

No. 07-6006

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RINEL FERDINAND,
Plaintiff-Appellant,

v.

GENE M. JOHNSON & A. DAVID ROBINSON,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA

APPELLANT'S OPENING BRIEF

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JURISDICTIONAL STATEMENT

A. Jurisdiction of the District Court

The district court had jurisdiction over Ferdinand's *pro se* complaint pursuant to 28 U.S.C. § 1331 and 42 U.S.C. §§ 1983 & 2000cc-2.

B. Jurisdiction of the Court of Appeals

On September 29, 2006, the district court entered an order dismissing the complaint. JA12. On October 5, 2006, Ferdinand filed a *pro se* motion for reconsideration with the district court, which the court construed as a motion under Fed. R. Civ. P. 60(b). JA13-25. On November 16, 2006, the district court denied Ferdinand's motion. JA32. On December 1, Ferdinand filed a timely notice of appeal. JA33-53. *See* Fed. R. App. P. 4(a)(1)(A), 4(a)(4)(A) & 4(c)(1). This Court's jurisdiction rests on 28 U.S.C. § 1291. *See Young v. Nickols*, 413 F.3d 416, 418 (4th Cir. 2005); *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064, 1066-67 (4th Cir. 1993).

INTRODUCTION

This is an appeal from an order dismissing a *pro se* complaint filed by Rinel Ferdinand. Ferdinand is an inmate committed to the Virginia

Department of Corrections (VDOC). He is a Rastafarian, and his religious practice includes wearing his hair in dreadlocks. Because the VDOC grooming policy prohibits inmates from wearing long hair, defendants—the warden of Ferdinand’s prison and the deputy director of VDOC—severely sanction him for this religious exercise. Ferdinand filed suit, alleging that the grooming policy violates his federal civil rights, principally those rights secured by the Religious Land Use and Institutionalized Persons Act (RLUIPA), PUB. L. No. 106-274, *codified at* 42 U.S.C. § 2000cc-1. Eleven days after Ferdinand filed his complaint, the district court *sua sponte* dismissed the action pursuant to the screening provision of the Prison Litigation Reform Act (PLRA), PUB. L. No. 104-134, *codified at* 28 U.S.C. § 1915A(b)(1), holding that Ferdinand did not state a claim upon which relief could be granted. Defendants did not appear before the district court or respond to the complaint.

The district court erred in dismissing this case. Because Ferdinand alleges that the VDOC grooming policy substantially burdens his religious exercise, he has properly stated a claim for relief. Thus, his complaint should have survived the PLRA screening process.

In concluding to the contrary, the district court held that the VDOC policy passed the strict scrutiny test established by RLUIPA. But RLUIPA firmly places the burden on a defendant to prove, with evidence, that a challenged policy satisfies the RLUIPA strict scrutiny standard. By effectively conducting a *sua sponte* summary judgment proceeding, the court vastly overstepped its authority under the PLRA.

Not only was the district court's resolution of the strict scrutiny question premature because it arose in the context of PLRA screening, but it was also premature because the court lacked the record necessary to reach this conclusion. This Court has made clear that RLUIPA strict scrutiny determinations turn on the evidence actually proffered by the defendants. But the district court did not provide defendants the opportunity to present such a case. And developing the record is particularly important here. In *Smith v. Ozmint*, 578 F.3d 246, 250 (4th Cir. 2009), this Court concluded that a similar prison policy in South Carolina created a substantial burden on an inmate's religious practice. The Court further held that the prison failed to demonstrate that its policy satisfied RLUIPA strict scrutiny and thus remanded for further proceedings. Thus, whatever evidence and argument VDOC

ultimately proffers must be viewed in light of this recent holding. Moreover, as many jurisdictions—including the Federal Bureau of Prisons, Alaska, California, Colorado, Nevada, New Mexico, Michigan, and Oregon—permit inmates like Ferdinand to wear long hair, Ferdinand may probe whether VDOC has adequately considered these jurisdictions’ alternative policies. A remand is required to establish the necessary factual record in order to resolve the strict scrutiny issue.

STATEMENT OF ISSUES

1. Whether, in alleging that VDOC’s grooming policy seeks to coerce him to discontinue his religious exercise, Ferdinand has stated a claim for relief under RLUIPA.

2. Whether the district court erred by prematurely making the factual determination that the VDOC grooming policy satisfies the RLUIPA strict scrutiny standard (a) in the context of a PLRA pre-screening order or (b) without any factual development.

STATEMENT

1. Factual background

Plaintiff-appellant Rinel Ferdinand is a prisoner at Wallens Ridge State Prison, a prison administered by the VDOC. JA4. Ferdinand was convicted of second-degree murder in St. Croix, U.S. Virgin Islands, but

was transferred to Virginia to serve his sentence on October 28, 2002 pursuant to an agreement between Virginia and the U.S. Virgin Islands. *Id.*; see also *Lake v. Johnson*, 2008 WL 2641323, at *1 (W.D. Va. July 1, 2008); Frank Green, *Va. Accepts Prisoners from Virgin Islands Under Old Contract*, Richmond Times-Dispatch, 2008 WLNR 19086791 (Oct. 7, 2008).

Ferdinand, who was raised in the Rastafarian religion, resumed the active practice of his religion in July 2003. JA5. As part of his religious exercise, Ferdinand grew his hair into dreadlocks. *Id.* VDOC Division Operating Procedure, however, bars an inmate from wearing dreadlocks. *Id.* To coerce Ferdinand to cut his hair, defendants subjected Ferdinand to several sanctions, including: (1) solitary confinement, (2) restricted phone call access, (3) loss of commissary rights, (4) restrictions on electrical appliances, (5) loss of supplies for personal hygiene, (6) restricted recreation time, (7) restricted shower rights, (8) loss of contact visits, and (9) mandatory strip searches upon exiting his cell. *Id.* Because of his religious practice of wearing dreadlocks, Ferdinand has also been committed to the Segregated Housing Unit—*i.e.*, solitary confinement—for extended periods of time.

Id. He contends that these restrictive conditions of confinement have caused him to lose more than fifty pounds, that the restrictions limited his educational and vocational opportunities, and that they caused him severe physical, mental, and emotional damage. JA5-6.

2. Procedural background

On September 18, 2006, Ferdinand filed a civil complaint against defendants-appellees Gene M. Johnson, the deputy director of VDOC, and A. David Robinson, the warden of Wallens Ridge State Prison. JA4. Ferdinand alleged that VDOC's policy sanctioning his religious practice of wearing his hair in dreadlocks violated his rights secured by RLUIPA, 42 U.S.C. § 2000cc-1, as well as other rights secured by the Constitution and statute.¹ JA5-7. Ferdinand seeks declaratory and injunctive relief, compensatory and punitive damages, and an award of attorneys' fees. JA7.

Eleven days after Ferdinand filed suit, on September 29, 2006, the United States District Court for the Western District of Virginia dismissed Ferdinand's complaint pursuant to the screening provision of

¹ Ferdinand also asserted rights arising under the First Amendment, the Eighth Amendment, the Revised Organic Act, 18 U.S.C. § 5003, and 42 U.S.C. §§ 1985 & 1986. *See* JA5-7.

the PLRA, 28 U.S.C. § 1915A(b)(1). That provision requires the district court to dismiss any portion of a complaint that “is frivolous, malicious, or fails to state a claim upon which relief may be granted.” *Id.* Quoting *Ragland v. Angelone*, 420 F. Supp. 2d 507, 515 & 520 (W.D. Va.), *aff’d sub nom. Ragland v. Powell*, 193 F. App’x 218 (4th Cir. 2006) (per curiam), the court found that VDOC’s grooming policy “furthers compelling penological interests in security, staff safety, inmate identification, and inmate health” and that the policy “accomplishes its purposes by the least restrictive means.” JA10 (internal quotations omitted). Thus, “[b]ased on the reasoning of the *Ragland* opinion, which was affirmed by the Fourth Circuit,” the district court concluded that “Ferdinand’s RLUIPA claim must be dismissed.” *Id.*

Ferdinand filed a motion for reconsideration (JA13-25), which he deposited in the institutional mail system on October 5, 2006 (JA25). The district court denied that motion on November 16, 2006. JA32. Ferdinand then submitted a timely notice of appeal, which he deposited in the institutional mail system on December 1, 2006. JA53.

On June 12, 2007, this Court placed the case in abeyance pending resolution of the appeal in *McRae v. Johnson*, 261 F. App’x 554 (4th Cir.

2008). On June 5, 2008, the Court continued the abeyance pending resolution of *Smith v. Ozmint*, 578 F.3d 246, 250 (4th Cir. 2009). The Court removed the case from abeyance on September 11, 2009, and on March 3, 2010, appointed undersigned counsel to represent Ferdinand in this matter.

SUMMARY OF THE ARGUMENT

Ferdinand, an inmate of a facility covered by RLUIPA, alleges that he has a sincere belief in the Rastafarian religion. He contends that wearing his hair in dreadlocks is a religious exercise. And he maintains that the VDOC grooming policy seeks to coerce him to cut his hair, despite his sincere religious beliefs. If true, these allegations would demonstrate that VDOC has substantially burdened Ferdinand's religious exercise. Thus, Ferdinand has stated a claim for relief under RLUIPA. Because these allegations would survive a motion filed pursuant to Federal Rule of Civil Procedure 12(b)(6), they must likewise satisfy the PLRA screening standard.

In dismissing the complaint, the district court invoked the language of the PLRA (which is modeled on Rule 12(b)(6)) and stated that Ferdinand "failed to state a claim upon which relief may be

granted.” JA8. But Ferdinand plainly has stated a claim for relief. In effect, the court granted VDOC summary judgment on an affirmative defense that VDOC has not yet raised: whether the policy, notwithstanding its substantial burden on religious exercise, is justified as the least restrictive means of furthering a compelling governmental interest. Indeed, the court candidly rationalized its order by explaining that “the grooming policy satisfies RLUIPA’s strict scrutiny standard.” JA10. RLUIPA, however, makes clear that—because the defendants bear the burden of proof—the question whether a prison policy satisfies strict scrutiny is an affirmative defense that defendants must specifically invoke with evidence tailored to the plaintiff’s specific claim. *See Smith*, 578 F.3d at 250. Thus, because the key issue turns on a disputed question of fact, the district court overstepped the bounds of the PLRA screening mechanism in dismissing Ferdinand’s complaint.

Because Ferdinand has adequately alleged a claim for relief, dismissal pursuant to the PLRA was inappropriate, and the Court should remand for further proceedings. Indeed, even if it were appropriate in this posture to consider whether the VDOC policy satisfies RLUIPA strict scrutiny—a contention we reject—there simply

is no basis in the record to resolve this difficult question. Because the case was dismissed prior to any response by defendants, there is no evidence in the record as to whether VDOC's substantial burden of Ferdinand's religious exercise is the least restrictive means of furthering some compelling governmental interest. And contrary to the district court's approach, a court may not itself construct or speculate as to a prison's basis for a particular policy. *See Lovelace v. Lee*, 472 F.3d 174, 193 (4th Cir. 2006) ("If a court could * * * offer explanations on its own, then prisons would be effectively relieved of their responsibilities under RLUIPA."). On remand, the district court must apply this Court's recent holding in *Smith* to determine whether the VDOC grooming policy passes RLUIPA muster. This is a substantial question that cannot be resolved at this point in the proceedings.

STANDARD OF REVIEW

This Court reviews *de novo* an order dismissing a case pursuant to the PLRA pre-screening provision, 28 U.S.C. § 1915A(b)(1). *See Slade v. Hampton Rds. Reg'l Jail*, 407 F.3d 243, 248 (4th Cir. 2005); *Liner v. Goord*, 196 F.3d 132, 134 (2d Cir. 1999). The Court must "accept all of the allegations in [Ferdinand's] complaint as true, construing [his] pro

se complaint liberally.” *De’Lonta v. Angelone*, 330 F.3d 630, 631 n.1 (4th Cir. 2003). And in the context of a civil rights complaint, the Court “must be especially solicitous of the wrongs alleged and must not dismiss the complaint unless it appears to a certainty that the plaintiff would not be entitled to relief under any legal theory which might plausibly be suggested by the facts alleged.” *Slade*, 407 F.3d at 248 (internal quotations omitted).

ARGUMENT

I. Ferdinand Has Stated A Claim For Relief Under RLUIPA.

Concerned that inmates’ religious rights were “at the mercy of those running the institution” (*Lovelace*, 472 F.3d at 186), Congress enacted RLUIPA, intending it to be “construed in favor of a broad protection of religious exercise.” 42 U.S.C. § 2000cc-3(g). In relevant part, RLUIPA provides:

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution * * * even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

- (1) is in furtherance of a compelling governmental interest; and
- (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc-1(a). “Government” includes any “official” of any “State, county, municipality, or other governmental entity created under the authority of a State,” as well as “any other person acting under color of State law.” 42 U.S.C. § 2000cc-5(4)(A).

RLUIPA applies to the Wallens Ridge State Prison because VDOC accepts federal funds. *See* 42 U.S.C. § 2000cc-1(b)(1); *Madison v. Virginia*, 474 F.3d 118, 122 (4th Cir. 2006) (“[B]ecause Virginia voluntarily accepted federal correctional funds, it cannot avoid the substantive requirements of RLUIPA.”); *Lovelace*, 472 F.3d at 186. Moreover, because VDOC has custody over Ferdinand due to Virginia’s contractual agreement with the U.S. Virgin Islands, the violations of RLUIPA Ferdinand alleges affect interstate commerce. *See* 42 U.S.C. § 2000cc-1(b)(2).

Thus, to state a claim under RLUIPA, Ferdinand need only allege facts that, if true, would support a finding that VDOC has substantially burdened the exercise of his religion. Because Ferdinand alleges that he is a practicing Rastafarian, that the growth and maintenance of dreadlocks constitute a religious exercise, and that the VDOC grooming

policy sanctions him for this religious practice, Ferdinand has properly stated a claim for relief pursuant to RLUIPA.

A. Wearing dreadlocks is an exercise of the Rastafarian religion.

“The most widely accepted Rastafarian principles include beliefs in the divinity of Ethiopian Emperor Haile Selassie and that the hair and beard should never be cut. Many Rastafarians wear their hair uncut, uncombed, and called ‘dreadlocks.’” *Benjamin v. Coughlin*, 708 F. Supp. 570, 571 (S.D.N.Y. 1989), *aff’d*, 905 F.2d 571 (2d Cir. 1990). As the district court further explained:

Many Rastafarians take the “vow of the Nazarite” never to cut their hair or beard. Inmate witnesses testified that the wearing of dreadlocks is a “consecration” and a “covenant” with God. The source of the belief is both Biblical (identified by inmate witnesses as Leviticus 6, Numbers 6) and symbolic of Haile Selassie, whose Nyabinghi warriors wore their hair in dreadlocks. The matted look of the hair is symbolic of a lion, and therefore of Haile Selassie, who is revered by Rastafarians as “the lion of Judah.” The vow is of central importance to most Rastafarians. Ernest Nurse testified that the wearing of dreadlocks is “very holy.”

708 F. Supp. 2d at 572 (record citations omitted).

Courts have uniformly agreed that Rastafarians wear dreadlocks as a religious practice. *See, e.g., Smith*, 578 F.3d at 249; *Booth v. Maryland*, 327 F.3d 377, 380 (4th Cir. 2003); *May v. Baldwin*, 109 F.3d

557, 562 (9th Cir. 1997); *Reed v. Faulkner*, 842 F.2d 960, 962 (7th Cir. 1988) (Posner, J.). And commentators have further documented the role of dreadlocks in the Rastafarian religion. See, e.g., Melissa R. Johnson, Note, *Positive Vibration: An Examination of Incarcerated Rastafarian Free Exercise Claims*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 391, 396-97 (2008); Derek O'Brien & Vaughan Carter, *Chant Down Babylon: Freedom of Religion & the Rastafarian Challenge to Majoritarianism*, 18 J.L. & RELIGION 219 (2002); Note, *Soul Rebels: The Rastafarians & the Free Exercise Clause*, 72 GEO. L.J. 1605 (1984).

Ferdinand has alleged that he is a practicing Rastafarian. JA5. He further maintains that wearing dreadlocks is a part of his religious practice. *Id.* Accordingly, Ferdinand's practice of wearing dreadlocks constitutes a religious exercise.

B. The VDOC policy substantially burdens Ferdinand's religious exercise.

For purposes of RLUIPA, "a substantial burden * * * occurs when a state or local government, through act or omission, 'puts substantial pressure on an adherent to modify his behavior and to violate his religious beliefs.'" *Lovelace*, 472 F.3d at 187 (alteration omitted) (quoting *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S.

707, 718 (1981)). And in *Thomas*—which this Court adopted in *Lovelace* as supplying the appropriate standard for RLUIPA claims—the Supreme Court more fully explained:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, *the infringement upon free exercise is nonetheless substantial.*

Thomas, 450 U.S. at 717-18. Thus, even if a government coerces a prisoner to violate his religious beliefs only indirectly, that coercion nonetheless qualifies as a “substantial burden” for purposes of RLUIPA. And in “assessing this burden, courts must not judge the significance of the particular belief or practice in question.” *Lovelace*, 472 F.3d at 187 n.2.

Here, Ferdinand alleges that he has been subjected to a series of severe penalties because of his refusal to cut his hair. *See, supra*, at 7-8. These penalties include solitary confinement, restricted phone access, restricted shower privileges, and restricted recreation time. JA5. Thus, Ferdinand has properly stated a RLUIPA claim: He alleges that VDOC is seeking to coerce him, through the use of severe

penalties, to modify his behavior in a way that conflicts with his religious beliefs.

This Court recently recognized that similar allegations demonstrated a “substantial burden” on an inmate’s religious practice. *Smith*, 578 F.3d at 248. Smith, a practicing Rastafarian, objected to the South Carolina Department of Corrections’ policy that forcibly shaved his dreadlocks. *Id.* at 249. This Court concluded that the policy “compelled him to modify his behavior in violation of his genuinely held religious beliefs” and that the “policy substantially burdened Smith’s religious exercise.” *Id.* at 251. In so holding, the Court rejected any notion that neutral application of a prison grooming policy foreclosed liability; RLUIPA expressly applies with equal force to policies of neutral application. *Id.* The Court reversed the award of summary judgment, finding that an affidavit submitted in a different action was an insufficient basis to conclude that the corrections policy satisfied the RLUIPA strict scrutiny standard. *Id.* at 254 (finding that the defendants had “not demonstrated in the summary judgment record * * * that its policy of forcibly shaving the heads of MSU inmates who wear long hair as a matter of religious belief furthers a compelling

governmental interest in space utilization, hygiene, and security by the least restrictive means”).

Other courts have likewise concluded that prison policies prohibiting long hair may constitute a substantial burden on an inmate’s religious exercise for purposes of RLUIPA. In *Warsoldier v. Woodford*, 418 F.3d 989, 992 (9th Cir. 2005), for example, a Native American inmate expressed a religious belief that required him to permit his hair to grow uncut. Because Warsoldier refused to comply with the prison grooming policy, he was (like Ferdinand) subjected to a series of punishments (like restricted phone privileges and confinement) “designed * * * to coerce him into compliance.” *Id.* at 995-96. The court concluded that such coercive policies constitute a “substantial burden” for purposes of RLUIPA; “[b]ecause the grooming policy intentionally puts significant pressure on inmates such as Warsoldier to abandon their religious beliefs by cutting their hair, [the] grooming policy imposes a substantial burden on Warsoldier’s religious practice.” *Id.* at 996.

By sanctioning Ferdinand because his religious practice conflicts with prison policy and thereby attempting to coerce Ferdinand to forego

his religious exercise, the VDOC policy substantially burdens Ferdinand's religious exercise. The fact that VDOC has not attempted to shave Ferdinand's head forcibly has no bearing on whether the grooming policy constitutes a substantial burden. Because VDOC "put[s] substantial pressure on [Ferdinand] to modify his behavior and to violate his beliefs, a burden upon religion exists." *Thomas*, 450 U.S. at 717-18. Accordingly, Ferdinand has presented a cognizable claim for relief pursuant to RLUIPA. His claim, therefore, must survive PLRA screening.

II. The District Court Erred In Prematurely Addressing The RLUIPA Strict Scrutiny Standard.

In dismissing Ferdinand's complaint, the district court concluded that the VDOC grooming policy "satisfies RLUIPA's strict scrutiny standard." JA10. But because proof that a prison policy satisfies RLUIPA's strict scrutiny standard rests with the prison—not the claimant—the district court erred by converting the screening provision of the PLRA into a *sua sponte* summary judgment proceeding. *See Lovelace*, 427 F.3d at 186 ("In particular, the government must prove that the burden in question is the least restrictive means of furthering a compelling governmental interest."). The court therefore exceeded its

authority under the PLRA. And even if it could be appropriate to consider in this posture whether the grooming policy is consistent with RLUIPA strict scrutiny, the record here is simply insufficient to resolve that question. Thus, the case must be remanded for further proceedings.

A. The District Court misapplied the screening provision of the PLRA in dismissing Ferdinand’s suit.

The PLRA directs district courts to screen prisoner civil suits filed against a governmental entity or official, and to dismiss any claim that is “frivolous,” “malicious,” “fails to state a claim upon which relief may be granted,” or seeks damages from an immune defendant. *See* 28 U.S.C. § 1915A(b); 42 U.S.C. § 1997e(c)(1).² It is well established that

² The PLRA creates two parallel and overlapping screening mechanisms. Section 802 of the act created 42 U.S.C. § 1997e(c)(1), which applies to federal suits raising federal questions. *See* PUB. L. NO. 104-134 § 802, 110 Stat. 1321, 1321-66 (1996). The provision provides:

The court shall on its own motion or on the motion of a party dismiss any action brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility if the court is satisfied that the action is frivolous, malicious, fails to state a claim upon which relief can be granted, or seeks monetary relief from a defendant who is immune from such relief.

42 U.S.C. § 1997e(C)(1). Section 805 of the PLRA established 28 U.S.C. § 1915A, which applies to all prisoner suits in federal court, regardless of subject matter. *See* PUB. L. NO. 104-134 § 805, 110 Stat. 1321, 1321-75 (1996). That provision similarly requires a court to screen for and dismiss any claim filed by a prisoner that “is

district courts must apply the familiar standards of Fed. R. Civ. P. 12(b)(6) in determining whether a complaint “state[s] a claim upon which relief can be granted” under the PLRA. Indeed the PLRA employs language that is identical to that used in Rule 12(b)(6). Thus, this Court—like every other court to consider the question—has grafted Rule 12(b)(6) standards onto the PLRA screening mechanisms. *See Slade*, 407 F.3d at 248 (applying Rule 12(b)(6) standard); *see also McEachin v. McGuinnis*, 357 F.3d 197, 200 (2d Cir. 2004); *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *Sanders v. Sheahan*, 198 F.3d 626, 626 (7th Cir. 1999); *Sudler v. Danberg*, 635 F. Supp. 2d 356, 358 (D. Del. 2009) (“The legal standard for dismissing a complaint for failure to state a claim pursuant to § 1915A is identical to the legal standard used when ruling on 12(b)(6) motions.”).

The PLRA does not permit the district court to effectively grant *sua sponte* summary judgment. Rather, dismissal is *only* appropriate under 28 U.S.C. § 1915A or 42 U.S.C. § 1997e(c)(1) for “failure to state a claim” if “after accepting all well-pleaded allegations in the plaintiff’s

frivolous, malicious, or fails to state a claim upon which relief may be granted” or “seeks monetary relief from a defendant who is immune from such relief.” 28 U.S.C. § 1915A(b).

complaint as true and drawing all reasonable factual inferences from those facts in the plaintiff's favor, it appears certain that the plaintiff cannot prove any set of facts in support of his claim entitling him to relief." *Slade*, 407 F.3d at 248 (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999)). Thus, when a plaintiff has properly pleaded a cause of action against a defendant, a court may not resolve disputed factual questions via the PLRA screening mechanisms.³

The strict scrutiny provision of RLUIPA functions as a fact-intensive affirmative defense that a defendant may choose to invoke.

³ To be sure, the PLRA also requires dismissal if a claim is "frivolous" or "malicious" or if a plaintiff sues a defendant who is immune. Whether a claim is "frivolous" should be determined by reference to the well-trodden standards developed in the context of Fed. R. Civ. P. 11(b)(2) (requiring a party filing a document to certify that "the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law"). *See Martin v. Scott*, 156 F.3d 578, 580 n.2 (5th Cir. 1998) (per curiam) ("The function of section 1915A is also quite similar to the roles played by Federal Rules of Civil Procedure 11 and 12(b)(6)."). Thus, if a prisoner files a complaint that technically alleges a claim for relief, but is nonetheless frivolous as defined by Rule 11, the PLRA requires dismissal.

This is not a frivolous case. The district court rested its decision solely on its finding that Ferdinand failed to state a claim. *See* JA10. And as we explain, *infra* at 25-32, Ferdinand has substantial arguments to present on remand. By no means does Ferdinand's claim approach being "frivolous." *See Hunter v. Earthgrains Co. Bakery*, 281 F.3d 144, 153 (4th Cir. 2002) (in context of Rule 11, "maintaining a legal position to a court is only sanctionable when, in 'applying a standard of objective reasonableness, it can be said that a reasonable attorney in like circumstances could not have believed his actions to be legally justified.'" (quoting *In re Sargent*, 136 F.3d 349, 352 (4th Cir. 1998))).

See, e.g., Rocky Mountain Christian Church v. Bd. of County Comm'rs, 612 F. Supp. 2d 1163, 1174 (D. Colo. 2009) (“The affirmative *defense* codified at § 2000cc(a) replicates the strict scrutiny standard of constitutional law.” (emphasis added)). That is, RLUIPA quite clearly requires the *defendant* to “prove that the burden in question is the least restrictive means of furthering a compelling governmental interest.” *Lovelace*, 472 F.3d at 186. To state a *prima facie* case for a RLUIPA claim, then, a plaintiff need not show that the challenged practice fails strict scrutiny. Thus, to prevail on a strict scrutiny defense, a defendant must present some evidence that the policy is sufficiently tailored. When, like here, this is a contested factual question, it is properly adjudicated either through summary judgment or a trial. The strict scrutiny question, therefore, cannot be the basis for a court to dismiss a claim under the PLRA screening mechanism for failure to state a claim.

Applied here, there can be no question that Ferdinand has alleged sufficient facts to state a *prima facie* RLUIPA violation. Thus, the district court’s use of the PLRA to dismiss his claim was error. Upon remand, the parties may take appropriate discovery and offer evidence

for the record. Only then may the district court resolve the strict scrutiny issue.

B. Ferdinand's claim requires further factual development.

Even if the strict scrutiny issue were appropriately before the Court at this juncture, the record here is simply insufficient to resolve whether VDOC's treatment of Ferdinand's religious exercise accords with RLUIPA's strict scrutiny requirements. There exists no evidence in the record as to whether the VDOC policy is in fact the "least restrictive means" of furthering a "compelling governmental interest." 42 U.S.C. § 2000cc-1(a). And this is certainly not the appropriate venue to develop the record in the first instance. Where a court has "no sworn statement from the warden, the assistant warden, or any other prison official that discusses any security, safety, or cost consideration that justifies the restrictions" that allegedly violate a prisoner's rights under RLUIPA, this "fundamental problem * * * cannot be solved * * * by a court suggesting on its own the governmental interest that might be present." *Lovelace*, 472 F.3d at 191.

Moreover, this Court has provided substantial guidance in *Smith* that must inform the district court's consideration of the factual issues

in this case. For example, if VDOC were to argue that permitting inmates to wear dreadlocks would strain manpower, VDOC would have to offer evidence that the grooming policy reduces manpower needs or costs. *Smith*, 578 F.3d at 252-53. If VDOC argues that long hair affects officer hygiene during searches, it would have to show why the use of latex gloves and masks is an unworkable alternative. *Id.* at 253. If VDOC claims inmate safety is promoted by the policy, VDOC would have to demonstrate how the safety concerns relate to Ferdinand's current housing unit. *Id.* And VDOC must explain why female inmates are permitted to wear braids while male inmates are not. *Id.* at 254.

In particular, this Court in *Smith* found that an affidavit "not written to address [that specific] case" was an insufficient basis for the defendants to secure summary judgment on a RLUIPA claim very similar to this one. 578 F.3d at 253. *Smith* explains that, in order to demonstrate that a prison policy satisfies the RLUIPA strict scrutiny requirement, a prison must "meet *its* burden" and a district court must make an individualized determination given the facts of the particular case at hand. *Id.* at 254 (emphasis added). Indeed, RLUIPA on its face requires such plaintiff-specific evidence; the statute demands that

defendants justify the “imposition of the burden *on that person.*” 42 U.S.C. § 2000cc-1(a) (emphasis added); *cf. Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418, 430-31 (2006) (in context of identical RFRA language, the government must demonstrate that the “compelling interest test is satisfied through application of the challenged law ‘to the person’—the particular claimant whose sincere exercise of religion is being substantially burdened” (quoting 42 U.S.C. § 2000bb-1(b))). The state has not—and has been afforded no opportunity to—provide the context-specific evidence that RLUIPA requires.

And there is good reason that development of the record is necessary here. Satisfying the RLUIPA burden, for example, requires VDOC to “demonstrate[] that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice.” *Spratt v. R.I. Dep’t of Corr.*, 482 F.3d 33, 41 (1st Cir. 2007) (quoting *Warsoldier*, 418 F.3d at 999). Numerous, less restrictive options are available that would permit VDOC to ensure both hygiene and security but that do not include coercing a prisoner to cut his or her hair. *See Smith*, 578 F.3d 252-54. VDOC must, at the very least,

explain why it has deemed these alternatives unacceptable. Indeed, at least several other state prison systems—such as Colorado,⁴ Michigan,⁵ and New Mexico⁶—provide religious exemptions to grooming policies. Other prison systems—including the Federal Bureau of Prisons,⁷ Alaska,⁸ California,⁹ Nevada,¹⁰ and Oregon¹¹—have no hair length

⁴ See Colo. Dep’t of Corr., Reg. 850-11(I), § IV(A)(1)(d), Eff. Dec. 15, 2009, *available at* <http://tinyurl.com/yfmygam> (“An offender who claims that long hair and/or a beard is a fundamental tenet of a sincerely held religious belief will not be required to have a hair cut as long as the offender obtains documentation from the Office of Faith and Citizen Programs’ coordinator.”).

⁵ See Mich. Dep’t of Corr., Policy Dir. 05.03.150, § E, Eff. Sept. 20, 2007, *available at* <http://tinyurl.com/y9esmb2> (“[P]risoners may maintain head and facial hair in accordance with their religious beliefs provided that reasonable hygiene is maintained and prisoner identification cards are kept current.”) (excluding prisoners in the Special Alternative Incarceration Program, a highly-disciplined military-style program used as an alternative to traditional incarceration).

⁶ See N.M. Corr. Dep’t, Policy CD-151100, Procedure 2-CO-4D-01(J), Eff. Sept. 12, 1994, revised Feb. 24, 2010, *available at* <http://tinyurl.com/yd43r52> (outlining religious exemption to grooming policy).

⁷ See U.S. Dep’t of Justice, Fed. Bureau of Prisons, Program Statement 5230.05 § 551.4, Nov. 4, 1996, *available at* <http://tinyurl.com/ydkk5sw> (“The Warden may not restrict hair length if the inmate keeps it neat and clean.”).

⁸ See Alaska Dep’t of Corr. Policies & Procedures, Index # 806.02, Procedures § A.3, July 7, 1995, *available at* <http://tinyurl.com/yabahmg> (“Staff shall routinely search prisoners’ hair for contraband.”).

⁹ See Cal. Code Regs. tit. 15, § 3062(e) (2009), *available at* <http://tinyurl.com/y863ltj> (“An inmate’s hair may be any length but shall not extend over the eyebrows, cover the inmate’s face or pose a health and safety risk. If hair is long, it shall be worn in a neat, plain style, which does not draw undue attention to the inmate.”); *id.* § 3062(g) (“An inmate with hairstyles, including but not limited to braids, cornrows, ponytails, or dreadlocks, shall be required to unbraid, undo, or take down their hair, as applicable for thorough inspections, as instructed by custody staff to ensure hair is free of contraband.”).

limitation at all.¹² Although we do not contend that the mere existence of these alternative policies necessarily means that VDOC's policy is indefensible, the comparison nonetheless demonstrates that Ferdinand has a substantial claim that VDOC's policy is not the least restrictive alternative. *See Warsoldier*, 418 F.3d at 1000 (“[W]e have found comparisons between institutions analytically useful when considering whether the government is employing the least restrictive means.”); *Washington v. Klem*, 497 F.3d 272, 285 (3d Cir. 2007); *Spratt*, 482 F.3d at 41-42. On remand, VDOC must show why it has rejected alternative policies that would accommodate Ferdinand's religious exercise.

¹⁰ *See* Nev. Dep't of Corr. Admin. Reg. 705.01 § 1.1, Eff. Nov. 15, 2004, *available at* <http://tinyurl.com/ylcvcjn> (“Inmates shall be permitted freedom in personal grooming as long as their appearance does not conflict with the institution's requirements for safety, security, identification and hygiene.”); *id.* at § 1.4.4 (“Inmates who work around machinery, which is likely to cause injury *if long hair is worn*, must wear hairnets or other head coverings required by the work supervisor.” (emphasis added)).

¹¹ *See* Or. Admin. R. § 291-123-0015(2)(a), *available at* <http://tinyurl.com/ya2b3gc> (“Head and facial hair must be maintained daily in a clean and neat manner.”); *id.* § 291-123-0015(2)(b) (“If a hair search needs to be conducted by staff, it may be necessary to require that the inmate unbraid, loosen, or cut the hair to complete the search.”).

¹² To be clear, the listed policies are meant to be illustrative only. We have not conducted an exhaustive review of the prison grooming policies of all fifty states. Thus, the fact that we do not list a state in this list should not be taken to signify that the state maintains a policy similar to VDOC's policy.

We recognize that district courts in Virginia have previously rejected challenges to the VDOC grooming policy and that this Court, in unpublished opinions, has affirmed. *See McRae v. Johnson*, No. 3:03-cv-00164 (E.D. Va. Aug. 16, 2006), *aff'd*, 261 F. App'x 554 (4th Cir. 2008) (per curiam); *Ragland v. Angelone*, 420 F. Supp. 2d 507, 515, 520 (W.D. Va.), *aff'd sub nom. Ragland v. Powell*, 193 F. App'x 218 (4th Cir. 2006) (per curiam). But these lower-court and unpublished decisions do not control the result here. In both *McRae* and *Ragland*, the defendants moved for judgment or summary judgment *after* placing substantial evidence on the record. *See McRae*, 193 F. App'x at 556 (district court conducted bench trial at which both sides presented witnesses and subsequently entered judgment for defendants); *Ragland*, 420 F. Supp. 2d at 515 (granting summary judgment based on the “substantial evidence” offered by defendants). Thus, the plaintiffs had an individual opportunity to contest the evidence presented by the state. Ferdinand has had no similar opportunity to challenge VDOC’s argument here, thus consideration of his RLUIPA challenge is premature in this case. Moreover, *Smith*—a superseding, published opinion of this Court—provides a detailed analytical framework, not obviously followed in

these prior cases, that the district court should apply on remand to the facts ultimately developed in this case.

We also respectfully submit that *Ragland* and *McRae* were wrongly decided. In *Ragland*, the district court explained—just as Ferdinand here contends—that refusal to cut one’s hair results in a charge of “disobeying a direct order,” and, “[i]f convicted, that inmate will serve an isolation sentence. * * * The inmate will remain assigned to segregation until the inmate fully complies with the grooming standards.” *Ragland*, 420 F. Supp. 2d at 510. But the court curiously found this fact dispositive *in favor of the prison*: “Ragland fully retains his right to practice his religious belief that his hair and beard not be cut. This fact, *more than any other*, weighs heavily in favor of finding that the grooming policy is no more restrictive than necessary to further its stated goals, and the court so finds.” *Id.* at 519 (emphasis added). And in *McRae*, this Court similarly noted that “VDOC’s Grooming Policy does not mandate the forcible cutting of an inmate’s long hair and/or beard” and found this a “key feature[] * * * that supports the district court’s least restrictive means conclusion.” *McRae*, 261 F. App’x at 559. As we have explained, *supra* at 19-20, a prison does not avoid a

RLUIPA violation if it *coerces* a prisoner to forego religious exercise through sanctions rather than if it physically *prevents* that practice. In reaching the contrary conclusion, the *Ragland* and *McRae* courts fundamentally erred.

On remand, Ferdinand will have a substantial argument that the VDOC grooming policy impermissibly violates his rights to religious exercise secured by RLUIPA. But this difficult question can only be properly considered with the benefit of a sufficiently developed record.

* * * *

There can be no doubt that, in the course of further proceedings, the district court must accord “due deference to the experience and expertise of prison and jail administrators in establishing necessary regulations and procedures to maintain good order, security and discipline, consistent with consideration of costs and limited resources.” *Lovelace*, 472 F.3d at 189-90 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 723 (2005)). RLUIPA surely does not “elevate accommodation of religious observances over an institution’s need to maintain order and safety.” *Cutter*, 544 U.S. at 722. But while these presumptions may ease the defendants’ burden, in no way do they eliminate defendants’

obligations to place in the record case-specific evidence that justifies their chosen policy as required by RLUIPA. A court may not simply “rubber stamp or mechanically accept the judgments of prison administrators”; rather, Ferdinand must have an opportunity to review whatever evidence defendants proffer and raise appropriate challenges to that evidence. *Lovelace*, 472 F.3d at 190. As this Court explained, “the first job” in reviewing whether a prison policy meets RLUIPA strict scrutiny “is to require [the prison] to take the unremarkable step of providing an explanation for the policy’s restrictions that takes into account any institutional need to maintain good order, security, and discipline or to control costs. That explanation, when it comes, will be afforded due deference.” *Id.* Such an explanation is equally necessary here. The district court’s dismissal of Ferdinand’s claim under the PLRA, therefore, was error.

CONCLUSION

For the foregoing reasons, the district court’s order dismissing Ferdinand’s complaint pursuant to 28 U.S.C. § 1915A(b)(1) should be reversed and the matter remanded to the district court for further proceedings.

REQUEST FOR ORAL ARGUMENT

Appellant Rinel Ferdinand respectfully requests oral argument.

Respectfully submitted,

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DATE: April 26, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 07-6006 *Caption: Ferdinand v. Johnson*

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I certify that on this 26th day of April 2010, I served the foregoing Appellant's Opening Brief via the Court's ECF system, with prior written consent, upon:

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