18-3223-pr
Barnes v. Fedele, et al.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 29th day of May, two thousand twenty.

PRESENT: ROBERT D. SACK,
RICHARD C. WESLEY,
DENNY CHIN,
Circuit Judges.

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ARRELLO BARNES,

Plaintiff-Appellant,

-v- 18-3223-pr

LOUIS FEDELE, CORRECTION OFFICER, MICHAEL FURMAN, SERGEANT, ROBERT MURPHY, CORRECTION OFFICER, THERESA STANLEY, CHAPLAIN, PAUL J. CHAPPIUS, JR., DEPUTY SUPERINTENDENT OF SECURITY, ANGELA BARTLETT, DEPUTY SUPERINTENDENT OF PROGRAMS, JOHN NUTTALL, DEPUTY COMMISSIONER OF PROGRAM SERVICES,

*Defendants-Appellees.**

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FOR PLAINTIFF-APPELLANT: ALAN M. MENDELSOHN (Ira M. Feinberg, *on the brief*), Hogan Lovells US LLP, New York, New York.

FOR DEFENDANTS-APPELLEES: KATE H. NEPVEU, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, and Victor Paladino, Senior Assistant Solicitor General, *on the brief*), *for* Letitia James, Attorney General of the State of New York, Albany, New York.

Appeal from the United States District Court for the Western District of New York (Larimer, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the order of the district court is **AFFIRMED** in part and **VACATED** in part, and the action is **REMANDED** for further proceedings consistent with this order.

Plaintiff-appellant Arrello Barnes appeals from an order issued by the district court on October 2, 2018 denying his motion for summary judgment and granting summary judgment in favor of defendants-appellees, a group of officers and employees at Southport Correctional Facility ("Southport") of the New York State

* The Clerk of the Court is respectfully directed to amend the official caption to conform to the above.

Department of Correctional and Community Supervisions ("DOCCS"). On appeal, Barnes argues that the district court erred by granting summary judgment for all defendants-appellees because they failed to proffer legitimate penological interests supporting the creation and carrying out of the directive at issue, which led to the confiscation of Barnes's religious headwear. Moreover, Barnes contends that the district court erred in denying his cross-motion for summary judgment and asks that we remand for a determination of damages. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

BACKGROUND

In January 2007, Barnes, an inmate at Southport, identified as Jewish and wore a Tsalot-Kob, a religious headwear, because his yarmulke did not fit over his dreadlocks. A then-DOCCS prison directive -- Directive 4202 (the "Directive") -- however, permitted only Rastafarians to wear Tsalot-Kobs, and consequently Southport corrections officers confiscated Barnes's headwear.[1] The confiscated Tsalot-Kob was turned over to Sergeant Michael Furman, who then delivered it to Chaplain Theresa Stanley. Stanley ultimately determined that the confiscation was proper because Jewish inmates at that time were permitted to wear only yarmulkes as headwear.

[1] The details of the confiscation of Barnes's headwear are disputed. These details, however, are immaterial, as Southport Corrections Officers Louis Fedele and Robert Murphy have acknowledged that they were involved in the confiscation in late January 2007.

Barnes contested the confiscation by utilizing the prison grievance procedures and writing additional letters to other prison and DOCCS officials, which alleged that Deputy Commissioner of Program Services John Nuttall, Deputy Superintendent of Programs Angela Bartlett, and Deputy Superintendent of Security Paul Chappius, Jr. supported the confiscation. The grievances were denied because under the Directive only yarmulkes -- not Tsalot-Kobs -- were proper headwear for Jewish inmates.

Barnes filed the complaint below, naming Bartlett, Chappius, Fedele, Furman, Murphy, Nuttall, and Stanley as defendants (collectively, "Defendants").[2] On February 12, 2014, the district court granted summary judgment in favor of Defendants and dismissed Barnes's complaint. *See Barnes v. Fedele*, No. 07-CV-6197, 2014 WL 11460504, at *1 (W.D.N.Y. Feb. 12, 2014). Although it found that Barnes's free exercise rights under the First Amendment and the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA") were violated, *id.* at *6, the district court ruled that Defendants were entitled to qualified immunity, *id.* at *7.

Barnes appealed, and we affirmed in part, vacated in part, and remanded via summary order. *See Barnes v. Furman*, 629 F. App'x 52, 57 (2d Cir. 2015). Relevant here, we found that the record needed to be further developed to determine whether Defendants were, indeed, entitled to qualified immunity. *Id.* at 56-57. Specifically, we

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[2] Other defendants named in Barnes's complaint have been dismissed.

explained that it was unclear whether there was a legitimate penological interest in "limit[ing] Jewish inmates' head coverings to yarmulkes only." *Id.* at 56. Moreover, we held that even if there was a legitimate penological interest, Defendants would still have to show that they acted in an objectively reasonable manner by following the Directive. *Id.* at 57. Finally, we noted that the analysis for the Defendants who were merely applying the Directive -- that is, Bartlett, Chappius, Fedele, Murphy, and Stanley -- might be different than the analysis for the Defendant who implemented the policy -- that is, Nuttall. *Id.*

On remand, Defendants accompanied their motion for summary judgment with declarations from five of the remaining six Defendants. Although Chappius was not involved in creating the Directive and did not sign off on it, his declaration provided his "understanding" of the penological interest behind the policy: Because religious crowns (*i.e.*, religious head coverings) can be used to hide "[c]ontraband, such as drugs and weapons . . . the limitations of crowns to just those of Rastafarian faith[] was to limit the number of . . . crowns to be searched." J. App'x at 190. The remaining declarations, which were from Bartlett, Fedele, Murphy, and Stanley, all stated that the declarants believed they were following a lawful policy. Nuttall did not submit a declaration, and no one else opined on the penological interest behind the creation of the Directive. Barnes cross-moved for summary judgment, arguing, *inter alia*, that there was no support for the purported penological interest

articulated by Chappius and that none of the Defendants had referenced such a reason in the responses they wrote to his grievances.

On October 2, 2018, the district court once again held that Defendants were entitled to qualified immunity and denied Barnes's cross-motion for summary judgment. *Barnes v. Fedele*, 337 F. Supp. 3d 227, 235 (W.D.N.Y. 2018). The district court noted that Defendants "have now identified penological reasons for the policy underlying [the Directive], insofar as it relates to the restrictions on Tsalot-Kobs." *Id.* at 234. It remarked that "Nuttall could reasonably have believed that such a restriction was constitutionally permissible, given the legitimate penological interest in reducing the risk of smuggling contraband into prisons." *Id.* It also held that the Defendants who merely followed the Directive -- that is, every Defendant other than Nuttall -- were entitled to qualified immunity because there was no reason for them to question the constitutionality of the Directive. *Id.* This appeal followed.

DISCUSSION

We review a district court's decision to grant summary judgment *de novo*, with the view that "[s]ummary judgment may be granted only if there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Vincent v. The Money Store*, 736 F.3d 88, 96 (2d Cir. 2013) (internal quotation marks omitted). A party may submit affidavits and declarations in support of its motion for summary judgment, provided the statements included therein are "made on personal

knowledge" and "set out facts that would be admissible in evidence." Fed. R. Civ. P. 56(c)(4). When reviewing the district court's grant of a motion for summary judgment, we resolve all ambiguities and draw all factual inferences in favor of the non-moving party. *See Topps Co. v. Cadbury Stani S.A.I.C.*, 526 F.3d 63, 68 (2d Cir. 2008). Summary judgment must be granted when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Qualified immunity "shields government officials from civil liability 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Farid v. Ellen*, 593 F.3d 233, 244 (2d Cir. 2010) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). It is clearly established that although inmates retain their free exercise rights, prisons may abridge those rights "if reasonably related to some legitimate penological interests." *Ford v. McGinnis*, 352 F.3d 582, 594 (2d Cir. 2003). In the Fourth Amendment context, the Supreme Court has held that visual body-cavity inspections can be conducted in detention facilities even when officers do not have probable cause because they promote the "significant and legitimate security interests" of preventing the "[s]muggling of money, drugs, weapons, and other contraband." *Bell v. Wolfish*, 441 U.S. 520, 559-60 (1979); *see also Sec. & Law Enf't Emps., Dist. Council 82, Am. Fed'n of State, Cty. & Mun. Emps., AFL-CIO by Clay v. Carey*, 737 F.2d 187, 204 (2d Cir. 1984) (noting "the

important governmental interest in controlling the flow of contraband into correctional facilities"). If a policy is, indeed, constitutional, state actors who enforce that policy almost always have qualified immunity because carrying out a lawful policy is reasonable. *See Wilson v. Layne*, 526 U.S. 603, 617-18 (1999) (officers acted reasonably in following a department policy and were therefore entitled to qualified immunity even though that policy later turned out to be unconstitutional). If a policy is unconstitutional, those enforcing it may nevertheless be entitled to qualified immunity if "a reasonable [actor] might have believed that the challenged order was lawful in light of legitimate pen[o]logical interests supporting [the policy]." *Holland v. Goord*, 758 F.3d 215, 223 (2d Cir. 2014).

As to the Defendants applying the Directive -- that is, Bartlett, Chappius, Fedele, Murphy, and Stanley -- we conclude that the district court did not err in granting them summary judgment. Regardless of whether the Directive was constitutional, these Defendants acted reasonably in carrying it out because they reasonably believed it was constitutional at the time. Chappius, who at the time was deputy superintendent of security at Southport, explained that he understood that the Directive was aimed at preventing prisoners from concealing contraband in their headwear and limiting the number of searches that corrections officers had to conduct. Preventing the flow of contraband in prison is certainly a legitimate penological interest, *see Wolfish*, 441 U.S. at 559-60; *Carey*, 737 F.2d at 204, and it is logical that

requiring officers to conduct excessive searches would distract them from their other duties. Therefore, Chappius acted reasonably in carrying out what he believed to be a constitutional directive, *see Wilson*, 526 U.S. at 617-18, and he was entitled to summary judgment. Similarly, it was reasonable for Bartlett, Fedele, Murphy, and Stanley -- each of whom attested that they were carrying out what they believed to be a lawful policy -- to enforce the Directive, as carrying out a lawful policy is reasonable. *See id.* Accordingly, the district court did not err in granting summary judgment for these Defendants.

As to Nuttall, however, we conclude that the district court erred in granting him summary judgment. Nuttall relies primarily on *White v. Pauly*, 137 S. Ct. 548, 551 (2017), which he argues changed the law after our last remand and required there to be "clearly established" precedent showing that an official violated the law before he can be stripped of qualified immunity. Appellee's Br. at 13. We disagree. *White* did not change the law; it merely "reiterate[d] the longstanding principle that clearly established law should not be defined at a high level of generality." 137 S. Ct. at 552 (internal quotation marks omitted). Here, the law is and has been specific and clear: Prison officials may only abridge a prisoner's free exercise rights if doing so is "reasonably related to some legitimate penological interests." *Ford*, 352 F.3d 594.

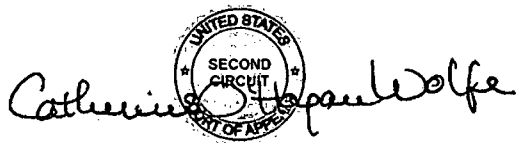
Importantly, Nuttall was the only Defendant involved in creating the Directive, yet he did not provide a declaration explaining the penological purpose

behind its creation. Indeed, he did not provide any declaration. Nevertheless, the district court imputed the penological interest articulated by Chappius onto Nuttall. *See Barnes*, 337 F. Supp. 3d at 234. This was error, as nothing in the record sets forth Nuttall's motivation or thinking. As we indicated when this case was last before us, the analysis for the Defendants who merely applied the Directive is different than the analysis for the Defendant who implemented it. *See Barnes*, 629 F. App'x at 57. It is possible, after all, that Chappius's "understanding" of the policy, J. App'x at 190, was not aligned with Nuttall's reason for signing the Directive. Accordingly, on the record before us, Nuttall is not entitled to summary judgment.[3]

* * *

Accordingly, we **AFFIRM** the order of the district court in part, **VACATE** in part, and **REMAND** the action for further proceedings consistent with this order.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



[3] To the extent that Barnes appeals the district court's denial of his cross-motion for summary judgment, we conclude that he did not show that he was entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c)(1) ("A party asserting that a fact cannot be . . . genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . . or . . . showing . . . that an adverse party cannot produce admissible evidence to support the fact.").

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 11th day of August, two thousand twenty.

Arrello Barnes,

Plaintiff - Appellant,

v.

Louis Fedele, Correction Officer, Michael Furman, Sergeant, Robert Murphy, Correction Officer, Theresa Stanley, Chaplain, Paul J. Chappius, Jr., Deputy Superintendent of Security, Angela Bartlett, Deputy Superintendent of Programs, John Nuttall, Deputy Commissioner of Program Services,

Defendants - Appellees.

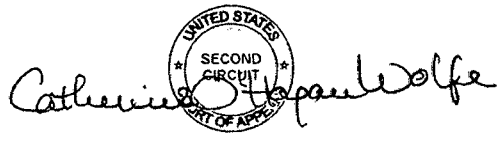
ORDER

Docket No: 18-3223

Appellant, Arrello Barnes, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



Judgment in a Civil Case

United States District Court
WESTERN DISTRICT OF NEW YORK

Arrello Barnes

v.

Fedele, et al.,

JUDGMENT IN A CIVIL CASE
CASE NUMBER: 07-CV-6197

☐ **Jury Verdict**. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court**. This action came before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the complaint is dismissed.

Date: October 3, 2018

MARY C. LOEWENGUTH
CLERK OF COURT

By: Barbara Keenan
Deputy Clerk

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INTRODUCTION AND RULE 35 STATEMENT

Plaintiff-Appellant Arrello Barnes respectfully seeks panel rehearing and rehearing en banc of the panel's decision on this appeal. This appeal arises from Barnes' damages action under 42 U.S.C. § 1983, in which he seeks redress for the unlawful seizure by officers of the New York State Department of Correctional and Community Supervision ("DOCCS") of his religious head covering—a "Tsalot-Kob"—pursuant to a DOCCS directive that explicitly limited Tsalot-Kobs to Rastafarians. Barnes identified as Jewish, but wore the Tsalot-Kob because a yarmulke would not fit over his dreadlocks.

On a prior appeal, a panel of this Court reversed the District Court's initial grant of summary judgment to Defendants, and remanded for reconsideration. The prior decision made clear that a policy that expressly discriminated on the basis of religion was unconstitutional, but remanded for the District Court to determine whether Defendants were entitled to qualified immunity, *i.e.*, to assess whether there was any legitimate penological interest supporting such a policy and, if not, whether Defendants could show that they reasonably believed they were enforcing a lawful policy. When the District Court once again granted summary judgment to Defendants, Barnes took this appeal.

The panel on this appeal reversed the District Court's ruling as to Defendant John Nuttall, at the time DOCCS' Deputy Commissioner of Program Services,

ruling that he had failed to show any penological justification for his actions in approving the unconstitutional policy. But the panel affirmed summary judgment as to the other six Defendants, holding that, "[r]egardless of whether the Directive was constitutional," the subordinate officers were all entitled to qualified immunity because they "acted reasonably in carrying it out" and "reasonably believed it was constitutional at the time." Summary Order at 8.

There is no support for the panel's holding as to these Defendants. For starters, the officers did not act reasonably "in carrying . . . out" the DOCCS policy—indeed, they were not "carrying out" the DOCCS policy at all. Instead, the record shows that they were carrying out a nonexistent policy—that Jewish inmates were only authorized to wear yarmulkes—which finds no support in the DOCCS Directive. Moreover, many of the officers believed that Barnes' headwear was a Kufi, not a Tsalot-Kob, and thus they could not possibly have been enforcing the policy, which did not restrict Kufis. And the officers' confiscation of the Tsalot-Kob flouted the Directive's procedural requirements, which would have allowed Barnes to keep his headwear while an investigation was underway.

There is also no support for the panel's assertion that the officers "reasonably believed [the policy] . . . was constitutional at the time." *Id.* None of the officers even *claimed* that they had a reasonable belief that the policy was constitutional. Most Defendants merely "attested that they were carrying out what

they believed to be a lawful policy," *id.* at 9, without any explanation as to *why* they believed such a facially unconstitutional policy was lawful or why this belief was reasonable. Only one Defendant—Paul Chappius, the facility's Deputy Superintendent for Security—offered any justification for the policy: his "understanding" that it reflected a concern that contraband could be concealed in a Tsalot-Kob. But that security concern does not provide any reasonable basis for limiting Tsalot-Kobs to inmates based on their choice of religion, or respond to the basis for this Court's remand—to determine whether there was a "legitimate penological reason to limit only Tsalot-Kobs to inmates registered as Rastafarian." JA 171. Further, one Defendant, Sergeant Michael Furman, did not submit any declaration explaining his actions. Yet the panel apparently affirmed summary judgment as to him, too, based on nothing at all.

In short, the officers' defense boiled down to a claim that they were acting in furtherance of a state policy that they had no role in creating, even if the policy was facially unconstitutional. And the panel agreed, even though there was no evidence they had a reasonable belief that their actions were lawful, and they were not actually following the policy.

This holding is contrary to settled Supreme Court and Circuit precedent, and cannot be permitted to stand. While the existence of a state policy is relevant to the qualified immunity reasonableness analysis, the Supreme Court has

consistently held that "a policy . . . could not make reasonable a belief that was contrary to a decided body of case law." *Wilson v. Layne*, 526 U.S. 603, 617 (1999). This Court has repeatedly made the same point. *See, e.g.*, *Hartline v. Gallo*, 546 F.3d 95, 103 (2d Cir. 2008); *Lauro v. Charles*, 219 F.3d 202, 216 (2d Cir. 2000).

The panel's ruling is also of exceptional importance because it sends a perverse message to law enforcement officers that they will not be accountable for their actions so long as they point to a state policy that they purport to be following—even where they are not following that policy. Removing accountability from officers' interactions with the public encourages officers to take actions that they could not reasonably believe are lawful, and, as current events show, can lead to devastating consequences.

The panel should reconsider its decision to grant these officers qualified immunity. Alternatively, the full Court should vacate the panel's decision and rehear this case en banc.

FACTUAL AND PROCEDURAL BACKGROUND

This case began in 2007, when DOCCS officers confiscated Barnes' religious head covering, a Tsalot-Kob. Summary Order at 3. Barnes identified as Jewish but, because of his dreadlocks, chose to wear a Tsalot-Kob over the more traditional yarmulke. *Id.* DOCCS Directive 4202 (the "Directive"), in force at the

time, provided that Tsalot-Kobs are "only authorized for members of the Rastafarian faith." JA 209.[1]

When Corrections Officers Louis Fedele and Robert Murphy observed Barnes wearing the Tsalot-Kob, they confiscated it on sight and turned it over to Sergeant Michael Furman, who, in turn, delivered it to Chaplain Theresa Stanley. Summary Order at 3.[2] Chaplain Stanley—who is *not* Jewish—determined the confiscation proper "because Jewish inmates . . . were permitted to wear only yarmulkes." *Id.* Chaplain Stanley took this action even though the Directive set out no such limitation for Jewish inmates, required investigations to be conducted by "a Chaplain *of the inmate's faith*," and mandated that inmates "shall be permitted to wear the head covering until the investigation is completed." JA 209 (emphasis added).

Barnes contested the confiscation through the facility's internal grievance procedures and by writing letters to DOCCS officials. Summary Order at 4. Nuttall, Chappius, and the facility's Deputy Superintendent of Programs, Angela

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[1] The Directive was revised after Barnes filed this lawsuit, and no longer limits an inmate's choice of headwear based on their religious affiliation. JA 168.

[2] Barnes and Defendants dispute the precise circumstances of the confiscation, including Barnes' allegation that Defendants Fedele and Murphy forged cell search records in an effort to comply with DOCCS policies. But, as the panel recognized, the details are "immaterial" here, since both Fedele and Murphy have acknowledged that they were involved in the confiscation. Summary Order at 3 & n.1.

Bartlett, approved the confiscation, likewise because "only yarmulkes . . . were proper headwear for Jewish inmates." *Id.* In a memorandum to Furman, Bartlett acknowledged that the proper procedures had not been followed, because "a facility chaplain [should have been] asked to investigate prior to the item being confiscated." Dkt. #119 at 36.

In 2007, Barnes filed his complaint in the Western District of New York. In 2014, the District Court (Larimer, J.), on dueling motions for summary judgment, held that the Directive was unconstitutional "insofar as it was enforced to prevent plaintiff from adopting the religious crown specific to plaintiff's sincerely-held beliefs," because "'there is no legitimate reason for DOCS to afford members of only one religious denomination the opportunity to adhere to a sincerely held religious belief.'" JA 156 (quoting *Amaker v. Goord*, No. 06- CV- 490A (SR), 2010 WL 2595286, at *12 (W.D.N.Y. Mar. 25, 2010)). But the District Court nonetheless granted summary judgment to Defendants on the basis of qualified immunity and dismissed the complaint.

This Court reversed. JA 162-72.[3] The Court held that "it has been clearly established that burdens on prisoners' free exercise rights must be justified by a legitimate penological interest." JA 169. Nonetheless, the Court explained, there

[3] The earlier panel's summary order is reported as *Barnes v. Furman*, 629 F. App'x 52 (2d Cir. 2015).

remained the question whether "reasonable persons in [Defendants'] position would not have understood that their conduct was within the scope of the established prohibition." JA 171. The Court could not answer that question because Defendants provided no "legitimate penological reason to limit only Tsalot-Kobs to inmates registered as Rastafarian." *Id.* It therefore remanded to the District Court for further development of the record. But this Court cautioned that identifying such an interest would be a tall order, since "there is no legitimate reason for DOCS to afford members of only one religious denomination the opportunity to adhere to a sincerely held religious belief relative to grooming or headwear." JA 170-71. In discussing the District Court's task in assessing qualified immunity, this Court recognized that the "individual corrections officers who confiscated Barnes' Tsalot-Kob may very well have been acting reasonably when following DOCS policy," but ruled that resolution of that question would ultimately depend on "whether a reasonable officer might have believed that the challenged order was lawful in light of legitimate penological interests supporting the directive." JA 171 (quoting *Holland v. Goord*, 758 F.3d 215, 223 (2d Cir. 2014) (quotations omitted)).

On remand, five of the seven Defendants submitted declarations in support of their motion for summary judgment. Nuttall—the only Defendant involved in creating the Directive—did not submit a declaration. Neither did Furman. Fedele,

Murphy, Stanley, and Bartlett each stated that they believed they were following a lawful policy—but none explained *why* they believed the policy was lawful or why that belief would be reasonable, or identified any legitimate penological interest behind the policy. *See* JA 185-98, 244-47. Only Chappius explained his "understanding" of the penological interest behind the Directive—that it sought to limit the number of Tsalot-Kobs in the facility because they can be used to hide contraband. JA 190. But Chappius did not provide any explanation for why he believed it was lawful to limit Tsalot-Kobs to one religious group, Rastafarians, rather than restricting Tsalot-Kobs on some religion-neutral ground—which was the *only* question that this Court left open on remand.

Nevertheless, the District Court granted summary judgment to all Defendants once again, and denied Barnes' cross-motion. The District Court stated, without careful analysis, that Defendants "have now identified penological reasons for the policy underlying [the Directive], insofar as it relates to the restrictions on Tsalot-Kobs"; that Nuttall "could reasonably have believed that such a restriction was constitutionally permissible"; and that Defendants who merely followed the Directive had no reason to question its constitutionality. JA 287.

Barnes again appealed, and the Court appointed counsel to represent him. After oral argument, the panel issued a summary order reversing as to Nuttall but

otherwise affirming the District Court's decision. The panel explained that Nuttall, the only Defendant who played a role in creating the Directive, was not entitled to summary judgment because "officials may only abridge a prisoner's free exercise rights if doing so is reasonably related to some legitimate penological interests," and Nuttall "did not provide a declaration explaining the penological purpose behind its creation." Summary Order at 9 (internal citations and quotation marks omitted). The panel held that it was error for the District Court to "impute[ ] the penological interest articulated by Chappius onto Nuttall," because Chappius' "understanding" of the policy might not be consistent with Nuttall's "reason for signing the Directive." *Id.* at 10.

However, the panel affirmed as to the remaining Defendants. As to Chappius, the panel held that the penological interest he asserted—to prevent prisoners from concealing contraband—was "certainly a legitimate penological interest," *id.* at 8, ignoring the fact that it did not address the Directive's restriction of Tsalot-Kobs to one particular religion, the precise issue for which the earlier panel had remanded. *See* JA 171 (remanding to determine "whether there was a legitimate penological reason to limit only Tsalot–Kobs to inmates registered as Rastafarian"). The panel also held that "it was reasonable for Bartlett, Fedele, Murphy, and Stanley—each of whom attested that they were carrying out what they believed to be a lawful policy—to enforce the Directive, as carrying out a

lawful policy is reasonable." Summary Order at 9. The panel did not address the settled law that qualified immunity for carrying out an *unlawful* policy depends on whether the officer could reasonably believe that the policy was lawful. The panel also ignored that none of these Defendants asserted any understanding of the purpose of the Directive, and failed to explain why it was proper for the District Court to effectively attribute Chappius' "understanding" of the purpose of the Directive to Bartlett, Fedele, Murphy or Stanley when it was *error* to impute it to Nuttall. *Id.* at 10.

Finally, the panel made no express ruling at all as to Furman, who had not even submitted a declaration claiming that he believed he was carrying out a lawful policy. While the panel's intent is thus unclear, the panel noted that the District Court had granted summary judgment to "the Defendants who merely followed the Directive—that is, every Defendant other than Nuttall," Summary Order at 6, and the panel's failure to separately discuss and reverse as to Furman strongly suggests that it intended to affirm as to him as well.

REASONS FOR GRANTING REHEARING

I. The Panel's Decision Conflicts with Settled Supreme Court and Circuit Precedent.

The panel's ruling that the subordinate officers were entitled to qualified immunity simply because they believed they were enforcing a lawful policy is wrong and inconsistent with decades of precedent. It ignores settled Supreme

Court and Circuit authority and improperly immunizes all officers not immediately involved in drafting state policies from being held responsible for their actions, even where those policies clearly "violated plaintiff's [constitutional] rights." JA 156.

The Supreme Court has made clear that state employees are *not* entitled to qualified immunity simply because they were carrying out a state policy or the orders of a superior, even if they subjectively believed the policy was lawful. As the Court held in *Wilson*, "a policy . . . could not make reasonable a belief that was contrary to a decided body of case law." 526 U.S. at 617. This Court has repeatedly made the same point. *See, e.g.*, *Hartline*, 546 F.3d at 103 (defendants not entitled to qualified immunity as a matter of law even where strip search had been conducted pursuant to municipal policy); *Sorensen v. City of New York*, 42 F. App'x 507, 510-11 (2d Cir. 2002) (rejecting argument by low-level employees that it "was objectively reasonable for them to believe that a policy promulgated by the City was constitutional"); *see also Burrell v. Zurek*, No. 917-CV-0906 (LEK) (TWD), 2019 WL 4051596, at *4 (N.D.N.Y. Aug. 28, 2019) ("[T]he Second Circuit has held a defendant's actions can be objectively unreasonable even if that defendant was following a policy."). Thus, in *Lauro*, this Court explained that instructions from a superior officer support qualified immunity only if, "viewed objectively in light of the surrounding circumstances, they could lead a reasonable

officer to conclude that the necessary legal justification for his actions exists." 219 F.3d at 216.

Indeed, this Court reiterated the same point on Barnes' first appeal. The Court explained that, even "[w]hen officials follow an established prison policy . . . their entitlement to qualified immunity depends on 'whether a reasonable officer might have believed that the challenged order was lawful in light of legitimate penological interests supporting' the directive." JA 171 (quoting *Holland*, 758 F.3d at 223). The Court accordingly remanded to the District Court to determine whether there was any penological interest that would justify limiting "Tsalot-Kobs to inmates registered as Rastafarian." JA 171. And the Court specifically directed the District Court to determine whether "it was objectively reasonable for those defendants to believe that denying a Tsalot-Kob *to an inmate registered as Jewish* was constitutional." JA 171 (emphasis added).

But on this appeal, the panel's summary order ignored these fundamental principles. Instead, with little analysis, the panel held that the subordinate officers were entitled to qualified immunity simply because they claimed to believe they were following a lawful order. Indeed, the panel apparently granted qualified immunity to one defendant, Furman, although he did not even make that simple claim.

The record provides no support for Defendants' claim that they were entitled to qualified immunity. Defendants did not present any penological interest served by the state's Directive. While Chappius provided a declaration claiming a general penological interest in curbing contraband, that interest provides no justification for "believ[ing] that denying a Tsalot-Kob *to an inmate registered as Jewish* was constitutional," as the Court's prior summary order required. JA 171 (emphasis added). While the cited interest in curbing contraband is certainly legitimate, the Defendants could have easily taken religion-neutral actions to achieve that objective—for example, by restricting the wearing of Tsalot-Kobs in certain locations or increasing the frequency of security checks for prisoners wearing Tsalot-Kobs. *See, e.g.*, *Benjamin v. Coughlin*, 905 F.2d 571, 579 (2d Cir. 1990) (approving DOCCS policy restricting Tsalot-Kobs to designated areas to reduce risk of contraband). Indeed, the Court recognized on the prior appeal that there was likely "no legitimate reason for DOCS to afford members of only one religious denomination the opportunity to adhere to a sincerely held religious belief." JA 169-70 (citations omitted). But the panel's order this time ignored this critical point.

The panel also erred in imputing Chappius' "understanding" of the basis for the state policy to Bartlett, Fedele, Murphy, and Stanley. As the panel noted, *these* Defendants asserted only "that they were carrying out what they believed to be a

lawful policy." Summary Order at 9. But simply making that claim does *not* entitle an officer to qualified immunity; indeed, one would be hard pressed to ever find a defendant admitting that he did *not* believe he was carrying out a lawful policy. The law requires much more: a showing that the defendant's belief that the policy was constitutional was objectively reasonable. *Wilson*, 526 U.S. at 617. But Defendants made no such showing.

Moreover, since these Defendants asserted no penological interest to justify their actions, the only way that the panel could have found in their favor is if it ascribed to them *Chappius'* penological justification. The panel found error in doing just that with respect to Nuttall: "[T]he district court imputed the penological interest articulated by Chappius onto Nuttall. This was error, as nothing in the record sets forth Nuttall's motivation or thinking." Summary Order at 10. But the panel inexplicably changed course with respect to all other Defendants.

The panel's errors were compounded by its disregard of undisputed evidence that Defendants were not, in fact, acting in furtherance of the Directive or the claimed security interest in seizing Barnes' Tsalot-Kob. As several Defendants explained, they did not confiscate Barnes' headwear because of any concern about inmates wearing Tsalot-Kobs—they did so because, in their view, Jewish prisoners were only allowed to wear yarmulkes. *See* JA 69 (Chappius); JA 80 (Bartlett); JA

84, 87, 199 (Stanley); JA 144, 244 (Fedele). Defendants—and the panel—fail to grasp the difference, but it is precisely the point: Defendants would have confiscated *any* headwear that was not a yarmulke. Nothing in the Directive supports or authorizes this conduct.

Indeed, Defendants' admissions undermine the very backbone of their claim to qualified immunity—that they took away Barnes' headwear because of security concerns. Fedele, Furman, Murphy, and Chappius all admitted that they thought that Barnes' headwear was a *Kufi*, not a Tsalot-Kob. *See* JA 144 (Fedele & Furman); JA 193 (Murphy); JA 69 (Chappius). But Kufis were not restricted under the Directive. If Defendants thought they were confiscating a Kufi from Barnes, it cannot be because of anything in the Directive; it was solely because they were acting under the mistaken notion that Jewish inmates could only wear yarmulkes, a policy which finds no support in the Directive. The record thus demonstrates conclusively that Defendants were not acting pursuant to the Directive.

Finally, the evidence also shows that Defendants failed to follow the Directive's procedural requirements. They seized Barnes' Tsalot-Kob before the investigation was completed by the facility Chaplain. *See* JA 210. And they relied on a determination made by a non-Jewish Chaplain, instead of referring the matter to a rabbi, as required by the Directive. *See id.* Defendants therefore could not

have "reasonabl[y] . . . believed" that their actions were lawful based on the Directive. Summary Order at 9.

Separately, the panel ignored Barnes' appeal as to Defendant Furman. After making a ruling as to Nuttall, the panel held: "As to the Defendants applying the Directive—that is, Bartlett, Chappius, Fedele, Murphy, and Stanley—we conclude that the district court did not err in granting them summary judgment." *Id.* at 8. Either the panel made no ruling regarding Furman, or it implicitly affirmed the District Court's grant of summary judgment in his favor. Either way, the panel made a serious error. Furman failed to submit even a barebones declaration stating that he believed he was following a lawful policy; he submitted no declaration at all. The District Court nonetheless granted him summary judgment, and the panel apparently affirmed.

The panel's failure to apply the settled legal standards governing the availability of qualified immunity warrants this Court's attention. As the Supreme Court has explained, "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982). Qualified immunity was designed to balance the "interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis v. Scherer*, 468 U.S. 183, 195 (1984). An unfairly high qualified-immunity bar is particularly

problematic in the prison context, where an inmate has no ability to distance himself from corrections personnel at the facility.

In its ruling, the panel disregarded these basic principles. It granted most Defendants qualified immunity even where the Directive plainly "violated plaintiff's [constitutional] rights," JA 156, the officers provided "no legitimate reasons" for those violations, JA 171, and did not even follow the Directive that they claimed to be enforcing. Far from incentivizing rank-and-file corrections officers to be thoughtful in their interactions with inmates, the panel's order, if not revised, would remove all accountability for those officers and signal they are free to take unconstitutional actions so long as they can point to an unconstitutional directive in their defense. Whatever the right balance is, it is not *that*. *See Owen v. City of Independence*, 445 U.S. 622, 651 (1980) ("[Section] 1983 was intended . . . to serve as a deterrent against future constitutional deprivations.").