—the inmate was again searched and secured before being taken back to his cell by a group of officers.

Though tedious, these steps were meant to ensure "that the escorting officers were safe and that the prison remained secure." As the deputy warden explained, the "shower security protocol" helped stop the flow of contraband and weapons that could be hidden in clothing and taken to the shower.

Rodriguez, however, disagreed with those policies and believed that the restrictions infringed his constitutional rights. As a Muslim, Rodriguez practiced *ghusl*, a ritual bathing that involves

washing the whole body multiple times and that must be completed every 24 hours. He complained that *ghusl* was impossible to perform using the sink and towel in his cell because it "requires a large amount of water" and would have produced a slipping hazard. Rodriguez conceded that the sink and towel were helpful, enabling him to perform a simpler and more frequent religious washing called *wudu*. But because prison officials were not providing him with daily showers, they were—at least as he saw it—violating his First Amendment right to freely exercise his religion.

Rodriguez's religious beliefs also dictated that he dress modestly "by wearing garments that cover from mid-stomach or the naval to the bottom of the knees" around anyone but immediate family. Of course, the shower transport policy did not allow for that much clothing—he could wear only boxers and shower shoes. The policy thus contravened his religious modesty obligations by requiring him to expose both his lower stomach and a portion of his leg above his knee.

To challenge these policies and raise a host of other complaints, Rodriguez sued several prison officials under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc–1, and 42 U.S.C. § 1983, seeking declaratory, injunctive, and monetary relief. In his complaint, Rodriguez claimed that the shower policies intruded on his First and Fourteenth Amendment rights.

The district court granted summary judgment to the prison officials on his shower policy claims. Adopting the magistrate judge's report, the court held

that prison officials had not violated Rodriguez's First and Fourteenth Amendment rights when they enforced the prison's shower policies. The policies were "reasonably related to the legitimate penological interests in securing the prison." It also held that he was not entitled to relief under RLUIPA because his injunctive claims were mooted when he was transferred out of the Special Management Unit.

Rodriguez appeals, contending that the shower policies fail First Amendment scrutiny. The prison officials disagree, and argue that they are entitled to qualified immunity in any event. Rodriguez also argues that the magistrate judge was incorrect to reject motions related to discovery requests and appointment of counsel.

II.

We review de novo the district court's grant of summary judgment to the prison officials on Rodriguez's free exercise claim. *See Jurich v. Compass Marine, Inc.*, 764 F.3d 1302, 1304 (11th Cir. 2014). We view all facts and reasonable inferences in the light most favorable to the nonmoving party, and summary judgment is proper when the moving party is entitled to judgment as a matter of law. *Id.*

A.

"Prison walls do not form a barrier separating prison inmates from the protections of the Constitution." *Turner v. Safley*, 482 U.S. 78, 84 (1987). But those protections can be limited, because they sometimes conflict with an inmate's "status as a prisoner or with the legitimate penological objectives of the corrections system." *Pesci v. Budz*, 935 F.3d

1159, 1165 (11th Cir. 2019) (quotation omitted); *see also Pell v. Procunier*, 417 U.S. 817, 822 (1974).

Deciding what limits are permissible is tricky—running a prison "is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner*, 482 U.S. at 84–85. Respect for the separation of powers thus requires us to exercise "judicial restraint regarding prisoner complaints." *Id.* at 85 (quotation omitted). And when critiquing a state penal system, principles of federalism "bolster that deference." *Pesci*, 935 F.3d at 1165.

To allow prison officials "to remain the primary arbiters of the problems that arise in prison management," we evaluate a prisoner's constitutional claim under a "unitary, deferential standard." *Shaw v. Murphy*, 532 U.S. 223, 229–30 (2001). Under that standard, a prison regulation burdening an inmate's exercise of constitutional rights must be "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89.

To succeed on a constitutional claim, an inmate must show that "the logical connection between the regulation and the asserted goal is so remote as to render the policy arbitrary or irrational." *Id.* at 89–90. We do not inquire whether the prison could make an individualized exception for the complaining inmate—we assess "only the relationship between the asserted penological interests and the prison regulation." *Shaw*, 532 U.S. at 230.

The Supreme Court in *Turner* outlined four factors that frame our analysis. To decide whether the prison's policies impermissibly burden Rodriguez's First Amendment right to free exercise, we ask

> (1) whether there is a "valid, rational connection between the prison regulation and the legitimate governmental interest put forward to justify it";
>
> (2) whether "alternative means" of exercising the right "remain open to prison inmates," such that they may "freely observe a number of their religious obligations";
>
> (3) what "impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally"; and
>
> (4) whether any "obvious, easy alternatives" to the current regulation exist, which would suggest that the policy is an "exaggerated response to prison concerns."

See Turner, 482 U.S. at 89–91 (quotations omitted); *O'Lone v. Est. of Shabazz*, 482 U.S. 342, 352 (1987).

To be quite clear, we do not balance these factors to see if some outweigh the others. *Beard v. Banks*, 548 U.S. 521, 532–33 (2006) (plurality opinion). The last three factors are valuable because they provide more angles from which to view the fundamental inquiry: whether the prison regulation is reasonably related to legitimate penological interests. *Turner*, 482 U.S. at 89. If that rational connection is missing, "the regulation fails, irrespective of whether the other factors tilt in its favor." *Shaw*, 532 U.S. at 229–30;

Pesci, 935 F.3d at 1167. And if the connection exists, the policy will stand. *See Beard*, 548 U.S. at 533.

B.

We start with the three-showers-per-week limitation. Rodriguez does not dispute that the prison officials' asserted interests in this rule are legitimate. He accepts that transporting an inmate to the shower "involved 'safety and security risks' and was 'time- and labor- intensive' for correctional officers." No doubt that is true—promoting prison security is "perhaps the most legitimate of penological goals." *Overton v. Bazzetta*, 539 U.S. 126, 133 (2003); *Prison Legal News v. Sec'y, Florida Dep't of Corr.*, 890 F.3d 954, 967 (11th Cir. 2018). The Supreme Court has long recognized that prisons make do with "limited resources for preserving institutional order" and thus deserve deference in how they allocate those resources. *Turner*, 482 U.S. at 90.

Turning to the first *Turner* factor, a rational connection exists between limiting the frequency of showers and furthering safety and security. The policy requires multiple officers during the shower transport to help if an inmate resists returning to his cell, refuses to be handcuffed, or threatens the transporting officers. And the safety risk to officers is real—the unit houses the most "violent, disruptive, predatory" inmates in the Georgia prison system. In fact, some inmates are classified as so dangerous that they may be transported only if three officers are present and two of them are armed. Rodriguez himself demonstrates why such extreme care is called for—he was moved to the Special Management Unit after killing another inmate. The prison's precautions

are reasonably calculated responses to the risks involved in transporting this category of inmates.

Nor does it matter that the prison officials have not presented "evidence of an actual security breach." *Prison Legal News*, 890 F.3d at 968. To justify a security policy, prison officials need not establish a causal link between the practice and a reduction in violent incidents. *Id.* Instead, prison officials may "*anticipate* security problems" and "adopt innovative solutions." *Id.* (quotation omitted). A policy like this one—directly mitigating risk to prison safety and security—is reasonable.

The remaining three factors confirm this connection. *O'Lone* guides how we review the second factor. There, the prison's work policy prevented Muslim inmates from attending their Friday prayer service. *O'Lone*, 482 U.S. at 345–47. Even so, the Supreme Court held that the prisoners retained alternative means of religious exercise because the prison allowed them "to participate in other religious observances of their faith"—other prayer meetings, access to a state-provided imam, special meals, and modified mealtimes during the month of Ramadan. *Id.* at 352.

Rodriguez argues that refusing to provide him a daily shower left him with no alternative means of exercising his religion. But he misconstrues our inquiry. The question is not whether the prison accommodated every aspect of his religious practice, but whether he was allowed other means of practicing his religious beliefs. *See id.*, 482 U.S. at 352. And when we consider the prisoner's free exercise of religion, the right "must be viewed sensibly and

expansively." *See Thornburgh v. Abbott*, 490 U.S. 401, 417 (1989). As long as a prisoner like Rodriguez retains "the ability to participate in other Muslim religious ceremonies," the second factor tips against him. *See O'Lone*, 482 U.S. at 352.

Rodriguez could exercise his religion in many other ways. He could perform *wudu*, the other religious washing ritual, using the sink in his cell. And the prison allowed Muslim inmates to participate in "Friday Jumah service" by having the Muslim chaplain "go cell by cell to individual inmates for their Friday prayer." The prison also adjusted the meal schedule during Ramadan for those who wanted to observe the religious fast; they were "provided a morning meal around dawn (before sunrise) and an evening meal after sunset." These steps show that Rodriguez had many alternative means of practicing his religious faith despite the shower policy.

The third factor, resource allocation, also suggests that the prison's policy was reasonable. Providing daily showers would have been a severe drain on the prison's limited resources, forcing prison officers to more than double the time they spent making shower transports. Requesting such a "significant reallocation" of resources, the Supreme Court has explained, interferes with the smooth functioning of a prison. *Overton*, 539 U.S. at 135. These consequences confirm that the three-showers-per-week policy rationally advances the prison's security interests.

Our last consideration when deciding whether a prison rule is reasonably related to a legitimate interest is whether any "obvious, easy alternatives" to that regulation exist. *Turner*, 482 U.S. at 90. This is a

"high standard," designed to flush out whether the current policy is an "exaggerated response" to the prison's concerns. *Overton*, 539 U.S. at 136; *Turner*, 482 U.S. at 90 (quotation omitted). To meet it, a proposed alternative must be a simple and unmistakably effective choice.

Rodriguez argues that an alternative to the three-showers-per-week policy would have been to move him to another cell block where the cells contained personal showers.[1] But the fact that the prison could have moved him to a cell where he would not need shower transports does not suggest that the shower policy itself was irrational. In fact, Rodriguez is not proposing an alternative policy at all—he is asking for an individual exemption. We commonly confront such requests when reviewing RLUIPA claims. Under that standard (which is stricter on prisons than *Turner*), we assess whether a prison policy *as applied to an individual prisoner* is the "least restrictive means" of furthering a "compelling governmental interest." *Holt v. Hobbs*, 574 U.S. 352, 362–63 (2015) (quoting 42 U.S.C. § 2000cc–1(a)); *Dorman v. Aronofsky*, — F.4th—, No. 20-10770, 2022 WL 2092855, at *3–4 (11th Cir. June 10, 2022). The prison may also need to justify its denial of "specific exemptions to particular religious claimants" under RLUIPA's

[1] The prison officials argue that Rodriguez waived this issue by not properly objecting to the magistrate judge's recommendation. But in doing so, they fail to construe Rodriguez's pro se district court filings liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Rodriguez sufficiently proposed the daily-shower alternative below, so the officials should have addressed the merits of his argument.

"focused" inquiry. *Id.* (quotation omitted). That framework is not relevant here, however, because Rodriguez appealed the dismissal of his § 1983 claims, not his RLUIPA claims.

And *Turner* makes no comparable, individualized demands. It only requires a prison's policy to be rationally related to a legitimate government interest. To bring his First Amendment challenge to the policies under *Turner*, Rodriguez must do more than propose a personal accommodation. He must present an obvious alternative policy that could replace the current one on a prison-wide scale. *See Turner*, 482 U.S. at 93. For example, in *Prison Legal News* a publisher challenging a prison's magazine ban suggested that the prison could restrict inmates' access to prohibited services rather than banning its magazine for advertising those services. 890 F.3d at 974. And in *Overton v. Bazzetta*, a prison policy excluded most minor visitors other than immediate family; the suggested alternative was to allow "nieces and nephews or children for whom parental rights have been terminated" to visit. 539 U.S. at 129–30, 136. Rodriguez, on the other hand, falls short of proposing any alternative policy.

Instead, he insists that the prison officials had to "explain their refusal" to move him. But the Supreme Court has held otherwise: a prison need not "shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint." *Turner*, 482 U.S. at 90–91. The prison regulation need only be reasonable. The three-showers-per-week policy thus survives scrutiny.

C.

We apply the same *Turner* factors to consider whether it was reasonable to limit prisoners to wearing only boxers and shoes to the shower. The prison limited what prisoners wore to the shower because "contraband could be hidden in clothing and weapons could be taken to the shower." The same interests—safety and security—also justify this shower policy. And the validity of these interests, as we said earlier, is "beyond question." *Thornburgh*, 490 U.S. at 415.

Turning to the first factor, the policy rationally advances safety and security. Limiting the places where a prisoner could hide a weapon reduces the risk that an officer will be harmed, as well as the risk that the weapon will be conveyed to other prisoners. Rodriguez argues that the officials said that transporting prisoners in "full dress" rather than in boxers and shower shoes would threaten prison safety; allowing him to add a t-shirt to his shower garb would make no difference in his view given their justification. But we do not nitpick whether a policy could be adjusted to accommodate a prisoner's interest—this is not a "least restrictive alternative" test. *Turner*, 482 U.S. at 90 (quotation omitted). Quite simply, more clothing presents a greater safety threat. Because limiting what prisoners wear and carry to the shower makes it harder to move weapons or contraband, the policy is rationally related to advancing prison safety.

The remaining three factors implicate much of the same reasoning behind the other policy, so we do not rehash every detail. The second factor translates

unchanged: Rodriguez was allowed alternative means of exercising his religious beliefs. As for the third factor, requiring the prison to allow prisoners to wear t-shirts during shower transports would introduce the specific risk to prison safety and security that the policy sought to prevent. Other methods of mitigating the risk would require officers to dedicate more time and energy to carefully searching the extra clothing. Those added burdens confirm that the security policy rationally advances the prison's interest in safety. *See Beard*, 548 U.S. at 532–33.

Under the fourth factor, Rodriguez again suggests that the prison should have moved him to another cell. And again this suggestion is for a personal exemption rather than a policy change. Rodriguez does, however, present another solution that qualifies as an alternative policy.

He relies on the unit's "Standard Operating Procedures," which say that prisoners must never be removed from their cells in anything more than a t-shirt, boxers, and shower shoes. He argues that this policy is good enough for shower transports too. It may be true that in other instances the prison allowed prisoners to be transported while still wearing t-shirts. But the fact that the prison offers inmates the comparative dignity and comfort of wearing a shirt during other activities does not render it illogical or unreasonable to allow less clothing on the way to the shower. See *Thornburgh*, 490 U.S. at 419. Because Rodriguez's proposal would introduce the exact risk of harm the prison is working to prevent, it is not an obvious, easy alternative to the existing policy.

The prison officials therefore did not violate Rodriguez's First Amendment right to freely exercise his religion. Even if these particular policies substantially burdened Rodriguez's religious exercise, they were rationally related to the prison's legitimate interests in maintaining safe and secure conditions while providing prisoners with the opportunity to shower.

III.

The prison officials also argue that, regardless of our answer to the First Amendment question, they are entitled to qualified immunity. They say that it was not clearly established that the shower policies infringed the First Amendment.

Under the doctrine of qualified immunity, public officials may not be held liable for damages under § 1983 unless it is shown that they violated "a constitutional right that was clearly established at the time of the challenged action." *Echols v. Lawton*, 913 F.3d 1313, 1319 (11th Cir. 2019) (quotation omitted). Qualified immunity covers officials when they are acting within the scope of their discretionary authority; Rodriguez does not dispute that was the case here. *See id.* Qualified immunity therefore applies unless he produces evidence showing (1) that the officials violated a statutory or constitutional right, and (2) "that the right was clearly established at the time of the challenged conduct." *Wade v. United States*, 13 F.4th 1217, 1225 (11th Cir. 2021) (quotations omitted).

Rodriguez concedes that no materially similar case clearly establishes that these kinds of policies violate

prisoners' First Amendment rights. Nevertheless, he argues, *Turner* was so decisive that it formed a "broader, clearly established principle that should control the novel facts of the situation." *Id.* at 1226 (quotation omitted). But that is true only if the case drew a "bright line" between "lawful and unlawful" policies. *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified on other grounds*, 14 F.3d 583 (11th Cir. 1994). *Turner* drew no such line. Nor did it ask courts to fine tune a prison's policy to accommodate a prisoner's individual request. *See Turner*, 482 U.S. at 90–91. Rodriguez thus has not shown that a reasonable official would have had "fair and clear warning" that his particular conduct was "unlawful and unconstitutional." *Al-Amin v. Smith*, 511 F.3d 1317, 1335–36 (11th Cir. 2008). Even if the prison's policies were improper, the prison officials would be entitled to qualified immunity.

IV.

Turning to the district court's denials of a discovery motion and appointment-of-counsel motions, we review them for abuse of discretion. *Smith v. Sch. Bd. of Orange Cnty.*, 487 F.3d 1361, 1365 (11th Cir. 2007). Under this standard, a district court "has a range of choice" when managing the discovery process and "its decision will not be disturbed as long as it stays within that range and is not influenced by any mistake of law." *Knight through Kerr v. Miami-Dade Cnty.*, 856 F.3d 795, 811 (11th Cir. 2017) (quotation omitted).

Rodriguez asked the magistrate judge to order prison officials to help him depose other prisoners as he developed his claim that contaminated vegan

meals violated the Eighth Amendment. Rejection of that motion did not preclude Rodriguez from collecting evidence; he acquired affidavits from four other inmates to support his Eighth Amendment claim. And as the magistrate judge explained, Rodriguez failed to show a good-faith attempt to resolve the discovery dispute with the prison officials. *See* Fed. R. Civ. P. 37(a)(1). Part of the problem, the magistrate judge concluded, was that seeking depositions was a "particularly burdensome" method of gathering information and disproportionate to the needs of the case. We see no abuse of discretion.

Nor was the district court obliged to appoint counsel to help with discovery. Appointment of counsel in civil cases is a privilege "justified only by exceptional circumstances," not a constitutional right. *Wahl v. McIver*, 773 F.2d 1169, 1174 (11th Cir. 1985). A district court has "broad discretion" when ruling on such a motion. *Bass v. Perrin*, 170 F.3d 1312, 1320 (11th Cir. 1999). Here, the magistrate judge determined that Rodriguez set forth the essential facts underlying his claims and that the applicable legal doctrines were readily apparent. *See id.* Although we appointed counsel to represent Rodriguez on appeal, it was not an abuse of its discretion for the district court to conclude that no exceptional circumstances justified the appointment of counsel below. *See Norelus v. Denny's, Inc.*, 628 F.3d 1270, 1280 (11th Cir. 2010).

* * *

Prisons are tasked with providing safety and security for the inmate population as well as for prison staff—but cannot do so by disregarding

prisoners' constitutional rights. Here, Rodriguez had a First Amendment right to free exercise even while he was incarcerated in the Special Management Unit. Though that right was sometimes curtailed because of the prison's legitimate penological requirements, the prison's policies hit the right mark under *Turner*. Rodriguez's constitutional challenge fails.

AFFIRMED.

JILL PRYOR, Circuit Judge, Concurring in part, concurring in the judgment:

I join Parts III and IV of the majority opinion and concur in its judgment affirming the district court. Because I agree with Part III of the majority opinion that the First Amendment right the defendants stand accused of violating was not clearly established, I would not decide whether Mr. Rodriguez's First Amendment right to free exercise of his religion was violated. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

APPENDIX B

Date filed: 08/24/2022

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 20-11218-AA

HJALMAR RODRIGUEZ,

Plaintiff - Appellant,

versus

JOHN/JANE DOES
Kitchen Management and Staff, GDCP, *et al.*,

Defendants,

Commissioner,

GDOC,

Warden,

GDCP,

ERIC SELLERS,

f.k.a. CELLARS,

Warden, Telfair State Prison ,

JUNE BISHOP,

Deputy Warden, GDCP,

WILLIAM POWELL,

Deputy Warden of Security, GDCP,

GARY CALDWELL,

Deputy Warden of Care and Treatment, GDCP,

RUFUS LOGAN,

Unit Manager, GDCP,

FREDRICK SUTTON,

Kitchen Director, GDCP,

MARTIN,

Kitchen Director, GDCP,

DR. SHARON LEWIS,

DR. EDWARD H. BURNSIDE, Medical Director, GDOC,

MARY GORE,

Nurse,GDCP

LINDA ADAIR,

Nurse, GDCP,

Dr DAVID BUTTS,

Medical Director, GDCP,

CAPTAIN WILLIAMS,

GDOC,

KAREN FORTS,

Counselors, GDCP,

DARREL REID,

Counselors, GDCP,

COMMISSIONER,

Georgia Department of Corrections,

MICHAEL CANNON,

Warden and or Superintendent of GDCP,

THERESA THORNTON,

Deputy Warden of Care and Treatment, GDCP,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Georgia

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: JILL PRYOR, GRANT, and MARCUS, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

HJALMAR RODRIGUEZ, Jr.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION
	)	NO. 5:17-cv-10
Commissioner HOMER BRYSON, *et al.*,	)	(MTT)
	)	
	)	
Defendants.	)	
	)	

ORDER

The Magistrate Judge recommends granting in part and denying in part the Defendants' partial motion for summary judgment. Doc. 182.

Specifically, the Magistrate Judge recommends denying the motion as to the Plaintiff's claims against Defendant Burnside for (i) deliberate indifference to medical needs for inadequate treatment of the Plaintiff's shoulder, in violation of the Eighth Amendment; and (ii) retaliation, alleging that Burnside withheld treatment for the shoulder in retaliation for the Plaintiff's earlier lawsuits, in violation of the First Amendment. *Id.* at 58. The Defendant has not objected to that portion of the Recommendation, so pursuant to 28 U.S.C. § 636(b)(1), the Court reviews that portion of the Recommendation for clear error. After review, the

Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge regarding denial of the Defendants' motion on the two claims relating to the Plaintiff's shoulder.

The Magistrate Judge also recommends granting summary judgment on all other claims and limiting the Plaintiff's recovery on the retaliation claim to nominal damages. *Id*. at 58–59. The Plaintiff has objected, so pursuant to 28 U.S.C. § 636(b)(1), the Court reviews *de novo* the portions of the Recommendation to which the Plaintiff objects.

After review, the Court finds that the Defendants have not provided an adequate basis for limiting the Plaintiff's retaliation claim to nominal damages. Although a plaintiff generally may not recover compensatory damages based only on the abstract value of a constitutional right, *see Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), the Plaintiff claims that the alleged retaliatory conduct resulted in injury to his shoulder, which does provide a basis of recovery.[1] Further, the

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[1] When violations of First Amendment rights cause actual injuries, compensatory damages may be available. For example, when a local ordinance restricted door-to-door solicitations in violation of the First Amendment, a political canvassing organization was entitled to recover lost revenues. *City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1558 (7th Cir. 1986), *aff'd*, 479 U.S. 1048 (1987). Also, the Sixth Circuit recently held that a prisoner alleging retaliatory transfer to a higher-security prison could obtain compensatory damages for actual injuries from the alleged violation of his First Amendment rights. *King v. Zamiara*, 788 F.3d 207, 213 (6th Cir. 2015). Although it is true that First Amendment injuries are "rarely accompanied by physical injury," *Al-Amin v. Smith*, 637 F.3d

PLRA does not bar compensatory damages for the retaliation claim, because the Magistrate Judge found that the Plaintiff's torn rotator cuff—or, in the Defendants' euphemistic phrasing, "sore shoulder"—is a more than *de minimis* injury for purposes of the Prison Litigation Reform Act's ("PLRA's") limitations on recovery. Docs. 182 at 14; 175–2; *see* 42 U.S.C. § 1997e(e). The Court finds the Plaintiff's other objections to be without merit. After review, therefore, the Court accepts and adopts the findings, conclusions, and recommendations of the Magistrate Judge regarding granting summary judgment on the other claims, although the retaliation claim against Burnside is not limited to nominal damages.

Finally, the Magistrate Judge noted that the Defendants did not move for summary judgment on one of the two equal-protection claims: the claim that Jewish prisoners were provided with meals that comply with their kosher religious obligations, while Muslim inmates were not provided with meals that comply with their halal religious obligations. Doc. 182 at 2. The Defendants' objection to the report and recommendation requests that the Court grant summary judgment on the equal protection claim or, in the alternative, that the Court allow the Defendants an opportunity to file a separate motion for summary judgment on the equal protection claim.

1192, 1197 (11th Cir. 2011), damages are still available when the harm does result in a physical injury. *See also* Eleventh Circuit Civil Pattern Jury Instructions, § 5.1 (providing damages instructions for retaliation claims in cases in which a prisoner suffers physical injury).

See generally Doc. 183.[2] The Defendants may file that motion.

In conclusion, the Recommendation (Doc. 182) is **ADOPTED as modified**, and the Defendants' motion for partial summary judgment (Doc. 175) is **GRANTED** in part and **DENIED** in part. The only remaining claims in this lawsuit are the deliberate indifference and retaliation claims against Burnside regarding the Plaintiff's shoulder injury and the equal protection claim regarding halal food. The claims against Burnside are not, at this stage, limited by the PLRA.

Finally, the Defendants shall file a supplemental motion for summary judgment on the remaining equal protection claim within **fourteen days**. The Plaintiff shall file a response within **fourteen days** of service of that supplemental motion. The Defendants may file a reply brief within **ten days** of service of the Plaintiff's response.

SO ORDERED, this 6th day of September, 2019.

S/ Marc T. Treadwell
MARC T. TREADWELL, JUDGE
UNITED STATES DISTRICT COURT

[2] As noted above, the Defendant does not object to the Magistrate Judge's recommendation to deny the motion for summary judgment on the claims against Dr. Burnside relating to the Plaintiff's shoulder injury.

APPENDIX D

Date filed: 07/10/2019

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA MACON DIVISION

HJALMAR RODRIGUEZ, JR.,	:	
	:	
Plaintiff,	:	Case No. 5:17-cv-
	:	00010-MTT-CHW
v.	:	
	:	Proceedings
Commissioner HOMER	:	Under 42 U.S.C.
BRYSON, *et al.*,	:	§ 1983
	:	Before the U.S.
Defendants.	:	Magistrate Judge
	:	

REPORT AND RECOMMENDATION

Before the Court is a motion for summary judgment filed by Defendants[1] against Plaintiff Hjalmar Rodriguez, a state inmate who is proceeding *pro se*. (Doc. 175). For the reasons stated in this Report and

[1] The remaining defendants in this action are as follows: Nurse Adair, Deputy Warden Bishop, Commissioner Bryson, Dr. Burnside, Health Services Administrator Butts, Deputy Warden of Care and Treatment Caldwell, Superintendent Cannon, Warden Chatman, Commissioner Dozier, Counselor Forts, Nurse Gore, Officer Hunter, Medical Director Lewis, Unit Manager Logan, Director of Food Service Martin, Superintendent McCloud, Deputy Warden Powell, Counselor Reid, Warden Sellers, Interim Director of Food Service Sutton, Deputy Warden of Care and Treatment Thornton, and Captain Williams.

Recommendation, it is **RECOMMENDED** that Defendants' motion be **GRANTED in part and DENIED in part**.

I. SUMMARY OF CLAIMS

On screening pursuant to 28 U.S.C. §§ 1915A(a) and 1915(e), the Court permitted the following eleven claims[2] to proceed for further factual development (Docs. 14, 84):

Four claims under the First Amendment's Free Exercise Clause: (1) failure to provide a diet that complies with Plaintiff's religious obligations as a Sunni Muslim, (2) deprivation of sufficient calories during Ramadan, (3) violation of religious modesty obligations while being escorted to the prison shower room and yard, and (4) violation of religious cleanliness requirements by restricting shower use;

Two conditions of confinement claims under the Eighth Amendment's Cruel and Unusual Punishments Clause: (5) contaminated food; and (6) nutritionally inadequate food;

Two deliberate indifference to medical needs claims under the Eighth Amendment's Cruel and Unusual Punishments Clause: inadequate treatment for (7) a damaged tooth and (8) injured shoulder;

A retaliation claim under the First Amendment against Defendant Dr. Burnside: (9) providing constitutionally inadequate medical treatment for the damaged tooth and shoulder injury in retaliation for

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[2] The Court has previously denied Defendants' motion to sever the claims. (Docs. 105, 117).

the lawsuit Plaintiff had previously filed against Defendant Burnside; and

Two equal protection claims under the Fourteenth Amendment's Equal Protection Clause: (10) non-Muslim inmates received sufficiently nutritious meals, whereas Muslims observing Ramadan received nutritionally inadequate meals, and (11) Jewish prisoners were provided with proper kosher meals while Muslim inmates were not provided with religiously proper meals.

Defendants have moved for summary judgment as to claims (1) through (10) only, and did not address the equal protection claim regarding officials' alleged favorable treatment of Jewish prisoners over Muslim prisoners at the GDCP in respect to religious diets.[3] Accordingly, no recommendation is issued as to that claim.

For the reasons set forth below, it is recommended that Defendants' motion for summary judgment be **DENIED** as to Plaintiff's Eighth Amendment claim against Defendant Burnside for deliberate indifference to Plaintiff's shoulder injury and Plaintiff's retaliation claim against Defendant Burnside. It is recommended that Defendants' motion

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[3] Defendants address Plaintiff's equal protection claim in a footnote that refers only to "an equal protection claim based on the contention that non-Muslim inmates receive three meals a day during Ramadan.". (Doc. 175-2, p. 15 n.4). The Court also allowed Plaintiff to proceed with a claim based on Plaintiff's allegation that "Jewish prisoners are provided with proper kosher meals while Muslim prisoners are not provided with religiously proper meals." (Doc. 84, p. 10).

be **GRANTED** and summary judgment entered as to all other claims.

II. FACTUAL BACKGROUND

A. Religious Freedom Claims

1. Failure to Provide Diet that Complies with Plaintiff's Religious Obligations

Plaintiff is a Salafi Sunni Muslim, who was, at all times relevant to his claims, incarcerated in the Special Management Unit ("SMU") of the Georgia Diagnostic and Classifications Prison ("GDCP"). (Doc. 39-1, ¶ 21).[4] Plaintiff has since been transferred to Valdosta State Prison. (Doc. 152). In accordance with his religious obligations, Plaintiff must not consume meat that is not "Islamically clean (i.e. Halal—or Kosher)." (Doc. 39-1, ¶ 23). To qualify as Halal, the meat must be slaughtered and prepared in a way that accords with the particular tenets of Plaintiff's Islamic faith. (*Id.*; Doc. 175-3, p. 28). "Fish or marine animals" are "automatically Halal," however. (Doc. 39-1, ¶ 24).

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[4] The fact that the operative complaint in this action, Plaintiff's first amended complaint (Doc. 39), is unverified does not prevent the filing from serving as evidence, given that the statements made therein are supported by Plaintiff's deposition testimony, affidavits, and verified filings submitted throughout this litigation. *See Sears v. Roberts*, 922 F.3d 1199, 1206 (11th Cir. 2019). For example, Plaintiff's second amended complaint (Doc. 85), which was filed without leave, was identical to the first amended complaint and verified. *See* (Doc. 181-3, ¶ 8 (verifying the statements made in the second amended complaint)); *see* also (Doc. 1, p. 7).

In addition to the manner in which the food is prepared, Plaintiff's adherence to the Hadith books requires him "[t]o take meals not on the same [utensils] that the unbelievers and the people of the book [i.e., followers of Christianity or Judaism] eat off of." (*Id*., ¶¶ 25–27; Doc. 175-3, pp. 24–29). In other words, Plaintiff's religious beliefs prohibit him from eating food that has been served on or prepared with utensils, such as cutlery and serving trays, that have been used to serve or prepare food that does not conform with his religious beliefs. *See* (Doc. 175-3, p. 26).

The GDCP allows for inmates to choose between two different vegan meal plans: the regular vegan meal plan and the restricted vegan meal plan. (Doc. 1-4). At all times relevant to this action, Plaintiff has participated in the restricted vegan meal plan. (Doc. 175-3, p. 30). The restricted vegan meal plan requires all food served under the plan to be vegan—that is, "free of animal products, by-products, or blood"—and "prepared with separate utensils and equipment that may not be used to prepare non-Restricted Vegan meals." (Doc. 1-4, p. 1). In addition, utensils and trays utilized as part of the restricted vegan meal plan "cannot be used for any other purpose and should be stored separately and designated as use for Alternative Entrée Meal Plans only." (*Id*., p. 2). Facility dishwashers cannot be used to clean the utensils and trays used under the restricted plan. (*Id*., p. 3). Furthermore, all restricted vegan food must be served on disposable plates and inmates provided with disposable sporks, "unless special arrangements have been made for reusable items (color-coded,

special identification)." (*Id.*, p. 3). Generally, restricted vegan foods "should not come in contact with other foods" and must be stored separately from non- restricted vegan foods. (*Id.*).

Plaintiff alleges that the trays used to serve his restricted vegan meals violated these requirements, in that the trays were also used to serve non-restricted vegan meals. (Doc. 39-1, ¶¶ 28–29). For this alleged violation, Plaintiff has sued Defendants Bishop, Bryson, Caldwell, Cannon, Chatman, Dozier, Logan, Martin, McCloud, Powell, Sellers, Sutton, and Thornton. (*Id.*, ¶¶ 34, 111).

According to prison policy, the serving trays used to serve restricted vegan food were required to be a different color than the trays used to serve non-restricted vegan food. (*Id.*, ¶ 29). Plaintiff's allegations are unclear as to the exact color of the different trays served to inmates in the SMU; however, in his deposition, Plaintiff stated that restricted vegan meals were "to be served on either . . . a turquoise or a light brown tray or Styrofoam trays," whereas the regular vegan diet "was supposed to be served on either the light brown tray or . . . a bright yellow tray like the manila envelope color." (Doc. 175-3, pp. 26–27). Plaintiff claims, "during the time I was there [at the SMU], they only fed the restrictive vegan and vegan on the manila-colored trays." (*Id.*, p. 27).

According to Plaintiff, he "[p]ut a small nick on the side" of the trays provided to him to learn whether other inmates who were not on the restricted vegan plan received their food on the same trays as those on the restricted plan. (Doc. 175-3, pp. 32–33). Plaintiff

claims he determined that he was being served food on non-conforming trays after discovering that other inmates in his dormitory had received their non-restricted vegan food on the nicked trays. (*Id.*). Plaintiff has provided affidavits from inmates who testified to that effect. *See* (Aff. of Chris Salmon, Doc. 11-3, p. 2; Affs. of Daniel Barfield, Doc. 11-6, pp. 2, 5). Inmate Daniel Barfield, for example, stated, under oath, that "food service put[] regular tray food onto the vegan and restricted vegan trays." (Doc. 11-6, p. 2). Plaintiff also claims that the restricted vegan trays had "damage markings from being run through the institution dishwasher," and were not stacked upright, causing contaminated water to stagnate on the trays. (Doc. 39-1, ¶ 29).

Plaintiff also alleges that, during the 2016 Ramadan fast, he was served chicken and chili, neither of which were Halal. (*Id.*, ¶ 35). Plaintiff names Defendants Sutton and Martin as responsible for this alleged violation. (*Id.*, ¶¶ 35, 111).

2. Insufficient Caloric Intake During Ramadan Fast

Plaintiff's Islamic faith requires that he participate in the annual month-long Ramadan fast, during which he must abstain from consuming food and drink between sunrise and sunset. (Doc. 39-1, ¶¶ 32, 35). In 2016, Ramadan lasted from June 7 to July 8. (*Id.*, ¶ 36). According to Plaintiff, prison policy dictates that all male inmates receive 2800 calories per day. (*Id.*, ¶¶ 36–37). Plaintiff claims that he was provided less than that amount during the 30 days of Ramadan in 2016. (*Id.*). Specifically, because Muslims must forgo their midday meal during the fast,

Plaintiff claims that he was provided with only two-thirds of his daily calorie requirement, or around 1,867 calories, during the fast. (Mot. for TRO, Doc. 140-1, p. 7). Plaintiff alleges that Defendants Bishop, Bryson, Cannon, Chatman, Dozier, Logan, Martin, McCloud, Powell, Sellers, and Sutton are liable for this deprivation and that they either abrogated or condoned the abrogation of the 2800-daily-calories provision during Ramadan "[f]or no other reason [than] because offenders are Muslims." (Doc. 39-1, ¶ 37).

3. Modesty Violated During Escort to Shower Area and Prison Yard

Plaintiff claims that his religious obligations under the Sunni methodology of Islam require him to guard his modesty by remaining covered "from [the] mid-stomach or the nav[e]l to the bottom of the knees," or the "awrah,"[5] while in the presence of any individual other than his spouse and children. (Docs. 39-1, ¶ 48; 175-3, pp. 64–65). Plaintiff alleges that prison policy and practice at the SMU prevented him from

[5] Since case law from courts in the Eleventh Circuit involving similar facts describes the navel-to-knee region of the body as the "awrah," for the sake of convenience and consistency, this Court shall do the same. *See*, *e.g.*, *Sims v. Jones*, No. 4:16CV49-WS/CAS, 2018 WL 1535483, at *1 (N.D. Fla. Mar. 29, 2018) (describing "awrah" as the "area between navel and knees"); *Muhammad v. Crosby*, No. 4:05CV193-WS, 2008 WL 2229746, at *8 (N.D. Fla. May 29, 2008) ("Aurah, which is that part of the male body from the navel to just over the knees . . . ."); *see also Lewis v. Ollison*, 571 F. Supp. 2d 1162, 1166 (C.D. Cal. 2008) ("Islam directs Muslim men to exercise modesty by covering from others' gaze their 'awrah' (the portion of the body from the navel to the knee).").

exercising this religious mandate by forcing him to wear only his boxers and shower shoes while being escorted by officers from his cell to the shower area and the prison yard, thus revealing his awrah to the individuals escorting him and others in the prison. (Docs. 39-1, ¶ 49; 175-3, pp. 65–66).

The policy at issue is GDC Standard Operating Procedure IIB09-0004.VI.J.1.b., which provides:

> b. Prior to being brought out of his cell for any reason:
>
> 1) The offender must strip down to tee shirt, boxers, and shower shoes.
>
> 2) The offender must hand each item out to the officer.
>
> 3) The officer must thoroughly check each item for contraband. Hand held metal detectors should be utilized for checking the clothing.
>
> 4) The offender must be restrained with handcuffs behind his back and with leg irons. At least two (2) Correctional Officers must be present and maintain maximum control and supervision.

(Doc. 11-8, pp. 7–8).

According to Plaintiff, Defendants Chatman, Sellers, Cannon, Powell, and Bishop have instructed correctional officers, including Defendant Hunter,[6] to

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[6] Defendant Hunter has not been served in this action, and both the Court's and the parties' efforts to locate Defendant Hunter have been exhausted, to no avail. As Defendant Hunter has not been served, it is **RECOMMENDED** that the claims against him be **DISMISSED without prejudice** pursuant to

disregard the policy concerning how male inmates in the SMU are to be dressed while being escorted from their cells. (Doc. 39-1, ¶ 50). Defendants' instructions and actions, Plaintiff claims, in effect, serve to abrogate the policy by not allowing him to leave his cell in a t-shirt. (*Id*., ¶¶ 50–51; Doc. 181-2, p. 4). Plaintiff further alleges that Defendants Dozier and Bryson "condon[ed] and up[held]" those instructions. (Doc. 39-1, ¶ 114). Moreover, Plaintiff claims that Defendant Hunter ridiculed him while Plaintiff was being escorted from his cell in the manner alleged by telling Plaintiff that his "religious obligations don't mean anything, this is the United States." (*Id*., ¶ 50).

Plaintiff argues that prison officials could use other methods of "achiev[ing] their security purposes" while being escorted, such as using metal detectors, body scanning machines, or pat downs to search his person. (*Id*., ¶ 51). He claims that the electronic methods of searching him are "readily available" and serve as the "least restrictive means to achieve their security purposes." (*Id*.).

4. Restricted Shower Use

Plaintiff, as a Sunni Muslim, must perform the daily ghusl ritual, which involves bathing "each body part" three times. (Doc. 39-1, ¶¶ 52–53). As an SMU inmate, however, Plaintiff is only allowed to shower

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Rule 4(m) of the Federal Rules of Civil Procedure. *See* (Doc. 150, p. 2). In any case, as Defendant Hunter, a state employee at the time of the events alleged, would be entitled to qualified immunity from the single claim against him, he would, if he had been served, also be entitled to summary judgment. *See* Section V.B.4., *infra*.

three times a week, on Monday, Wednesday, and Friday, respectively. (*Id.*, ¶ 55). For Plaintiff to "properly perform[]" the compulsory five daily prayers, his "body and clothing must be and remain properly cleaned." (*Id.*, ¶ 54). Plaintiff claims that only ghusl satisfies this requirement. (*Id.*, ¶ 53).

Another Islamic ritual, wudu, which Plaintiff describes as a "short version" of ghusl, does not satisfy the cleanliness requirement, however. (Doc. 175-3, pp. 58–59, 63). Wudu involves the washing of the hands, face, nostrils, mouth, forearms, and feet three times, and the head once. (*Id.*, p. 58). Wudu can be performed with either water, dust, or sand, and is required "if one uses the restroom[,] passes wind[,] comes into contact with pus or blood," or "comes into sexual contact with their spouse." (*Id.*, pp. 58–60; Doc. 39-1, ¶ 43). To perform ghusl, wudu is performed first, then the right and left sides of the body are washed, head to toe, three times. (Doc. 175-3, p. 59). Ghusl, unlike wudu, requires a "large amount of water." (*Id.*, p. 63).

Plaintiff alleges that, although he is able to perform wudu using the sink in his cell, he is unable to perform the daily ghusl ritual due to the shower restrictions on inmates in the SMU. (Doc. 175-3, p. 63). Plaintiff claims that Defendants Bishop, Powell, Sellers, and Cannon refused to allow him to shower at least once a day, "[d]espite [there] being showers readily available in the dorms" in which he is housed. (Doc. 39-1, ¶ 56). He also states that prisoners in the general population unit and other facilities have unrestricted access to the showers from 5:30 a.m. to 11:30 p.m. on weekdays, and to 1:00 a.m. on

weekends. (*Id*., ¶ 57). The denial of the opportunity to perform ghusl every day leaves his prayers "hindered and ultimately not [accepted], i.e. void." (*Id*. ¶ 53).

B. Equal Protection Claim

As discussed in Section II.A.2., above, Plaintiff contends that he was not provided with calories sufficient to supplement the caloric loss he and other Muslims in the GDCP sustained during the Ramadan fast. Plaintiff adapted these facts to the equal protection context by alleging that, unlike Muslim inmates observing Ramadan, non-Muslim inmates received sufficient calories during the duration of the fast. (*Id*., ¶¶ 33, 37). Plaintiff claims that Defendants Bishop, Bryson, Caldwell, Chatman, Dozier, Logan, Martin, Powell, Sellers, Sutton, and Thornton deprived Muslim Ramadan observers of sufficient calories with "prejudicial intent against Muslims," in violation of the Fourteenth Amendment's Equal Protection Clause. (*Id*., ¶ 33).

C. Eighth Amendment Claims

1. Conditions of Confinement Claims

i. Contaminated Food

Over half of the food served pursuant to Plaintiff's restricted vegan diet consists of beans. (Doc. 39-1, ¶ 41). These beans, Plaintiff claims, are "grown by inmates at Rogers State Prison and collected in [50] pound bag[]s," where they are then "shipped ac[]ross the State of Georgia." (*Id*., ¶ 38). "Along with the beans and vegetables," however, "there are rocks, sticks, dirt and other foreign objects." (*Id*.).

Plaintiff alleges that, on January 12, 2016, he bit "down on a rock in the food," breaking off a quarter of one of his molars, "[r]esulting in a hole in the tooth" and "a great amount of pain." (*Id*., ¶ 40). The rock was "[a]bout the size of a pea." (Doc. 175-3, p. 67).

According to Plaintiff, both he and other inmates have filed a "continuous bombardment of grievances and complaints" regarding "the fact that food is still being served with all said dangerous objects." (Doc. 39-1, ¶ 39). Plaintiff also claims that he had previously chipped a tooth in a similar incident between six months and a year before the 2016 incident. (Doc. 175-3, p. 71). That incident, however, is not part of the instant lawsuit. Plaintiff names Defendants Caldwell, Cannon, Chatman, Martin, Sutton, and Thornton as the parties responsible for contaminating or permitting the contamination of the food served at the GDCP.

ii. Provided with Nutritionally Inadequate Meals

The factual basis of Plaintiff's Eighth Amendment claim against Defendants Bryson, Caldwell, Cannon, Chatman, Dozier, Logan, Martin, McCloud, Sellers, Sutton, and Thornton regarding the caloric and nutritional deficiency of his meals generally mirrors the facts of his Free Exercise claim. *See* Section II.A.2., *supra*. In addition, Plaintiff alleges that the food he was served was inedible and his restricted vegan meals were not served with protein supplements. (Doc. 39-1, ¶¶ 42–45). According to Plaintiff, he was served gravy, which was "nothing more than grea[s]e with salt in it," and uncooked bread and cabbage. (*Id*., ¶ 42). Plaintiff also alleges

that he was often served cold evening meals, particularly during Ramadan, and "[a] lot of times it wasn't cooked." (Doc. 175-3, p. 40). Plaintiff claims that the issues with his food caused him digestive problems, specifically excessive flatulence, and that the food served was nutritionally inadequate. (Doc. 39-1, ¶ 43).

2. Deliberate Indifference to Medical Needs Claims

i. Damaged Tooth

As discussed in Section II.C.1.i., above, on January 12, 2016, Plaintiff allegedly broke his molar when he bit into a small rock that was obscured in his food. The damage to his tooth allegedly caused "explosive amounts of pain throughout [P]laintiff's mouth and face." (*Id*., ¶ 59). Following the incident, Plaintiff filed a medical request form for dental treatment. (*Id*., ¶ 62). Seven days later, on January 19, Plaintiff was seen by Dr. Burnside, who referred Plaintiff to a dentist and recommended Plaintiff take aspirin for his pain. (*Id*., ¶¶ 68–70). Plaintiff contends, however, that the aspirin "didn't work" and was not readily available, and that, when Dr. Burnside offered him ibuprofen instead, Plaintiff informed him that ibuprofen made him ill. (*Id*., ¶ 70–71). In response, Dr. Burnside allegedly told Plaintiff to "take it or leave it." (*Id*., ¶ 71).

Plaintiff filed another medical request form on February 2 and was seen by dentist Dr. Barron, a since-terminated defendant in this action, on February 9. (*Id*., ¶ 72; 175-4, p. 19). At the appointment, Dr. Barron x-rayed and examined

Plaintiff's mouth. (Doc. 175-3, p. 94). After Dr. Barron informed Plaintiff that the tooth needed to be extracted, Plaintiff asked Dr. Barron to try to save the tooth. (*Id.*). In an attempt to prevent the removal of the tooth, Dr. Barron placed a temporary filling in Plaintiff's damaged tooth and told Plaintiff that if the pain had not returned in two months, he would place a permanent filling in the tooth. (Doc. 39-1, ¶ 76). Dr. Barron informed Plaintiff, however, that if the pain did return the tooth would have to be extracted. (*Id.*; Doc. 175-3, p. 94; Barron Aff., Doc. 181-8, p. 10). Plaintiff contends that filing another medical request would have been futile, because the medical staff at the prison were "already den[y]ing him" medical care regarding the shoulder injury that is also a part of the instant litigation. (Doc. 39-1, ¶ 77). Nevertheless, on March 30, 2016, Plaintiff submitted a medical request to inform Dr. Barron that his pain had not returned and "it was almost time to put the [permanent] filling in." (*Id.*, ¶ 79).

By April 18, 2016, however, Plaintiff's tooth pain had returned. (*Id.*, ¶ 80). Consequently, Plaintiff submitted at least two medical requests for dental treatment between April 18 and April 27, 2016. (*Id.*, ¶¶ 80–83). On May 3, while at an appointment concerning unrelated shoulder pain, Plaintiff was told that he was on the waiting list for a dental appointment. (*Id.*, ¶ 84). Plaintiff filed two emergency grievances for dental treatment, on May 4 and 18, respectively, and he was seen by Dr. Barron on May 26. (*Id.*, ¶¶ 85–86). By this time, Plaintiff was "unable to eat properly without inflicting more pain on himself." (*Id.*, ¶ 86). On May 26, 2016, a little over a

month after the recurrence of Plaintiff's tooth pain, Plaintiff's molar was removed, thus resolving the issue. (*Id*., ¶ 86; Doc. 175-3, p. 96).

Plaintiff claims that his tooth "could have [been] saved" and he would not have undergone needless pain if his treatment had not been not delayed. (Doc. 39-1, ¶ 87). He names Defendants Adair, Bryson, Burnside, Butts, Chatman, Dozier, Forts, Gore, Lewis, Reid, and Sellers as the parties liable for his deliberate indifference to medical needs claim.

ii. Injured Shoulder

Plaintiff's second deliberate indifference claim relates to an incident that occurred on January 9, 2016, when Plaintiff injured his left shoulder while performing the reverse-dips exercise on the edge of his bed. (*Id*., ¶ 89; Doc. 175-3, pp. 75–76). Plaintiff described the pain he experienced when injuring his shoulder as "like a sharp knife being stuck in the back part of his arm." (Doc. 39-1, ¶ 90). Plaintiff submitted a medical request on January 12, 2016, and was seen by Dr. Burnside on January 19. (*Id*., ¶ 90). Dr. Burnside allegedly examined Plaintiff while Plaintiff was still handcuffed behind his back, thus preventing a proper examination of Plaintiff's shoulder. (*Id*., ¶ 91). At the same appointment, Dr. Burnside prescribed ibuprofen, which causes Plaintiff to suffer side effects, including a "sick stomach." (*Id*.). Dr. Burnside also told Plaintiff "to stay off of his arm." (*Id*.).

After seeing Dr. Burnside, Plaintiff continued to suffer "unbearable" pain, resulting in Plaintiff submitting another medical request on February 2,

2016. (*Id*., ¶ 93). On February 16, Plaintiff was again assessed by Dr. Burnside, who, again, did not conduct a proper physical examination due to Plaintiff being handcuffed behind his back, but did refer Plaintiff for an x-ray, which was conducted on February 18, 2016. (*Id*., ¶¶ 95, 97). Plaintiff takes issue with Dr. Burnside's conclusion that an x-ray was required, arguing that an x-ray would reveal only broken bones, not muscle, ligament, or tendon damage. (*Id*., ¶ 96). Plaintiff contends that an MRI scan was required instead. (Doc. 175-3, pp. 84–85). In fact, Plaintiff claims that Dr. Burnside informed him that his "only con[c]ern was to see if anything was broken." (Doc. 39-1, ¶ 96). Plaintiff contends that he was never told about the results of the x-ray. (*Id*., ¶ 97).

Plaintiff submitted further medical requests on February 22 and March 2, which went unanswered. (*Id*., ¶ 99; Medical Requests, Doc. 116-6, pp. 6–7). He also informed other prison officials about his condition, but was told that there was "'nothing they could do for me and I'd have to wait.' Irregardless of the fact they seen the plaintiff in physical pain." (Doc. 39-1, ¶ 100). Plaintiff made similar complaints during a 90-day classification review hearing on April 18, 2016. (*Id*., ¶ 106).

At this stage, Plaintiff's pain was "obvious," given that "Plaintiff's arm could not be put behind his back" to be handcuffed "without a great amount of pain being inflicted," and he had lost the ability "to properly use his arm." (*Id*., ¶¶ 106, 108). Plaintiff claimed that medical staff, including Dr. Burnside, had "refused emphatically to provide any medical treatment that would [alleviate] or assist Plaintiff in

fixing his injured shoulder." (*Id.*, ¶ 108). It was only when Plaintiff's family submitted "certified letters to Dr. Burnside's supervisors" on April 28, 2016, that Plaintiff received appropriate medical treatment. (*Id.*, ¶ 109).

On May 3, 2016, Plaintiff was "pulled to the main prison" to be assessed by Dr. Fowlkes. (*Id.*). According to Plaintiff, Dr. Fowlkes, in contrast to Dr. Burnside, performed a physical examination while Plaintiff was not handcuffed. (*Id.*). Dr. Fowlkes, after performing the examination, "found that Plaintiff had suffered a significant injury," namely, a small tear in his rotator cuff. (*Id.*; Doc. 175-3, p. 87). Dr. Fowlkes prescribed a "steroid regimen" of methylprednisolone; meloxicam, a pain medication; and omeprazole, a medication for to protect Plaintiff's stomach. (Doc. 39-1, ¶ 109; Burnside Interrog. Resp., Doc. 165-15, p. 7). Plaintiff was also referred for four rounds of physical therapy. (Doc. 39-1, ¶ 109). Dr. Fowlkes did not refer Plaintiff for an MRI as Plaintiff requested, however, though Plaintiff does not take issue with that decision. (Doc. 175-3, p. 87). By July or August 2016, Plaintiff's shoulder injury had resolved. (*Id.*, p. 90).

Plaintiff names Defendants Bishop, Burnside, Chatman, Powell, and Williams as the parties responsible for the alleged violation.

D. Retaliation Claim

Plaintiff alleges Defendant Dr. Burnside provided the aforementioned inadequate medical care in

retaliation for filing a lawsuit[7] against him before Plaintiff sought treatment for his tooth and shoulder injury. (Doc. 39-1, ¶ 108). According to Plaintiff, on January 19, 2016, at an assessment for his injuries, after Plaintiff voiced his concerns to Dr. Burnside regarding the prescription of ibuprofen, which, as discussed, allegedly caused Plaintiff to suffer side effects, Dr. Burnside told him, "take it or leave it, that if you th[i]nk you'd put paperwork on me and think there's . . . ." (*Id.*, ¶¶ 68, 71 (ellipses in original)). Dr. Burnside, before finishing his sentence, then dismissed Plaintiff from the room. (*Id.*, ¶ 71). Later, on March 29, 2016, while Defendant Burnside was conducting his rounds, Plaintiff asked him about obtaining further treatment for his shoulder injury. (Docs. 116-1, p. 2; 169-2, p. 95). Defendant Burnside allegedly responded, "if I wanted medical attention that I'd better get the court to do it." (*Id.*). Plaintiff argues that, based on these statements, Defendant Burnside's inadequate treatment for his injuries was a retaliatory response to the earlier-filed lawsuit.

III. AVAILABLE RELIEF

A. Official-capacity Suit for Damages

Defendants, as state employees, are entitled to immunity under the Eleventh Amendment from the claims brought against them in their official capacities. In suing Defendants in their official capacities, Plaintiff is effectively suing the sovereign, here, the State of Georgia. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against

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[7] *See Rodriguez v. Chatman*, No. 5:15-cv-00002-MTT-CHW (M.D. Ga. Jan. 5, 2015).

a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." (citations omitted)). *But see Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985) ("[O]fficial-capacity actions for *prospective* relief are *not* treated as actions against the State." (emphasis added) (citing *Ex parte Young*, 209 U.S. 123 (1908))). "[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in federal court." *Graham*, 473 U.S. at 169. As the State of Georgia has not waived immunity, and Section 1983 was not meant to abrogate a State's Eleventh Amendment sovereign immunity, *see id*. at 169 n.17 (citing *Quern v. Jordan*, 440 U.S. 332 (1979); *Edelman v. Jordan*, 415 U.S. 651 (1974)), Plaintiff is barred from suing Defendants in their official capacities for damages in this action.

B. Religious Freedom Claims

As relief for the alleged violations of his rights under RLUIPA and the Free Exercise Clause of the First Amendment, Plaintiff has requested nominal damages, injunctive and declaratory relief, attorney's fees, and court and discovery costs. (Doc. 39-1, pp. 31–36). Plaintiff has also included a broad prayer for any "such other relief as it may appear that the Plaintiff is entitled to." (*Id*., p. 36). In light of the governing case law, Plaintiff cannot recover for his RLUIPA claims for either legal or equitable relief; therefore, his claims under RLUIPA are no longer alive. All that remains of Plaintiff's religious freedom claims is his individual-capacity suit for nominal damages to recover for the alleged First Amendment violations.

1. Individual-capacity Suit for Damages

i. Prison Litigation Reform Act

First of all, since Plaintiff has not alleged a more than *de-minimis* physical injury as part of his religious freedom claims, any potential claims for compensatory or punitive damages are barred by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(e). The PLRA bars a civil action "brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury." 42 U.S.C. § 1997e(e). In the Eleventh Circuit, a prisoner cannot recover either compensatory or punitive damages for constitutional violations unless he can show a physical injury that is more than *de minimis*. *See Brooks v. Warden*, 800 F.3d 1295, 1307 (11th Cir. 2015). If the prisoner fails to make the requisite showing of a physical injury, nominal damages remain available to recognize the constitutional violation. *See id*. at 1307–08.

Here, only Plaintiff's allegations regarding his inadequate nutrition during the 2016 Ramadan fast present a potential physical injury; however, the injuries Plaintiff allegedly sustained were, at most, *de minimis*. Plaintiff's religious beliefs require him to forgo consumption of any food or drink during daylight hours during the annual Ramadan fast. In that case, while observing Ramadan, Plaintiff must obtain all of his daily calories and nutrition between sundown and sunrise. Plaintiff claims that he was not provided with adequate nutrition during this period, and the food that he was served was cold and "[a] lot of times it wasn't cooked." (Doc. 175-3, p. 40). As a

result, Plaintiff allegedly experienced "digestive problems," specifically "br[e]aking wind" (Docs. 39-1, ¶ 42; 181-2, p. 3), and lost between 10 and 20 pounds[8] (Doc. 175-3, pp. 41–45). Plaintiff's allegations of minor digestive problems and a temporary 20-pound weight loss (his weight increased by 30 pounds within a few months (Doc. 175-3, p. 45)) suggest that Plaintiff suffered no more than *de minimis* injuries, if any injury at all. *See Wooden v. Barringer*, No. 1:16-CV-378-WTH-GRJ, 2018 WL 6048259, at *8 (N.D. Fla. Apr. 25, 2018) (finding a five-pound weight loss to be *de minimis*, and collecting cases that held similarly); *Zerby v. McNeil*, No. 3:09CV284/LC/MD, 2010 WL 5019232 (N.D. Fla. Nov. 2, 2010) (finding an 18-pound weight loss to be *de minimis*); *cf. Talib v. Gilley*, 138 F.3d 211, 214 n.3 (5th Cir. 1998) (finding it "doubtful" that a loss of around 15 pounds over a five-month period "denied anything close to a minimal measure of life's necessities").

Accordingly, without the requisite showing of a greater than *de minimis* physical injury, the PLRA bars Plaintiff's individual-capacity claims for compensatory and punitive damages as to his

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[8] Plaintiff's testimony that he lost around 20 pounds during Ramadan appears to relate to the 2018 fast, not the 2016 fast, as relevant to the instant case. *See* (Doc. 39-1, ¶¶ 35–36 (discussing the claims in the context of the 2016 Ramadan fast, which lasted from June 7 to July 8, 2016)); *see also* (Doc. 1, ¶ 35). In light of Plaintiff's general assertion that his caloric intake during the 2016 fast was reduced to levels violative of the Constitution, this testimony is liberally construed to apply with equal force to the events alleged in Plaintiff's complaint and amended complaint.

religious freedom claims, leaving available only his prayer for nominal damages.

ii. RLUIPA

Next, binding Supreme Court and Eleventh Circuit case law bars Plaintiff from obtaining monetary damages under RLUIPA against officials sued in either their individual or official capacities. *See Sossamon v. Texas*, 563 U.S. 277, 288 (2011) (finding that RLUIPA does not allow a plaintiff to recover monetary damages against a State); *Smith v. Allen*, 502 F.3d 1255, 1275 (11th Cir. 2007) (holding that RLUIPA does not allow a plaintiff to recover monetary damages against individual defendants), *abrogated on other grounds by Sossamon*, 563 U.S. 277. RLUIPA, therefore, constitutes a separate and distinct bar to Plaintiff's action for monetary damages, including nominal damages, against Defendants in their individual and official capacities.

2. Equitable Relief

Both Plaintiff's official- and individual-capacity suits for injunctive and declaratory relief, under both RLUIPA and the First Amendment, are moot, based on his transfer to a different correctional facility.

The general rule in the Eleventh Circuit is that an inmate's transfer or release from prison moots his claims for injunctive and declaratory relief. *See Smith*, 502 F.3d at 1267 (citing *McKinnon v. Talladega Cty.*, 745 F.2d 1360, 1363 (11th Cir. 1984); *Zatler v. Wainwright*, 802 F.2d 397, 399 (11th Cir. 1986)); *Spears v. Thigpen*, 846 F.2d 1327, 1328 (11th Cir. 1988); *Francis v. Silva*, No. 11-24070-CIV, 2012 WL 3871863, at *5 (S.D. Fla. Sept. 6, 2012) (official

capacity) (citing *Powell v. Barrett*, 246 F. App'x 615, 619 (11th Cir. 2007)). Where the dispute is "capable of repetition, yet evading review," however, there is a continuing controversy to be resolved by the Court, and the plaintiff's claims for equitable relief are not mooted by the transfer. *See Sierra Club v. Martin*, 110 F.3d 1551, 1554 (11th Cir. 1997). The "capable of repetition, yet evading review," exception applies when (1) there is "a reasonable expectation or a demonstrated probability that the same controversy will recur involving the same complaining party, and (2) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration." *Id*. (citing *Murphy v. Hunt*, 455 U.S. 478, 482–83 (1982)).

Plaintiff was transferred from the SMU of the GDCP to Valdosta State Prison on June 30, 2018, where he currently resides. (Doc. 152). Therefore, Plaintiff's claims for injunctive and declaratory relief are moot unless those claims satisfy the "capable of repetition, yet evading review," exception. Plaintiff's claims, however, do not qualify for the exception.

First, Plaintiff's claim that he was served restricted vegan food that had been prepared with and served on utensils used to prepare and serve non-restricted vegan food is, despite Plaintiff's contrary assertion, moot. Plaintiff argues that, because he is still on the restricted vegan diet at Valdosta State Prison, his religious freedom claims relating to that diet still present active controversies sufficient to defeat mootness. (Resp. to Mot. for Summ. J., Doc. 181-2, p. 9). Plaintiff does not claim, however, that his restricted vegan food is still being served to him on

trays and prepared with utensils that do not conform to his religious mandates. On the contrary, Plaintiff explicitly testified that these practices occurred only during his time in the SMU. (Doc. 175-3, p. 29 ("Q. When did this happen? A. All throughout my SMU time through, 2011 to 2018.")). Furthermore, the record does not contain any evidence or allegations that relate to potential constitutional or RLUIPA violations concerning the use of non-conforming utensils at Valdosta State Prison. Nor is there any suggestion that any of the defendants named in this action are responsible for any violation of Plaintiff's rights that may have occurred at Valdosta State Prison. As it does not appear that Plaintiff's religious freedom claims for equitable relief regarding the manner in which his restricted vegan food was prepared and served remain active controversies, those claims are mooted by his transfer from the SMU.

Plaintiff's other claims for injunctive and declaratory relief are also moot following his transfer from the SMU. Plaintiff has not alleged similar deprivations of appropriate nutrition during Ramadan since his move to Valdosta State Prison.[9]

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[9] The 2018 Ramadan fast fell during the months of May and June. *See* (Doc. 175-3, pp. 34–35). Since Plaintiff was transferred to Valdosta State Prison in late June, after the fast had ended, no facts relating to the observance of Ramadan at Valdosta State could have possibly been revealed through discovery. The fact remains, however, that, regardless of the reason why, no allegations of a *continuing* harm related to his caloric intake during Ramadan are in evidence. The claims for injunctive and declaratory relief related to Plaintiff's Ramadan observance are, therefore, moot.

Nor does Plaintiff claim that he is unable to perform the ghusl or wudu cleaning ritual at Valdosta State. In fact, Plaintiff is now housed in general population, which, he admits, in contrast to his incarceration in the SMU, allows him to shower "at will." (Doc. 175-3, p. 22). Similarly, Plaintiff has not claimed that officials at Valdosta State Prison force him to reveal his awrah in front of others.

In light of Plaintiff's transfer from the SMU and failure to show that the alleged RLUIPA and First Amendment violations have continued at his new place of incarceration, Plaintiff's claims for injunctive and declaratory relief relating to all of his religious freedom allegations are mooted by his transfer from the SMU. *See Smith*, 502 F.3d at 1267. This leaves Plaintiff with no remedy for his claims under RLUIPA. Therefore, the only remaining relief Plaintiff can potentially obtain for his religious freedom claims is for nominal damages under the First Amendment.

C. Other Claims

As for Plaintiff's Eighth Amendment, retaliation, and equal protection claims, only Plaintiff's Eighth Amendment claims regarding his shoulder injury and broken tooth present an injury significant enough to overcome the PLRA's greater-than-*de-minimis* requirement.

First, the summary judgment record presents evidence, sufficient to establish a genuine issue of material fact, that Plaintiff's shoulder injury meets the PLRA's physical injury standard. There is evidence to indicate that when Plaintiff was finally

seen by Dr. Fowlkes, four months after his injury, he was diagnosed with an inflamed rotator cuff. (Doc. 169-2, p. 44). Rather than "fleeting pain" or "mere discomfort," which are considered *de minimis*, at best, *see Martelus v. Hattaway*, No. 3:17-CV-242-LC/MJF, 2019 WL 1245865, at *16 (N.D. Fla. Feb. 14, 2019), Plaintiff's torn rotator cuff allegedly caused Plaintiff significant pain and a loss of mobility in his shoulder for more than four months before he received the treatment prescribed by Dr. Fowlkes. (Doc. 169-2, pp. 44–45). Dr. Fowlkes prescribed Plaintiff with a variety of treatment for the injury, including physical therapy, steroids, and pain medication. (Doc. 39-1, ¶ 109). Following this treatment, Plaintiff's shoulder injury was resolved within two or three months. (Doc. 175-3, p. 90). On these facts, a reasonable jury could determine that Plaintiff's torn rotator cuff was a greater than *de minimis* physical injury under the PLRA.

Plaintiff's dental injury also meets the PLRA's physical injury requirement. As a consequence of biting a pea-sized rock left in his food, Plaintiff's molar allegedly broke, resulting in the eventual removal of the damaged tooth. Plaintiff alleges that he suffered "a great amount of pain" as a result. (Doc. 39-1, ¶ 40). Defendants contend that Plaintiff suffered no more than discomfort as a result of the alleged injury, thus falling short of the PLRA standard. (Doc. 175-2, p. 12 (citing *Wooden v. Barringer*, No. 1:16-CV-378-WTH-GRJ, 2018 WL 6048259, at *7 (N.D. Fla. Apr. 25, 2018) ("Discomfort does not equate to physical injury."))). However, the fact that the damage to his molar was significant enough to result

in the removal of the tooth by a dentist is indicative of the type of injury considered by courts in this Circuit to be greater than *de minimis*. *See*, *e.g.*, *Samuel v. Johnson*, No. 3:12CV218/RV, 2013 WL 6859083, at *7–10 (N.D. Fla. Dec. 30, 2013) (finding under the standards of both the Eighth Amendment and the PLRA that "[t]he evidence of the injuries sustained by Plaintiff, the destruction of his tooth in particular, is enough to consider Plaintiff's injuries to be more than *de minimis* in nature").

Given that Plaintiff's shoulder and dental injuries are considered physical injuries under the PLRA, Plaintiff may seek compensatory and punitive damages in recovery. However, because Defendants are entitled to qualified immunity from Plaintiff's claim regarding the dental injury, *see* Section V.D.2.ii., *infra*, Plaintiff cannot recover such damages in this action.

In addition, Plaintiff's transfer from the SMU moots his prayers for injunctive and declaratory relief as to the claims discussed in this subsection, including the Eighth Amendment claims related to the damaged tooth. *See Smith*, 502 F.3d at 1267. Moreover, Plaintiff's allegations as to these claims do not suggest any continuing harm.

IV. SUMMARY JUDGMENT STANDARD

A party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "An issue of fact is 'material' if it is a legal element of the claim under the applicable substantive law which

might affect the outcome of the case." *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). A factual dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party; however, "the mere existence of a scintilla of evidence in support of the position will be insufficient." *Johnson v. Bd. of Regents of Univ. of Georgia*, 263 F.3d 1234, 1243 (11th Cir. 2001) (quoting *City of Delray Beach v. Agricultural Ins. Co.*, 85 F.3d 1527, 1530 (11th Cir. 1996)).

The party moving for summary judgment bears the burden of informing the Court of the basis for its motion, and of citing "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," that support summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24 (1986). In resolving motions for summary judgment, the Court must view the evidence in the light most favorable to the nonmoving party, *Tolan v. Cotton*, 572 U.S. 650, 657 (2014), which requires the Court to believe the evidence provided by the nonmovant and draw all justifiable inferences in the nonmovant's favor, *Anderson*, 477 U.S. at 255. "Inferences based on speculation," however, "will not suffice to overcome a motion for summary judgment." *Melton v. Abston*, 841 F.3d 1207, 1219 (11th Cir. 2016) (citation and internal quotation omitted).

V. QUALIFIED IMMUNITY

At this stage of proceedings, Plaintiff has adequately established that Defendant Burnside acted deliberately indifferent to Plaintiff's shoulder

injury, in violation of the Eighth Amendment, and retaliated against Plaintiff for filing a civil rights action against him. All other defendants, however, are entitled to qualified immunity from Plaintiff's respective claims against them.

A. Qualified Immunity Standard

Qualified immunity protects government officials sued in their individual capacities "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The doctrine of qualified immunity "balances two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009). A government official enjoys the protection of qualified immunity even if his error is based on "a mistake of law, a mistake of fact, or a mistake based on mixed questions of law and fact." *Id.* (internal quotation marks omitted) (quoting *Groh v. Ramirez*, 540 U.S. 551, 567 (2004) (Kennedy, J., dissenting)). In essence, "qualified immunity operates 'to ensure that before they are subjected to suit, officers are on notice their conduct is unlawful.'" *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)).

A threshold matter in deciding whether an official is entitled to qualified immunity is whether the defendant has established that "the allegedly unconstitutional conduct occurred while he was

acting within the scope of his discretionary authority." *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1281 (11th Cir. 1998) (citation omitted). In the qualified immunity context, an official acts within his discretionary authority when his challenged actions occurred during the performance of legitimate job-related functions, "through means that were within his power to utilize." *Holloman v. Harland*, 370 F.3d 1252, 1266 (11th Cir. 2004). Once the defendant has made this showing, "the burden shifts to the plaintiff to show that qualified immunity is not appropriate." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002). Here, it is clear that Defendants' challenged conduct was performed within their respective discretionary authorities as officials or employees of the Georgia Department of Corrections ("GDC"). Since Defendants have shown that their alleged actions were discretionary acts performed as part of their jobs in the GDC, the burden shifts to Plaintiff to show that Defendants are not entitled to summary judgment on qualified immunity grounds.

To show that an official is not entitled to qualified immunity, the plaintiff must present evidence demonstrating (1) "that the official's alleged conduct violated a constitutionally protected right," and (2) "that the right was clearly established at the time of the misconduct." *Melton*, 841 F.3d at 1221 (citing *Pearson*, 555 U.S. at 232). Both elements must be satisfied to overcome a defense of qualified immunity, *see id*. (citing *Grider v. City of Auburn*, 618 F.3d 1240, 1254 (11th Cir. 2010)), and the Court's determination of the two elements may be conducted in any order, *Pearson*, 555 U.S. at 236. Where a defendant has not

violated a constitutional right, however, it is not necessary to address the clearly-established prong, and vice versa. *See id.*; *Melton*, 841 F.3d at 1225 (citing *Hudson v. Hall*, 231 F.3d 1289, 1294 (11th Cir. 2000) ("[W]hether a defendant has violated a constitutional right at all is a 'necessary concomitant' to the question of qualified immunity: if a defendant has not violated the law at all, he certainly has not violated clearly established law.")).

B. Religious Freedom Claims

1. Free Exercise Standard

The First Amendment's Free Exercise Clause provides, "Congress shall make no law . . . prohibiting the free exercise [of religion]." U.S. Const. amend. I. This constitutional mandate "requires government respect for, and noninterference with, the religious beliefs and practices of our Nation's people," *Cutter v. Wilkinson*, 544 U.S. 709, 719 (2005), including prisoners, *see Bell v. Wolfish*, 441 U.S. 520, 545 (1979) ("[C]onvicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison."); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987) ("Inmates clearly retain protections afforded by the First Amendment, including its directive that no law shall prohibit the free exercise of religion." (citations omitted)). In contrast to non-incarcerated persons, who enjoy broad rights under the Free Exercise Clause, prisoners' free-exercise rights are often circumscribed. *See Hakim v. Hicks*, 223 F.3d 1244, 1247 (11th Cir. 2000) ("Unlike the strict standards of scrutiny applicable to the constitutional rights of persons in free society, the Supreme Court has adopted a deferential standard

for determining whether a prison regulation violates an inmate's constitutional rights."). These limitations "arise both from the fact of incarceration and from valid penological objectives—including deterrence of crime, rehabilitation of prisoners, and institutional security." *O'Lone*, 482 U.S. at 348.

To establish that a prison official violated his rights under the Free Exercise Clause, a prisoner must show that the official imposed a "substantial burden" on his ability to practice his religion. *See Hoever v. Belleis*, 703 F. App'x 908, 912 (11th Cir. 2017) (citing *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 565 (1993)). "[T]he Supreme Court has made clear that the substantial burden hurdle is high and that determining its existence is fact intensive." *Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Ga.*, 843 F. Supp. 2d 1328, 1353–54 (N.D. Ga. 2012). In the Eleventh Circuit, an official's actions substantially burden an inmate's free exercise of religion when "the conduct complained of 'completely prevents the individual from engaging in religiously mandated activity, or . . . requires participation in an activity prohibited by religion' and, at a minimum, must have 'something more than an incidental effect on religious exercise.'" *Id.* (quoting *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004)).

The prison official can defend against allegations that his actions substantially burdened the inmate's religious practice by demonstrating that the conduct was "reasonably related to legitimate penological interests." O'Lone, 482 U.S. at 348. In other words, the challenged limitations on the prisoner's free

exercise of religion violate the First Amendment only if they are unreasonable in light of the deference owed to the valid interests of the state prison administration. *See Hakim*, 223 F.3d at 1247.

In the context of a challenge to the constitutionality of a prison regulation, courts in the Eleventh Circuit determine the reasonableness of the regulation by applying the four Turner factors:[10]

> (1) whether there is a valid, rational connection between the regulation and a legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the asserted constitutional right that remain open to the inmates; (3) whether and the extent to which accommodation of the asserted right will have an impact on prison staff, inmates, and the allocation of prison resources generally; and (4) whether the regulation represents an exaggerated response to prison concerns.

Johnson v. Brown, 581 F. App'x 777, 780 (11th Cir. 2014) (quoting *Hakim*, 223 F.3d at 1247–48); *see Turner v. Safley*, 482 U.S. 78, 89–91 (1987).

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[10] The *Turner* factors generally do not serve as a "'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable alternative method of accommodating the claimant's constitutional complaint. But if an inmate claimant can point to an alternative that fully accommodates the prisoner's rights at *de minimis* cost to valid penological interests, a court may consider that as evidence that the regulation does not satisfy the reasonable relationship standard." *Turner v. Safley*, 482 U.S. 78, 90–91 (1987) (citation omitted).

2. Failure to Provide Diet that Complied with Plaintiff's Religious Obligations

Plaintiff has not shown that his free exercise rights were violated when Defendants allegedly provided him with the wrong color serving trays on an unspecified number of occasions and served Plaintiff non-Halal meat during the 2016 Ramadan fast.

i. Mixing of Serving Trays Between Restricted Vegan Plan and Other Meal Plans

To recover for the serving-tray claim, Plaintiff has brought suit against 13 of the 22 named defendants in this action: Defendants Bishop, Bryson, Caldwell, Cannon, Chatman, Dozier, Logan, Martin, McCloud, Powell, Sellers, Sutton, and Thornton. Plaintiff's scatter-shot approach to identifying the parties responsible for the alleged First Amendment violation is misguided, however, as Plaintiff has failed to identify any conduct by any defendant that relates to the allegation, let alone rises to the level of a constitutional violation.

Furthermore, to the extent that Plaintiff has sought to hold defendants liable in their supervisory roles, it is well-established in the Eleventh Circuit that "[s]upervisory officials cannot be held liable under § 1983 for unconstitutional acts by their subordinates based on respondeat-superior or vicarious-liability principles." *Piazza v. Jefferson Cty.*, 923 F.3d 947, 957 (11th Cir. 2019) (citing *Hartley v. Parnell*, 193 F.3d 1263, 1269 (11th Cir. 1999)). Since Plaintiff has neither shown that any supervisory official named in this action personally participated

in the alleged constitutional violation, nor established a "causal connection" between the supervisor's conduct and the violation, Plaintiff cannot hold any supervisory official liable for the alleged violation of his religious free exercise rights. *See id.*

Plaintiff's claim also fails on the merits. The fact that Plaintiff may have been provided with serving trays of a different color to what he was expecting, presents, at most, a mere inconvenience on his right to free exercise, not a substantial burden. *See Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) ("[A] 'substantial burden' must place more than an inconvenience on religious exercise; a 'substantial burden' is akin to significant pressure which directly coerces the religious adherent to conform his or her behavior accordingly."). The prison administration had a policy in place that accommodated Plaintiff's specific religious obligations. Under the policy, all food served pursuant to the restricted vegan meal plan was required to be prepared separately from all other food, only utensils designated for use with restricted vegan food were to be used to prepare and serve that food, and all trays used to serve restricted vegan food were, at least in Plaintiff's case, to be color-coded. *See* (Doc. 1-4). Plaintiff has provided no evidence that this procedure was not followed.

Furthermore, even if Plaintiff's conclusory allegations were accepted as true, the color-coding policy was breached on an unspecified number of occasions by inadequately identified prison officials. Such a slight burden on Plaintiff's religious exercise does not rise to the level of a constitutional violation.

See McEachin v. McGuinnis, 357 F.3d 197, 203 n.6 (2d Cir. 2004) ("[T]here are some burdens so minor that they do not amount to a violation [of the Free Exercise Clause.]"); *Rapier v. Harris*, 172 F.3d 999, 1006 n.4 (7th Cir. 1999) ("De minimis burdens on the free exercise of religion are not of constitutional dimension. . . . Thus, the prison officials' failure to accommodate Mr. Rapier's standing request for non-pork meals on three isolated occasions does not give rise to liability for a constitutional violation." (citations omitted)).

As Plaintiff has not established that his constitutional rights were violated when Defendants purportedly served food to Plaintiff on the wrong colored tray on an unspecified number of occasions, Defendants are entitled to qualified immunity from Plaintiff's free exercise claim.

ii. Serving of Non-Halal Meat

As to Plaintiff's claim that he was served non-Halal meat, namely, chicken and chili, during Ramadan in 2016, Plaintiff's religious exercise was not substantially burdened.

Liberally construed, Plaintiff, in his amended complaint, stated that he was served chicken and chili on two occasions, June 7 and 13, 2016, respectively, although there is some confusion as to the exact dates. (Doc. 39-1, ¶ 35). For example, Plaintiff stated in a grievance that he was provided "chicken strips" on June 17, 2016. (Doc. 169-2, p. 102). Another inmate, Daniel Barfield, filed a grievance, in which he stated that, on June 16, 2016, inmates on the vegan and restricted vegan plans were provided with chicken

strips, and, on June 19, 2016, the vegan and restricted vegan inmates were provided with "ground beef chili," not vegan chili. (Doc. 11-6, p. 4); *see also* (Decl. of Daniel Barfield, Doc. 11-6, p. 2 (verifying "complaints about food service putting regular tray food onto the vegan and restricted vegan trays")).

Regardless of the inconsistent reports concerning the dates on which Plaintiff was served chicken and (possibly beef) chili, the evidence, even viewed in the light most favorable to Plaintiff, indicates that the issue occurred only twice during the 2016 Ramadan fast. Similar to the serving-tray issue, these two isolated incidents constituted a mere inconvenience on religious exercise, as opposed to a substantial burden. *See Midrash*, 366 F.3d at 1227. Although Plaintiff was presented with the classic Hobson's choice between following his religious precepts by refusing to eat the meals and abandoning his beliefs by eating non-Halal meat, *see Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1317 (10th Cir. 2010), he was faced with the choice on only two occasions, occurring several days apart. Such a temporary and slight infraction on religious exercise is generally not considered a "substantial" burden. *See*, *e.g.*, *Wilkinson v. GEO Grp., Inc.*, 617 F. App'x 915, 918 (11th Cir. 2015) (finding that the temporary deprivation of a religious artifact did not substantially burden the inmate's religious practice); *Lewis v. Ollison*, 571 F. Supp. 2d 1162, 1170 (C.D. Cal. 2008) (considering a temporary shower policy that would have required the inmate to walk through the prison in boxers and shower shoes, in violation of his religious tenets, imposed, at most,

an inconvenience on his free exercise rights); *Omar v. Casterline*, 414 F. Supp. 2d 582, 593 (W.D. La. 2006) (finding that the refusal to serve or let the inmate retain his meals after sunset on two days during Ramadan was, at most, "a *de minimis* impact on his free exercise rights").

As Plaintiff has not demonstrated that the serving of non-Halal meat on two occasions violated the Free Exercise Clause, Defendants enjoy qualified immunity from the claim.

3. Insufficient Caloric Intake During Ramadan Fast

Plaintiff has not established that his caloric intake during the 2016 Ramadan fast imposed a substantial burden on his religious exercise.

As an initial matter, the parties dispute the total amount of calories Ramadan observants at the prison lose during the fast. According to Senior Dietician at Georgia Correctional Industries, which provides the menus for GDC facilities, Samantha Minardo, "[t]he 28-day average calorie intake target for male inmates is 2700 calories," and inmates observing Ramadan "receive approximately 295-419 [fewer calories] per day" by missing their midday meal. (Doc. 175-4, pp. 2–3). Therefore, according to Defendants' estimate, Muslim prisoners fasting during Ramadan received around 2,281 to 2,405 calories per day, or between 84 and 89% of the 2,700-calorie diet.

Plaintiff, on the other hand, argues that male inmates are supposed to receive 2,800 calories each day, but receive "3[3].33%," or one-third, fewer calories per day during Ramadan. (Docs. 39-1, ¶¶ 36–

37; 140-1, p. 7). By Plaintiff's estimate, then, he received only 1,867 calories per day during the Ramadan fast. As evidence that he must receive at least 2,800 calories per day, Plaintiff has provided an article purportedly written by Alyssa Guzman, an "eHow Contributor," printed from the website ehow.com. (Doc. 1-5). In the article, Guzman claims that the GDC requires male inmates to receive 2,800 calories per day, not 2,700, as suggested by Defendants. (*Id.*). Although unverified, Guzman's statement is supported by an affidavit from Food Service Director Frederick Sutton, a defendant in this case, which states that kitchen staff "always follow the plating guide for a 2800 calorie diet." (Doc. 181-24, p. 17). For purposes of summary judgment, all evidence provided by Plaintiff, the nonmovant, must be believed, *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); therefore, at this stage in the proceedings, Plaintiff's assertion that he must receive at least 2,800 calories per day is accepted as true.

Plaintiff's contention that he lost one-third of his daily calories during Ramadan by forgoing his midday meal cannot be accepted as true, however, as it is not supported by evidence and is merely speculative. The allegation that he lost one-third of the 2,800 calories during Ramadan appears to have been deduced from the fact that he missed one of his three meals, the midday meal, each day while observing the fast. Plaintiff, however, has provided no evidence that the midday meal constituted one-third of his daily caloric intake during the fast. In contrast, Minardo, a dietician, in a sworn declaration, stated that Ramadan observers received "approximately 295-419

[fewer] calories" per day during the fast, which, on a diet of 2,800 calories, equates to a loss of between 11 and 15% of a male inmate's daily calories. (Doc. 175-4, pp. 2–3). Under Minardo's estimates, then, Plaintiff received between 2,381 and 2,505 calories per day during Ramadan, and Plaintiff has presented no evidence that indicates otherwise.

Even accepting as true Minardo's lowest estimation, Plaintiff has not demonstrated that the provision of only 2,381 calories per day was so deficient that he was pressured to forgo the Ramadan fast. *See*, *e.g.*, *Sprouse v. Ryan*, 346 F. Supp. 3d 1347, 1356–57 (D. Ariz. 2017) (granting summary judgment based on the plaintiff's failure "to present specific facts or evidence to show that receiving just 2150-2200 calories a day is inadequate" and "forc[ed] him to forgo or significantly alter his religious practice to maintain proper nutrition"); *Heard v. Finco*, No. 1:13-CV-373, 2014 WL 2920479, at *4 (W.D. Mich. June 27, 2014) ("[T]here is no indication that a diet of 2,350 calories would force Plaintiffs to refrain from participating in, or abandon, the Ramadan fast."). *But see Couch v. Jabe*, 479 F. Supp. 2d 569, 589 (W.D. Va. 2006) (denying summary judgment based on the "drastic[] reduc[tion]" of calories during Ramadan, from 2,800 calories per day to 1,000 per day). Accordingly, Plaintiff has not shown that the meals he received during Ramadan substantially burdened his religious practice, and Defendants are entitled to qualified immunity from the claim.

4. Modesty Violated During Escort to Shower Area and Prison Yard

Although Plaintiff has shown that Defendants' practice of escorting him to the shower room and yard call while Plaintiff is clothed in nothing but boxers and shower shoes substantially burdened his religious exercise, Defendants have sufficiently demonstrated that the security protocol for escorting Plaintiff and other inmates was reasonably related to the prison administration's interest in ensuring adequate security during the escort and in preventing the transfer of contraband in the prison.

Plaintiff, as a Sunni Muslim, must maintain a covered awrah while in the presence of individuals other than his spouse and children. By walking him from his cell in the SMU to the shower area and yard call in only his boxers and shower shoes, Plaintiff alleges that his awrah is left exposed, thus causing him to violate his religious obligation to keep the awrah covered. Defendants' actions, therefore, force Plaintiff to engage in "an activity prohibited by [his] religion." *Hoever v. Belleis*, 703 F. App'x 908, 912 (11th Cir. 2017). Such actions imposed a substantial burden on Plaintiff's religious exercise. *See id. But see Simmons v. Williams*, No. 6:14-CV-111, 2017 WL 3427988, at *14 (S.D. Ga. Aug. 9, 2017) (finding a substantial burden only when the awrah was "completely exposed," that is, where the inmate's genitalia was visible through wet and translucent boxers); *Lewis v. Ollison*, 571 F. Supp. 2d 1162, 1171 (C.D. Cal. 2008) (finding a temporary shower policy, which included a requirement that he walk to the shower room in only boxers and shower shoes, "at most an inconvenience, but not a significant interference with his religious practice").

Defendants' practice of escorting SMU inmates in only boxers and shoes is, however, both legitimate and reasonably related to the proposed penological interests in security and preventing the flow of contraband in the prison. "Running a prison is an inordinately difficult undertaking that requires expertise, planning, and the commitment of resources, all of which are peculiarly within the province of the legislative and executive branches of government." *Turner v. Safley*, 482 U.S. 78, 84–85 (1987). Prison officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979); *see also Overton v. Bazzetta*, 539 U.S. 126, 132 (2003). "Where, as here, a state penal system is involved, federal courts have 'additional reason to accord deference to the appropriate prison authorities.'" *McKune v. Lile*, 536 U.S. 24, 37 (2002) (quoting *Turner*, 482 U.S. at 85).

Georgia's prison regulations allow inmates in the SMU to be escorted to the shower and yard call in a t-shirt, boxers, and shower shoes, *see* (Doc. 11-8, pp. 7–8); however, the security *practice*, as described by prison officials, is to escort inmates in only boxers and shower shoes. Defendants assert that the security practice is necessary to prevent the flow of contraband around the prison and to ensure that the escorting officers are safe and the prison remains secure. (Doc. 175-2, p. 6). In support, Defendants have provided verified interrogatory responses from various officials in the GDCP. The Deputy Warden of Security of the

SMU, William Powell, for example, stated, "[I]t was the security practice to take inmates to shower call in shorts rather than in full dress, and the reason for this practice is that contraband could be hidden in clothing and weapons could be taken to the shower." (Doc. 169-9, p. 4). Other officials stated similarly. *See*, *e.g.*, (Docs. 169-5, p. 30; 169-8, pp. 6–7).

The GDCP is a highly secure environment where violence is common. *See*, *e.g.*, *Watson v. Bishop*, No. 5:12-CV-451 CAR, 2013 WL 1748617, at *3 (M.D. Ga. Mar. 28, 2013) (describing a violent altercation between inmates during a shower escort in the SMU); *see also* (Sellers Interrog. Resp., Doc. 169-9, p. 16 (discussing congregation prohibition "due to [SMU inmates'] violent history")). In light of the valid security concerns faced by SMU officials, and the deference owed to those state officials, Defendants have sufficiently demonstrated that the practice of escorting SMU inmates to the shower room and yard call in only boxers and shower shoes was reasonably related to the legitimate penological interests in securing the prison, keeping correctional officers safe, and preventing the flow of contraband throughout the prison. *Cf. Holt v. Hobbs*, 135 S. Ct. 853, 863 (2015) ("We readily agree that the Department has a compelling interest in staunching the flow of contraband into and within its facilities . . . ."). Furthermore, the deviation from the "t-shirt, boxers, shower shoes" policy in this case was not, by itself, sufficient to violate the Constitution. *See Salter for Estate of Salter v. Mitchell*, 711 F. App'x 530, 540 (11th Cir. 2017) ("A mere violation of a local government's policy does not necessarily implicate a

constitutional violation." (citing *Virginia v. Moore*, 553 U.S. 164, 173–74 (2008))).

As Plaintiff has failed to show Defendant violated his First Amendment rights by forcing Plaintiff to expose his awrah during the escort, Defendants are entitled to qualified immunity from the claim.

5. Restricted Shower Use

Plaintiff has demonstrated that Defendants' refusal to allow him to shower daily substantially burdened his religious exercise. However, because Defendants have shown the shower policy was reasonably related to legitimate penological purposes, Defendants did not violate the First Amendment by restricting Plaintiff to three showers a week.

Plaintiff is religiously obligated to perform the five daily Islamic prayers. (Doc. 39-1, ¶ 53). Plaintiff believes that his prayers are "not [accepted], i.e., void," unless he has performed the ghusl ritual, which he must do daily. (*Id.*, ¶¶ 52–53). The wudu ritual may not be substituted for the ghusl ritual, (Rodriguez Dep., Doc. 175-3, p. 59 ("But the Ghusl is performed irregardless every 24 hours. This is performed by performing the Wudu first. While in the shower or in the tub, you would perform the Wudu, then you would wash the right side of the body twice from head to toe and then you would wash the left side of the body head to toe.")), and ghusl cannot be performed using the sink provided in Plaintiff's cell, (*Id.*, p. 63 ("Ghusl was not performed, because it actually requires a large amount of water . . . . [S]o to have a large [amount] of water on the floor with no drain, creates kind of a hazard.")). Plaintiff, as an

SMU inmate, was only allowed to shower three times a week, on Monday, Wednesday, and Friday, respectively. (Doc. 39-1, ¶ 55). Without daily access to facilities that would allow him to perform ghusl, Plaintiff's ability to perform his five daily prayers in the manner mandated by his religion was substantially burdened.

Despite Plaintiff's showing of a substantial burden, Defendants Bishop, Cannon, Powell, and Sellers, in light of the deference owed to the professional judgment of prison officials, *see Overton*, 539 U.S. at 132, have sufficiently demonstrated that the shower policy was reasonably related to legitimate security concerns. Defendants assert that the security measures needed to secure inmates while escorting them to the shower room are so "time- and labor-intensive" to implement that inmates can shower, at most, three times a week. (Powell Interrog. Resp., Doc. 169-9, p. 4). As discussed, violence is commonplace in the SMU. *See*, *e.g.*, *Watson*, 2013 WL 1748617, at *3 (describing violence between inmates during a shower escort in the SMU). Inmates housed in the B wing of the SMU,[11] including Plaintiff Rodriguez, are escorted, in "full restraints," that is, handcuffs and leg irons, by at least two officers. (Docs. 169-9, p. 4; 175-3, pp. 55–56). Some inmates must be escorted by up to five officers (Doc. 169-9, p. 4), though Plaintiff contests that he is included among this group (Doc. 175-3, p. 55 ("Q. And you were escorted there by officers? A. Two officers.")).

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[11] Inmates housed in other wings of the SMU had cells with a shower. (Doc. 175-3, p. 57).

Given the time and resource expenditure needed to implement these security measures, which are clearly necessary to secure the caliber of prisoner housed in the SMU's B wing during the escort to and from the shower room, the three-day limitation on showering is reasonable. *See Turner v. Safley*, 482 U.S. 78, 90 (1987) ("When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials."). The only acceptable alternative, daily showers, is rendered impractical by the time and resources required to perform the steps needed to secure the inmates. *See id*. ("[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation."). The shower policy is, therefore, reasonable and thus does not violate the Free Exercise Clause.

6. Conclusion

Defendants are entitled to qualified immunity from all of Plaintiff's religious freedom claims. Accordingly, summary judgment should be granted in Defendants' favor as to those claims.

C. Equal Protection Claim

Plaintiff has not shown that Defendants Bishop, Bryson, Caldwell, Chatman, Dozier, Logan, Martin, Powell, Sellers, Sutton, and Thornton violated his equal protection rights by providing inadequate meals to Muslim inmates during Ramadan while providing non-Muslim inmates with adequately nutritious meals.

The Fourteenth Amendment's Equal Protection Clause provides: "No State Shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. To establish an equal protection claim, the inmate must demonstrate that (1) he is similarly situated with other prisoners who receive more favorable treatment, and (2) prison officials acted with discriminatory intent based on some constitutionally protected interest, such as race. *Searcy v. Prison Rehab Indus. & Ent, Inc.*, 746 F. App'x 790, 794 (11th Cir. 2018) (citing *Jones v. Ray*, 279 F.3d 944, 947 (11th Cir. 2001)).

Plaintiff's claim falls at the first hurdle: "Plaintiff cannot maintain an equal protection claim comparing Muslim inmates at [GDCP] to the remainder of the general population inmates at [GDCP], as the general population inmates—who may have no faith system or come from a variety of religious backgrounds—are not a similarly situated class with respect to special diets." *Bey v. Tennessee Dep't of Correction*, No. 2:15-CV-174-TWP-MCLC, 2018 WL 1542383, at *8 (E.D. Tenn. Mar. 29, 2018). As Plaintiff has failed to show he was similarly situated to non-Muslim inmates at the GDCP, he has not established a violation of his equal protection rights. Defendants are therefore entitled to qualified immunity from Plaintiff's equal protection claim.

D. Eighth Amendment Claims

1. Conditions of Confinement Claims

i. Standard

The conditions under which an inmate is confined are governed by the Eighth Amendment's Cruel and Unusual Punishments Clause. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). The Clause imposes a duty on prison officials to provide inmates with "adequate food, clothing, shelter, and medical care," among other things. *Id*. To establish a violation of this duty, the inmate must satisfy an objective and subjective component. *Chandler v. Crosby*, 379 F.3d 1278, 1289 (11th Cir. 2004). Under the objective component, the inmate must show that he suffered a "deprivation or injury that is 'sufficiently serious' to constitute a denial of the 'minimal civilized measure of life's necessities.'" *Thomas v. Bryant*, 614 F.3d 1288, 1304 (11th Cir. 2010) (quoting *Farmer*, 511 U.S. at 834). Only extreme conditions will satisfy this inquiry, and the inmate must show, at the very least, that the challenged conditions "posed an unreasonable risk of serious damage to his future health or safety." *Chandler*, 379 F.3d at 1289 (internal quotation marks omitted).

To establish the subjective component, the inmate must show that the prison official had a "sufficiently culpable state of mind." *Thomas*, 614 F.3d at 1304 (internal quotation marks omitted). "This means the prisoner must show that the prison officials: (1) had subjective knowledge of a risk of serious harm; (2) disregarded that risk; and (3) displayed conduct that is more than mere negligence." *Oliver v. Fuhrman*, 739 F. App'x 968, 970 (11th Cir. 2018) (citing *Farrow v. West*, 320 F.3d 1235, 1245 (11th Cir. 2003)).

Under the Eighth Amendment, inmates must be provided "reasonably adequate food," containing

"sufficient nutritional value to preserve health." *Hamm v. DeKalb Cty.*, 774 F.2d 1567, 1575 (11th Cir. 1985) (internal quotations omitted). "The fact that the food occasionally contains foreign objects or sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation." *Id.*

ii. Contaminated Food

Plaintiff has not shown that the broken tooth he sustained from biting down on a pea-sized rock in his food on January 12, 2016, constituted cruel and unusual punishment, under either the objective or subjective prong of the Eighth Amendment test.

The record does not indicate that the food Plaintiff received while housed in the GDCP also contained "rocks, sticks, dirt and other foreign objects" on a more than occasional basis. Plaintiff has provided evidence that foreign objects were found in prison food on, at most, three occasions over a period of three to four years. First, Plaintiff relies on his own allegations that he bit into a rock left in the beans on January 12, 2016. (Docs. 39-1, ¶ 40; 11-13; 181-19, p. 6). Next, in a grievance dated November 5, 2014, Plaintiff claimed that the "beans still have dirt and rocks in them." (Doc. 11-16, p. 1). Plaintiff did not appear to allege any injury from the incident, however. Finally, Plaintiff has provided three affidavits from other inmates who have alleged that they found foreign objects in the prison food at the GDCP. Inmate Robert Watkins, in an affidavit dated December 16, 2016, claimed that he was "subjected to harsh treatment during the months of [D]ecember 2013 – February 2014" when all the SMU inmates were served "bad portions of beans on supper trays

that contained dead insects." (Doc. 11-7, p. 2). Inmate Daniel Barfield, in a declaration dated June 1, 2017, alleged that the restricted vegan food also contained "[d]irt and sticks." (Doc. 11-6, p. 2). It is unclear when Barfield found the objects in his food, however, as none of the attached grievances appear to relate to the issue. *See generally* (Doc. 11-6). Inmate Patrick Connelly declared similarly, stating, "On [April 12, 2017,] while eating the prison food I unintentionally bit down on a rock and broke a molar tooth." (Doc. 11-5, p. 2). Connelly's affidavit has limited use for purposes of Plaintiff Rodriguez's case, however, as it relates to an incident that occurred over a year after his own. In sum, Plaintiff has presented evidence of foreign objects in the prison food on three occasions: sometime between December 2013 and February 2014 (Doc. 11-7, p. 2); January 12, 2016 (Doc. 39-1, ¶ 40); and April 12, 2017 (Doc. 11-5, p. 2).

Evidence of only three incidents of foreign objects in prison food—only two of which specifically relate to Plaintiff's personal experience—over a three-to-four-year period does not sufficiently show that the occurrence was more than occasional. *See Hamm*, 774 F.2d at 1575 ("The fact that the food occasionally contains foreign objects or sometimes is served cold, while unpleasant, does not amount to a constitutional deprivation."). Courts have held that "[e]vidence of frequent or regular injurious incidents of foreign objects in food . . . raises what otherwise might be merely isolated negligent behavior to the level of a constitutional violation." *Green v. Atkinson*, 623 F.3d 278, 281 (5th Cir. 2010); *see also Roberts v. Williams*,

456 F.2d 819, 827 (5th Cir. 1971)[12] (finding that "the sustained maintenance, over a period of time of a needlessly hazardous condition" could present a constitutional violation, and concluding, "careless preparation of a single meal, producing food poisoning in prisoners, was not cruel"); *Wassil v. Casto*, No. CIV.A. 3:13-06020, 2014 WL 988479, at *11 (S.D.W. Va. Mar. 12, 2014) ("Occasional short-lived problems with food service and isolated instances of spoiled food or foreign objects in the food do not state cognizable claims under the Eighth Amendment." (internal quotation omitted)). Based on the evidence of record, the incidents of foreign objects in the prison food, let alone injurious ones, were few and far between. Although it is unfortunate that Plaintiff suffered a broken tooth on one of those occasions, the infrequency alleged is insufficient to defeat summary judgment.

As for the subjective prong, Plaintiff has not shown that the pea-sized rock in his beans was the product of more than mere negligence. The process of ensuring that prison food does not contain foreign objects prior to being served to inmates at the GDCP is as follows:

> Farm vegetables such squash, collards, turnips, potatoes, etc. which are g[r]own and canned by GDC are sent from a warehouse out of Milledgeville. Any field or foreign items in the food would be rinsed and removed before preparation and plating. Vegetables

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[12] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

> would be cut, washed, and rinsed before cooking. Staff were trained to observe trays as they were being plated and would not serve a tray with any field or foreign objects. Serve safe training and methods were followed. In main kitchen food service staff would arrive at 3:30 am, each with specific assignment. Their work would be supervised by a food service official.

(Martin and Sutton Interrog. Resp., Doc. 169-3, p. 3). Plaintiff has provided no evidence that Defendants were more than negligent in following these procedures. Plaintiff's allegations, construed liberally, state that Defendants "knowingly" and "intentionally" permitted food to be "laced with dangerous objects." (Doc. 39-1, ¶ 38). Such conclusory statements, without more, are insufficient to satisfy Plaintiff's burden at this stage. *See United States v. Stein*, 881 F.3d 853, 857 (11th Cir. 2018) ("An affidavit cannot be conclusory . . . . [But] a litigant's self-serving statements based on personal knowledge or observation can defeat summary judgment." (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990))).

Because Plaintiff has not shown that the alleged food contamination violated his Eighth Amendment rights, Defendants are entitled to qualified immunity from the claim.

iii. Nutritionally Inadequate Meals

The conclusion (in Section V.B.3, above) that Plaintiff had not shown his reduced caloric intake during the 2016 Ramadan fast violated the Free Exercise Clause, applies with equal force to Plaintiff's

Eighth Amendment claim regarding his nutritionally deficient meals. Although Plaintiff has presented additional facts that might speak to an Eighth Amendment violation, those facts still do not raise Plaintiff's allegations to the level of a constitutional violation. For example, Plaintiff alleges that he has been served "grea[s]e with salt in it," instead of gravy; raw dough, instead of properly baked bread; uncooked cabbage; and cold evening meals. (Docs. 39-1, ¶ 42; 175-3, p. 40). Plaintiff allegedly experienced digestive problems[13] as a result of consuming the "[i]nedible" food. (Doc. 39-1, ¶¶ 42–43; Doc. 175-3, p. 41). Plaintiff also claims that his restricted vegan meals are, "over [75%] of the time," merely the regular meals "without the meat," and he is not provided with a protein supplement to compensate for the lost calories. (Doc. 39-1, ¶ 44).

Without evidence of an injury resulting from the alleged caloric deficiency, such as significant weight loss or something more than *de minimis* and generally unspecified digestive problems, however, Plaintiff's allegations do not present an Eighth Amendment violation. *See Hamm v. DeKalb Cty.*, 774 F.2d 1567, 1575 (11th Cir. 1985); *Thaddeus-X v. Blatter*, 175 F.3d 378, 404–05 (6th Cir. 1999) ("[C]old food apparently is an ordinary incident in prison life." (citing cases)); *Cross v. Virginia Beach Corr. Ctr.*, 865

[13] Plaintiff does not discuss in detail the digestive problems he experienced after consuming the allegedly inedible food. Plaintiff does, however, mention that he "br[e]ak[s] wind" more regularly as a result. (Doc. 39-1, ¶ 43). As discussed in Section III.B.1.i. of this Recommendation, regular, even excessive, flatulence presents a *de minimis* injury, at most.

F.2d 1257 (4th Cir. 1989) ("[The plaintiff] does not state a constitutional claim for inadequate nutrition merely because there were occasional incidents of his being served food he considered inedible." (citing *Lunsford v. Reynolds*, 376 F. Supp. 526 (W.D. Va. 1974))). Although the food may not have been to his liking, the Constitution does not require prison administration to provide its inmates with the "amenities, conveniences and services of a good hotel." *Alfred v. Bryant*, 378 F. App'x 977, 980 (11th Cir. 2010) (quoting *Harris v. Fleming*, 839 F.2d 1232, 1235 (7th Cir. 1988)).

Since Plaintiff has failed to show that the food he was served fell below constitutional standards, Defendants are entitled to qualified immunity from the claim.

2. Deliberate Indifference to Medical Needs Claims

i. Standard

To establish that a prison official acted with deliberate indifference to a medical need, the plaintiff must show: (1) he had an objectively serious medical need; (2) the official was deliberately indifferent to that need; and (3) the official's deliberate indifference and the plaintiff's injury were causally related. *Hinson v. Bias*, No. 16-14112, 2019 WL 2482092, at *13 (11th Cir. June 14, 2019).

"A serious medical need is 'one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention.'" *Taylor v. Hughes*, 920 F.3d 729, 733 (11th

Cir. 2019) (quoting *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1307 (11th Cir. 2009)). A serious medical need can also be determined by "whether a delay in treating the need worsens the condition." *Mann*, 588 F.3d at 1307. For example, "depending on the circumstances, severe pain that is not promptly or adequately treated can present a serious medical need." *Hinson*, 2019 WL 2482092, at *13 (citing *McElligott v. Foley*, 182 F.3d 1248, 1255–59 (11th Cir. 1999)); *see also Farrow v. West*, 320 F.3d 1235, 1243–44 (11th Cir. 2003) ("In certain circumstances, the need for dental care combined with the effects of not receiving it may give rise to a sufficiently serious medical need to show objectively a substantial risk of serious harm."). Either way, "the medical need must be one that, if left unattended, poses a substantial risk of serious harm." *Taylor*, 920 F.3d at 733 (quoting *Farrow*, 320 F.3d at 1243).

The plaintiff can show that the prison official acted with deliberate indifference by proving that the official (1) had subjective knowledge of a risk of serious harm and (2) disregarded that risk (3) by conduct that is more than mere negligence. *See Brown v. Johnson*, 387 F.3d 1344, 1351 (11th Cir. 2004) (citing *McElligott*, 182 F.3d at 1255). An official has subjective knowledge of the risk of harm when he is "both aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and must also have drawn the inference." *Burnette v. Taylor*, 533 F.3d 1325, 1330 (11th Cir. 2008) (alterations omitted) (quoting *Farmer v. Brennan*, 511 U.S. 825, 837 (1994)). Conduct that constitutes more than mere negligence includes grossly inadequate

care, a decision to take an easier but less efficacious course of treatment, and medical care that is so cursory as to amount to no treatment at all. *See Bingham v. Thomas*, 654 F.3d 1171, 1176 (11th Cir. 2011) (citing *Brown*, 387 F.3d at 1351). In other words, "[t]he facts alleged must do more than contend medical malpractice, misdiagnosis, accidents, and poor exercise of medical judgment." *Simpson v. Holder*, 200 F. App'x 836, 839 (11th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104–07 (1976)).

"Even where medical care is ultimately provided, a prison official may nonetheless act with deliberate indifference by delaying the treatment of serious medical needs, even for a period of hours, though the reason for the delay and the nature of the medical need is relevant in determining what type of delay is constitutionally intolerable." *McElligott*, 182 F.3d at 1255; *see also Adams v. Poag*, 61 F.3d 1537, 1544 (11th Cir. 1995) ("Some delay in rendering medical treatment may be tolerable depending on the nature of the medical need and the reason for the delay.").

ii. Damaged Tooth

The evidence of record, viewed in the light most favorable to Plaintiff, does not show that Defendants acted with deliberate indifference by delaying treatment for Plaintiff's broken tooth.

Based on the evidence presented, a jury could reasonably find that Plaintiff's damaged molar and resulting pain presented a serious medical need. Plaintiff's injury required pain medication, a temporary filling, and ultimately a tooth extraction to resolve. Plaintiff consistently complained of tooth

pain, which increased over time, and reported that he had difficultly eating without causing himself additional pain. On these facts, Plaintiff has sufficiently shown at this stage that he was suffering from a serious medical need during the relevant period. *See McClain v. Danzig*, No. 2:15-cv-594-FtM-38UAM, 2019 WL 1102184, at *4 (M.D. Fla. Mar. 8, 2019) ("The courts have universally agreed that a dental problem of whatever nature that results in substantial pain qualifies as a serious medical need." (citing cases)).

Plaintiff has not demonstrated that Defendants acted with deliberate indifference, however. Two periods of delay in treatment are at issue here: (1) the 28 days between January 12, 2016, when Plaintiff filed his original medical request for dental treatment, and February 9, 2016, when dentist Dr. Barron placed a temporary filling in Plaintiff's tooth; and (2) the 37 days between April 19, 2016, when Plaintiff filed a medical request after the recurrence of his tooth pain, and May 26, 2016, when Dr. Barron extracted the damaged tooth, resolving Plaintiff's pain. As for the first period of delay, although it took 28 days for Plaintiff to see a dentist, he was seen by Dr. Burnside, a medical doctor (Doc. 169-6, p. 18), seven days after the incident. At that time, Dr. Burnside prescribed mild pain medication and referred Plaintiff to a dentist. Plaintiff was then seen by dentist Dr. Barron three weeks later. As for the second period of delay, the only intervening medical treatment Plaintiff received was for a shoulder injury. (Doc. 39-1, ¶ 84).

The course of treatment and severity of the injury described, though a serious medical need for Eighth Amendment purposes, suggests that Plaintiff's injury was relatively minor. Of course, a delay of treatment, even for an injury that is of a lesser degree, can give rise to a constitutional claim. *See Farrow v. West*, 320 F.3d 1235, 1247 (11th Cir. 2003). The two periods of delay, however, were not unreasonable, given the non-emergent nature of the dental injury. Although Plaintiff complained of tooth pain significant enough to cause him additional pain while eating, the injury presented no other indicia that the injury was particularly emergent. For instance, symptoms such as swelling of the affected area,[14] bleeding gums, infection, or weight loss could indicate that a delay in treatment would cause significant harm. *See id.* ("Farrow was permitted to suffer from pain, bleeding and swollen gums and periodic weight loss, and the defendants have offered no reasonable medical reason for the fifteen-month delay."); *Moore v. Jackson*, 123 F.3d 1082, 1087 (8th Cir. 1997) (concluding that a jury could find that a three-month delay in treating an infection could have caused the plaintiff to lose his tooth); *Fields v. Gander*, 734 F.2d 1313, 1315 (8th Cir.

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[14] Plaintiff, in an affidavit dated January 13, 2016, the day after he damaged his tooth, stated, "My mouth is presently swollen and I am unable to eat . . . ." (Doc. 1-2, p. 2). However, the evidence of record does not suggest that Plaintiff's mouth was swollen beyond this date, as swelling of the area was not mentioned in any subsequent grievance, affidavit, or medical request, and Plaintiff has not established that Defendants subjectively knew his mouth was swollen. In fact, none of the medical or dental records submitted in this case note that swelling was observed by Defendants or prison medical staff.

1984) (reversing grant of summary judgment, where dental treatment was delayed for three weeks while the plaintiff suffered pain and swelling in his face). As Plaintiff's injury presented no such indicia, no reasonable jury could find that the delays in treatment demonstrated a disregard for the risk of harm.

Even if Plaintiff could show that Defendants were deliberately indifferent to his dental needs, Plaintiff has not established a causal link between such indifference and the loss of his tooth. Plaintiff's assertion that his tooth "could have [been] saved" if he had seen a dentist sooner is based on nothing more than mere speculation. At his February 9 dental appointment, Dr. Barron, after taking x-rays and examining Plaintiff's mouth, informed Plaintiff that the tooth needed to be extracted. (Doc. 175-3, p. 94). After Plaintiff asked Dr. Barron if the tooth could be saved, Dr. Barron placed a temporary filling in the tooth and told Plaintiff that if the pain returned, the tooth would have to be extracted. Although the temporary filling provided Plaintiff with about two months of respite from the pain, the pain ultimately returned and, after a 37-day delay, the tooth was in fact removed.

The 37-day delay had no causal connection to the tooth extraction because Dr. Barron was already intent on removing the damaged tooth at the February 9 appointment, over three months prior to its removal. As for the initial 28-day delay in treatment, neither Plaintiff's allegations nor the evidence of record indicates any difference in or exacerbation of the injury between the time the tooth

was damaged and the date he was first seen by Dr. Barron. Plaintiff's allegation that his tooth was broken mirrors Dr. Barron's observation that Plaintiff had suffered a broken molar. As discussed, there was no evidence of infection or any other indicia of a deterioration of Plaintiff's condition during the initial 28-day delay in treatment. Therefore, the initial damage Plaintiff sustained from biting into a small rock, not the delay, caused Plaintiff to lose his tooth. Accordingly, to the extent that Defendants acted deliberately indifferent to Plaintiff's dental injury by delaying treatment, Plaintiff has not established a causal connection between Defendants' indifference and the injury.

As Plaintiff has not shown that Defendants acted deliberately indifferent to his dental injury, Defendants are entitled to qualified immunity from the claim.

iii. Injured Shoulder

Plaintiff's final Eighth Amendment claim relates to the adequacy of the treatment he received for a torn rotator cuff in his left shoulder. Although Plaintiff has established that Defendant Burnside was deliberately indifferent to Plaintiff's serious medical needs, Plaintiff has failed to make a similar showing as to Defendants Bishop, Chatman, Powell, and Williams. Specifically, a jury could reasonably find that Defendant Burnside provided Plaintiff pain medication that he knew would cause Plaintiff to suffer side effects, performed a cursory physical examination that was inadequate under the circumstances, and deliberately delayed treatment,

and that those actions constituted deliberate indifference to Plaintiff's shoulder injury.

The evidence presented indicates that the small tear in Plaintiff's rotator cuff presented a serious medical need. Plaintiff reported that he suffered sharp pain and a reduced range of motion in his shoulder. Dr. Fowlkes, approximately five months after Plaintiff first reported to prison officials that he had injured his shoulder, diagnosed Plaintiff with a rotator-cuff injury. To treat Plaintiff's injury, Dr. Fowlkes prescribed pain medication and steroids, and referred Plaintiff for physical therapy. The injury Plaintiff suffered, together with the course of treatment, indicates that the rotator-cuff injury was a serious medical condition. *See Taylor v. Hughes*, 920 F.3d 729, 733 (11th Cir. 2019). At least one court in this Circuit has found similar injuries sufficiently serious to meet the Eighth Amendment standard. *See*, *e.g.*, *Bailey v. Santiago*, No. 4:15CV630-WS/CAS, 2017 WL 2471055, at *4 (N.D. Fla. May 3, 2017) ("Here, it is accepted that a rotator cuff injury may be a serious medical need.").

Four separate allegations of deliberate indifference are at issue here: (1) Plaintiff's shoulder injury would have been diagnosed and treated sooner had Defendant Burnside referred Plaintiff for an MRI instead of an x-ray; (2) Defendant Burnside, knowing that ibuprofen caused Plaintiff to suffer side effects, still prescribed the medication, and other pain medication was either not offered, ineffective, or unavailable; (3) Defendant Burnside performed two physical examinations of Plaintiff's shoulder while Plaintiff was handcuffed behind his back, thus

rendering his conclusions that Plaintiff had a "full ROM," or "range of motion," completely baseless; and (4) the delay in treatment alone constituted deliberate indifference. Liberally construed, Plaintiff has brought all of these allegations against Defendant Burnside, whereas the only allegation that relates to Defendants Bishop, Chatman, Powell, and Williams is the fourth allegation, which concerns the delay in treatment.

a. Failure to Order an MRI

The claim that Defendant Burnside should have ordered an MRI of Plaintiff's shoulder instead of an x-ray can be summarily dispatched. Supreme Court and Eleventh Circuit case law on the subject is clear: "Whether prison system medical staff should have employed 'additional diagnostic techniques or forms of treatment' is a 'classic example of a matter for medical judgment,' and, therefore, '[a] medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment.'" *Harris v. Prison Health Servs.*, 706 F. App'x 945, 952 (11th Cir. 2017) (quoting *Estelle v. Gamble*, 429 U.S. 97, 107 (1976)); *see also Bailey*, 2017 WL 2471055, at *5 ("The decision to order an x-ray instead of an MRI is not unconstitutional.").

b. Lack of Effective Pain Medication

Defendant Burnside's decision to prescribe ibuprofen to treat Plaintiff's pain requires a more in-depth inquiry. It is clearly established in this Circuit that inmates are entitled to be free from needlessly suffering pain. *See*, *e.g.*, *Brennan v. Comm'r, Ala. Dep't of Corrs.*, 626 F. App'x 939, 943 (11th Cir. 2015)

(citing *McElligott v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)). In the five months prior to being treated by Dr. Fowlkes, Plaintiff had consistently complained that his shoulder injury was causing him pain. *See, e.g.*, (Jan. 27 Medical Request, Doc. 116-8, p. 2 (neither aspirin nor tylenol "is helping with the pain"); Feb. 22 Medical Request, Doc. 116-6, p. 7 ("I am still in pain"); Mar. 2 Medical Request, Doc. 116-6, p. 6 ("I am still in constant pain regarding my shoulder"); Mar. 13 Grievance, Doc. 116-6, pp. 4–5 (same); Apr. 5 Grievance, Doc. 169-2, p. 95 (discussing shoulder injury in context of retaliation claim); Decl. of Jerrame Gauld, Doc. 37-4, p. 2 ("through the months of March [and] April, 2016, [Plaintiff] would be in pain")). Dr. Burnside, in the notes following the February 16 appointment, reported that Plaintiff had described his shoulder pain as "shooting." (Doc. 169-2, p. 45). Dr. Fowlkes, almost three months later, in his May 3 assessment of Plaintiff's shoulder, noted similarly, reporting that Plaintiff had described his pain at that time as "sharp." (Doc. 169-2, p. 44).

Plaintiff contends that Defendant Burnside, knowing that ibuprofen upsets Plaintiff's stomach, prescribed nothing but ibuprofen to relieve his pain. (Docs. 116-4, pp. 5–6; 116-5, pp. 2–3; 175-3, p. 83). Even though the medical notes show that Defendant Burnside prescribed Tylenol, not ibuprofen, this factual dispute is of no matter, as Plaintiff contends that Tylenol was ineffective. (Doc. 116-8, p. 2). According to Plaintiff, aspirin also did not relieve his pain (*Id.*), and, in any case, he claims that aspirin was not readily available (Doc. 39-1, ¶. 65 ("Plaintiff informed Defendant Gore that [there] wasn't any

[aspirin] in the [control booth] and that two (2) [aspirin] every eight hours is [inferior].")).

Based on the sworn allegations above, a jury could reasonably find that Defendant Burnside's prescription of ibuprofen, a pain medication which caused Plaintiff to experience side effects, together with the ineffectiveness of Tylenol and aspirin, and the general unavailability of the latter, to treat Plaintiff's shoulder pain effectively amounted to no treatment at all. *See McElligott*, 182 F.3d at 1257 ("[A] jury could find that the medication provided to Elmore was so cursory as to amount to no care at all."); *see also Sears v. Roberts*, 922 F.3d 1199, 1206 (11th Cir. 2019) (self-serving affidavits are sufficient to defeat summary judgment). As prisoners have the right to avoid needlessly suffering pain, *see McElligott*, 182 F.3d at 1255, a jury could reasonably find that, in the absence of treatment for Plaintiff's shoulder pain, Defendant Burnside was deliberately indifferent, *see Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985) ("Although the plaintiff has been provided with aspirin, this may not constitute adequate medical care. If, 'deliberate indifference caused an easier and less efficacious treatment' to be provided, the defendants have violated the plaintiff's Eighth Amendment rights by failing to provide adequate medical care." (quoting *West v. Keve*, 571 F.2d 158, 162 (3d Cir. 1978)).

c. Inadequate Physical Examination of Shoulder

There is evidence to support Plaintiff's claim that Defendant Burnside's examinations of Plaintiff's shoulder were similarly defective. Defendant

Burnside examined Plaintiff on two occasions, on January 19 and February 16, 2016, respectively. In his January 19 treatment notes, Dr. Burnside noted that Plaintiff could "raise left arm." (Doc. 169-2, p. 46). Defendant Burnside noted similarly in his February 16 treatment notes, reporting that Plaintiff had "full ROM" in his left shoulder. (Doc. 169-2 p. 45). The record, on the other hand, shows that Plaintiff consistently complained that he had difficulty moving his left arm throughout the five-month period at issue. *See*, *e.g.*, (Feb. 22 Medical Request, Doc. 116-6, p .7 ("I am still in pain and do not have full use of my arm."); Mar. 13 Grievance, Doc. 116-6, p. 5 ("I cannot raise my arm up over past my head, it causes me great pain to put my hand behind my back.")). In fact, even correctional officers observed that Plaintiff had difficulty moving his left arm. Correctional Officer Jerrame Gauld, in an April 29, 2016, declaration, testified that Plaintiff "personally showed me his inability to lift his arm all the way up and that I personally observed that lifting his arm caused him a deal of pain." (Doc. 37-4, ¶ 6). Furthermore, Dr. Fowlkes, in contrast to Dr. Burnside, found that Plaintiff had a decreased range of motion in his left arm on examination. (Doc. 169-2, p. 44). Notably, Dr. Fowlkes examined Plaintiff while Plaintiff's arms were unrestrained. (Doc. 175-3, p. 87). During both of Dr. Burnside's assessments, however, Plaintiff's arms were handcuffed behind his back. Dr. Burnside noted on January 19, 2016, that the assessment of Plaintiff's shoulder was performed while Plaintiff was handcuffed behind his back. (Doc. 169-2, p. 46 ("Handcuffed in back")). Although the February 16 treatment notes do not note similarly, *see* (Doc. 169-2,

p. 45), Plaintiff's sworn allegations claim otherwise (Doc. 39-1, ¶ 95 ("while handcuffed behind his back")). Defendant Burnside argues that, according to prison security policy, inmates are generally examined while handcuffed. (Doc. 169-6, p. 18). Defendant Burnside also states, however, that he had discretion to request that "restraints be moved from front to back, or vice versa." (*Id.*). Defendant Burnside provides no evidence as to whether he made such a request at the time and no explanation for choosing not to make such a request, if that was indeed the case. Nor does Defendant Burnside contradict Plaintiff's assertion that Plaintiff was handcuffed behind his back during the examinations.

To the extent that Defendant Burnside's review of the x-ray results might be sufficient to overcome the deficiencies in the physical examinations, Defendant Burnside's findings as to Plaintiff's mobility based on the x-ray are not in the record.[15] Nor is Burnside's other treatment sufficient to compel the conclusion that his overall course of treatment was adequate. Defendant Burnside merely told Plaintiff to limit his exercises and prescribed mild pain medication, which, as discussed above, may have been inadequate under the circumstances. (Doc. 169-7, p. 14). In *Ferreira v. United States*, No. 5:18-CV-62-OC-33PRL, 2019 WL

[15] Defendant Bishop reported that SMU medical staff had informed her that the results of the x-ray "show[ed] no visible injury." (Doc. 169-8, p. 12). It does not necessarily follow, however, that Plaintiff had full range of motion, and the only range-of-motion test performed after the x-ray results suggested the opposite was true. That test was performed by Dr. Fowlkes, not Defendant Dr. Burnside.

293312, at *3 (M.D. Fla. Jan. 23, 2019), the Middle District of Florida found, at the motion-to-dismiss stage, that a course of treatment, including "cortisone injections, pain medication, and a sling," for a torn tricep and rotator cuff and an injured elbow met constitutional standards. None of Defendant Burnside's treatment came close to the treatment described in *Ferreira*.

On these facts, a jury could reasonably find that Defendant Burnside's decision to examine Plaintiff's shoulder injury without regard to the potential hindrance caused by Plaintiff's restraints in assessing Plaintiff's range of motion was so cursory as to amount to no examination at all and caused Plaintiff to suffer unnecessary pain, in violation of clearly established law. *See Mandel v. Doe*, 888 F.2d 783, 789 (11th Cir. 1989).

d. Delay in Treatment

Plaintiff's final claim, that the delay in treatment amounted to deliberate indifference, follows from the previous claim regarding the defective examination. Even if Defendants Bishop, Chatman, Powell, and Williams knew of Plaintiff's shoulder injury and difficulty moving his arm, their reasonable reliance on Defendant Burnside's assessment that he had a full range of motion does not suggest deliberate indifference.

As Defendant Bishop, Deputy Warden of Security at the time, stated in the context of a grievance investigation, "Per medical [Plaintiff] has had an x-ray of his shoulder and the results show no visible injury and [Plaintiff] has full range of motion in his

shoulder. . . . [Plaintiff] is requesting an MRI and Dr. Burnside does not see a medical need for one at this time. . . . I am not medically trained and cannot order treatment for this or any inmate." (Doc. 169-8, p. 13). Defendant Bishop admitted that she knew of Plaintiff's shoulder injury as early as February 29, 2016. (*Id.*, p. 5). There is no indication from the record that either Defendants Chatman, Warden of GDCP; Powell, Deputy Warden of Security at the SMU; or Williams, a captain assigned to the SMU was medically trained. *Cf. Holloway v. Delaware Cty. Sheriff*, 700 F.3d 1063, 1075 (7th Cir. 2012) ("A nurse may . . . act with deliberate indifference if he or she ignores obvious risks to an inmate's health in following a physician's orders." (quotation and alteration omitted)).

An official's reasonable reliance on a physician's assessment of an inmate's medical condition in failing to arrange for further treatment does not reflect a subjective intent to punish, as required by the Eighth Amendment. *See Taylor v. Adams*, 221 F.3d 1254, 1258 (11th Cir. 2000); *cf. Montoya-Ortiz v. Brown*, 154 F. App'x 437, 439 (5th Cir. 2005) ("Montoya's mere allegation that [nurse] McCleery should have contacted additional doctors in contravention of the physician's order does not establish a showing of repugnant action to constitute deliberate indifference." (citing *Estelle v. Gamble*, 429 U.S. 97, 105–06 (1976)). Moreover, Plaintiff has not presented evidence sufficient to convince a reasonable jury that his "situation was so obviously dire" that a lay person would have known that a medical professional had grossly misjudged his condition. *See Kuhne v. Fla.*

Dep't of Corr., 618 F. App'x 498, 507 (11th Cir. 2015). Defendants Bishop, Chatman, Powell, and Williams, therefore, did not act with deliberate indifference by failing to procure additional treatment for Plaintiff during the three months between Defendant Burnside's assessment in February and Dr. Fowlkes's assessment in May 2016.

The question remains, however, whether Defendant Burnside delayed Plaintiff's treatment in violation of the Eighth Amendment. As discussed, a prison official can act with deliberate indifference "by delaying the treatment of serious medical needs, even for a period of hours, though the reason for the delay and the nature of the medical need is relevant in determining what type of delay is constitutionally intolerable." *McElligott*, 182 F.3d at 1255; *see also Adams v. Poag*, 61 F.3d 1537, 1544 (11th Cir. 1995). Only a deliberate delay in treatment will satisfy this standard. *See Sears v. Warden Okeechobee Corr. Inst.*, 762 F. App'x 910, 918–19 (11th Cir. 2019) (citing *McElligott*, 182 F.3d at 1255).

Plaintiff alleges that, on March 29, 2016, over a month after he was last treated by Defendant Burnside, and after filing two medical requests regarding his shoulder injury, he spoke to Defendant Burnside about his injury and the status of his medical requests while Burnside was conducting his rounds. (Docs. 116-1, p. 2; 169-2, p. 95). Plaintiff claims that, in response, Defendant Burnside stated, "if I wanted medical attention that I'd better get the court to do it." (*Id.*). This exchange not only indicates that Defendant Burnside was aware of Plaintiff's ongoing need for medical treatment, but also that

Burnside was deliberately ignoring Plaintiff's medical requests. Based on this testimony, a jury could reasonably find that Defendant Burnside deliberately delayed treatment for Plaintiff's shoulder injury by ignoring his medical requests, in violation of clearly established law. *See McElligott*, 182 F.3d at 1255; *Carswell v. Bay Cty.*, 854 F.2d 454, 457 (11th Cir. 1988) ("Under section 1983 'knowledge of the need for medical care and intentional refusal to provide that care has consistently been held to surpass negligence and constitute deliberate indifference.'" (quoting *Ancata v. Prison Health Servs., Inc.*, 769 F.2d 700, 704 (11th Cir. 1985)).

3. Conclusion

Plaintiff has presented evidence, sufficient to establish genuine issues of material fact, to support his allegations that Defendant Burnside was deliberately indifferent to Plaintiff's shoulder injury by providing inadequate treatment for the injury, performing inadequate examinations of the shoulder, and deliberately delaying treatment for the injury. All other defendants, however, are entitled to qualified immunity from Plaintiff's Eighth Amendment claims against them.

E. Retaliation Claim

Based on testimony regarding Defendant Burnside's statements to Plaintiff and the inadequate course of treatment for Plaintiff's injuries during the relevant period, Plaintiff has sufficiently established a genuine issue of material fact as to his claim that Burnside violated the First Amendment by

retaliating against Plaintiff for filing a lawsuit against him.

"The First Amendment prohibits prison officials from retaliating against prisoners for exercising their right of free speech by filing lawsuits or grievances." *Jacoby v. Mack*, 755 F. App'x 888, 902 (11th Cir. 2018) (citing *O'Bryant v. Finch*, 637 F.3d 1207, 1212 (11th Cir. 2011); *Wright v. Newsome*, 795 F.2d 964, 968 (11th Cir. 1986)). "An inmate may maintain a cause of action for retaliation under 42 U.S.C. § 1983 by showing that a prison official's actions were the result of the inmate's having filed a grievance [or lawsuit] concerning the conditions of his imprisonment." *Id.* (quoting *O'Bryant*, 637 F.3d at 1212).

To prevail on a retaliation claim, the inmate must establish that: (1) his speech was constitutionally protected; (2) the inmate suffered adverse action such that the official's allegedly retaliatory conduct would likely deter a person of ordinary firmness from engaging in such speech; and (3) there is a causal relationship between the retaliatory action and the protected speech. *Id.* For the third element, the inmate must present evidence that the prison official acted with retaliatory animus. *O'Bryant*, 637 F.3d at 1219. This requires the inmate to show that the protected conduct was at least a motivating factor behind the harm. *Jacoby*, 755 F. App'x at 902 (quoting *Smith v. Fla. Dep't of Corr.*, 713 F.3d 1059, 1063 (11th Cir. 2013)). Once the inmate has made a showing of retaliatory animus, the burden of production shifts to the official, who must show that he "would have taken the same action in the absence of the protected activity." *Id.*

Plaintiff contends that Defendant Burnside refused to provide adequate medical treatment in retaliation for filing an unrelated lawsuit against him shortly before Plaintiff sought treatment for his damaged tooth and shoulder injury. First, there is no question that an inmate's right to petition the courts for relief is clearly established and protected by the First Amendment. *See id.*; *Bennett v. Hendrix*, 423 F.3d 1247, 1255–56 (11th Cir. 2005) ("This Court and the Supreme Court have long held that state officials may not retaliate against private citizens because of the exercise of their First Amendment rights.").

Second, a jury could reasonably find that Defendant Burnside's refusal to provide constitutionally adequate medical treatment would likely deter a person of ordinary firmness from engaging in protected conduct. That Plaintiff filed several grievances, medical requests, and this lawsuit after Defendant Burnside's alleged retaliatory conduct is not determinative. The adverse-action element is an objective test, which does not require the inmate to show an "actual chilling" of his First Amendment rights. *Bennett*, 423 F.3d at 1250–54. Plaintiff has stated under oath that Burnside said he refused to provide medical treatment because Plaintiff "put paperwork" on him, which Plaintiff contends is a reference to the previously-filed lawsuit, and that Burnside told him that "if I wanted medical attention that I'd better get the court to do it." (Doc. 39-1, ¶ 71; 116-1, p. 2; 169-2, p. 95). This testimony is sufficient to defeat summary judgment.

As for the causal element, a jury could reasonably find that the previously filed lawsuit was a motivating

factor behind Defendant Burnside's refusal to provide constitutionally adequate treatment. Plaintiff was seen by Defendant Burnside on January 19, 2016, for both his dental and shoulder injury. (Doc. 39-1, ¶ 68). Defendant Burnside offered Plaintiff ibuprofen, which, as discussed in more detail above, caused Plaintiff to suffer certain side effects. When Plaintiff protested the prescription of ibuprofen, Burnside allegedly told him, "take it or leave it, that if you th[i]nk you'd put paperwork on me and think there's . . . ." (*Id*., ¶ 71 (ellipses supplied)). Plaintiff states that before Burnside completed his thought, he had Plaintiff removed from the medical room. (*Id*.). Although Plaintiff was seen by Burnside once more after this exchange, as discussed above, Plaintiff contends the treatment was constitutionally inadequate. Similarly, on March 29, 2016, when Plaintiff asked Defendant Burnside about treatment for his shoulder injury while the latter was completing his rounds, Burnside allegedly told Plaintiff, "if I wanted medical attention that I'd better get the court to do it." (Docs. 116-1, p. 2; 169-2, p. 95). Defendant Burnside did not treat Plaintiff for either his tooth or shoulder injury after this time.

A jury could reasonably infer from these facts that Plaintiff's lawsuit was at least a motivating factor behind Defendant Burnside's provision of inadequate medical treatment for Plaintiff's injuries during this period. Defendant Burnside has made no attempt to argue that the treatment for Plaintiff's injuries would have been the same absent the lawsuit filed against him.

In sum, Plaintiff has established genuine issues of material fact as to whether Defendant Burnside provided constitutionally inadequate treatment for his injuries in retaliation for the lawsuit Plaintiff had previously filed against him. Defendant Burnside therefore does not enjoy qualified immunity from Plaintiff's retaliation claim. The PLRA limits Plaintiff's recovery to only nominal damages. *See Brooks v. Warden*, 800 F.3d 1295, 1307 (11th Cir. 2015).

CONCLUSION

After a careful review of the record, it is **RECOMMENDED** that the Defendants' motion for summary judgment be **GRANTED in part and DENIED in part**.

It is recommended that Defendants' motion be **DENIED** as to Plaintiff's Eighth Amendment claim against Defendant Burnside for deliberate indifference to Plaintiff's shoulder injury and retaliation claim against Defendant Burnside, and that those claims proceed to trial.

Defendants have not moved for summary judgment as to Plaintiff's equal protection claim against Defendants Bishop, Bryson, Caldwell, Chatman, Dozier, Logan, Martin, Powell, Sellers, Sutton, and Thornton, regarding favorable treatment of Jewish prisoners over Muslim prisoners in respect to religious diets. That claim therefore remains for trial.

It is recommended that Defendants' motion for summary judgment be **GRANTED** as to all other claims.

Pursuant to 28 U.S.C. § 636(b)(1), the parties may serve and file written objections to this Recommendation, or seek an extension of time to file objections, WITHIN FOURTEEN (14) DAYS after being served with a copy thereof. The District Judge will make a de novo determination of those portions of the Recommendation to which objection is made. All other portions of the Recommendation may be reviewed for clear error.

The parties are further notified that, pursuant to Eleventh Circuit Rule 3-1, "[a] party failing to object to a magistrate judge's findings or recommendations contained in a report and recommendation in accordance with the provisions of 28 U.S.C. § 636(b)(1) waives the right to challenge on appeal the district court's order based on unobjected-to factual and legal conclusions if the party was informed of the time period for objecting and the consequences on appeal for failing to object. In the absence of a proper objection, however, the court may review on appeal for plain error if necessary in the interests of justice."

SO RECOMMENDED, this 9th day of July, 2019.

s/ Charles H. Weigle
Charles H. Weigle
United States Magistrate Judge

APPENDIX E

42 U.S.C. § 1983 provides:

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 brought against a judicial officer for an act or omission 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 the 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.