

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER DELANEY BOOKER, JR - PETITIONER

vs.

A.DAVID ROBINSON,et al.,- RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO

THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

AND

THE U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA,ALEXANDRIA DIVISION

PETITION FOR WRIT OF CERTIORARI

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757-

QUESTION(S) PRESENTED

1. Whether Congress in enacting 42 U.S.C. §2000cc-2(a), §2000 cc-2(b), §2000 cc-5(3) and §2000 cc-5(4)(A)(ii) thru (iii) of the Religious Land Use and Institutionalized Persons Act, meant to give a remedy to petitioner against the defendants in their individual capacity for intentional burdens, callous disregard and deliberate indifference to petitioner's Free Exercise, when the person who deprived petitioner is a prison official and/or a person acting under color of state law? See pages 9-17.
2. Whether a district court may take judicial notice of a prison Operating Procedure change submitted by neither party to action, when motions for summary judgment by the defendants and a responsive pleading by petitioner have been filed, disputing material facts and take a different course unrelated to the summary judgment motion and moot the action, without giving notice to petitioner that it was taking judicial notice to give an opportunity to dispute the regulation contrary to Federal Rules of Civil Procedure Rule 56(f)? See pages 17-20.
3. Whether voluntary cessation of some of the substantial burdens on petitioner's Free Exercise moots the action and prevents petitioner from a declaratory ruling? See pages 20-24.
4. Whether a pro se prisoner when presenting a retaliation claim is subjected to a more heightened pleading drafted by an attorney at law, that spells out a retaliation claim in a heading or can it be pleaded along with other facts as petitioner did to plead a valid claim to be noticed by the court? See pages 24-26.
5. Whether the Equal Protection Clause protects petitioner under RLUIPA and 42 U.S.C. §1983 and did he plead a valid claim to survive summary judgment. See pages 26-29.
6. Whether the prison administrators dismissed at the screening stage liable to petitioner under RLUIPA and Equal Protection Clause and did petitioner plead a valid claim against them? See pages 29-31.

LIST OF PARTIES

[] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RESPONDENTS:

A.DAVID ROBINSON,Chief of Corrections Operations

Wendy S.Hobbs, Regional Administrator

EDDIE L. PEARSON, Lead Warden

C.PARKER, Asst. Warden

J.HARRIS,Asst. Warden

C.BOONE,Regional Ombudsman

S.TAPP,Human Rights Advocate

K.WHITEHEAD,Grievance Coordinator

L.GOODER,Asst. Warden

D.DUGGER,InstitutionalHearings Officer

R.TIMMONS,Unit Manager

B.M. CLAUDE,Lieutenant

T.ROBINSON,Lieutenant

G.D. FAULCON,Sgt.

Lieutenant Taylor

M.L. ROOK,Sgt.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix

A to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or

☒ is unpublished.

The opinion of the United States district court appears at Appendix B, E, I, N, O to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or

☐ is unpublished.

☐ For cases from state courts:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or

☐ has not been designated for publication but is not yet reported; or,

☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,

☐ has been designated for publication but is not yet reported; or,

☐ is unpublished.

JURISDICTION

☒ For cases from federal courts:

The date on which the United States Court of Appeals decided my case was October 2, 2017.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

☐ For cases from state courts:

The date on which the highest state court decided my case was _____ . A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for writ of certiorari was granted to and including _____ (date) on _____ (date) in application No. _____ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

RELIGIOUS LAND USE AND INSTITUTIONALIZED PERSONS ACT 42 U.S.C. § 2000 cc through §2000 cc-5

PRISONER LITIGATION REFORM ACT, which includes 28 U.S.C. §1915, §1915A
42 U.S.C. §1997, §1997a, §1997e
18 U.S.C. §3626

FOURTEENTH AMENDMENT Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

FIRST AMENDMENT. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

ARTICLE I. SECTION. VIII. CLAUSE !1! of the U.S. CONSTITUTION, The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and General Welfare of the United States;

42 U.S.C. §1983; 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 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS

continued

Federal Rules of Civil Procedure 8, General Rules of Pleading

Federal Rules of Civil Procedure 56 (F) Summary Judgment,
Judgment Independent of Motion

Federal Rules of Evidence Rule 201 Judicial Notice

18 U.S.C. U.S.C. 3626

STATEMENT OF THE CASE

The petitioner's complaint alleged that he is a practicing Muslim and was intentionally, arbitrarily and with deliberate indifference substantially burdened in his religious exercise, to wear a beard without a compelling government interest nor least restrictive means under the Free Exercise Clause of the Religious Land Use And Institutionalized Persons Act,

Petitioner alleged he was denied equal protection of the RLUIPA, harassed and was burdened with retaliation for his religious exercise and access to the courts. Petitioner alleged that he was denied access to food, prevented from going to rec, law library access to access the courts, prevented from going to vocational programs, religious programs, charged with unjustified disciplinary offenses (4) times for refusing to shave, punished and placed in segregation, transferred to a maximum security prison, stripped of personal property use and economic use by the parties to the petition on pg.

Before these events occurred Operating Procedure 864.1 was amended to allow beards of 1/4-inch maximum length for all offenders. The defendants/respondents however substantially burdened petitioner's religious exercise because they did not like the way it grew, specifically because petitioner did not grow sideburns. The only offenders who were not substantially burdened were those with sideburns. Those offenders were given protection of the law.

Petitioner alleged that he was retaliated against, after

the complaint was served and a responsive pleading had been filed, by the same defendants who petitioner was seeking relief against. Petitioner alleged he was punished for his religious exercise and access to the courts

Petitioner alleged that collateral detriment follows from the substantial burdens that were not removed and there are continuous substantial burdens that are irreparable.

Petitioner alleged that E. Pearson, W. Hobbs, D. Dugger, R. Timmons, B. Claude, T. Robinson, G. Faulcon, Lt. Taylor, Rook et al. had direct personal involvement in the substantial burdens on petitioner's religious exercise, by intentionally denying the access to food, recreation, vocational programs, law library access, harassing him, continuous charging of disciplinary offenses, retaliation against him, punishing petitioner after-the-fact and alleged E. Pearson, W. Hobbs, C. Parker, J. Harris, C. Boone, S. Tapp, K. Whitehead, L. Goode and D. Dugger were officials and actors under state law who received notice of the violations and not only ignored them, but sanctioned the continuation of the practices

Petitioner sought relief to grow a $\frac{1}{4}$ -inch to $\frac{1}{2}$ -inch beard in his facial hair area.

Petitioner continues to suffer from intentional substantial burdens.

Rulings of the District Court.

On September 23, 2014 (DKT.9) the court held that petitioner named the Chief of Corrections Operations, the Regional

Administrator, the Head Warden of GCC, the Regional Ombudsman, and several grievance and hearings officers as defendants because they supervised other individuals at GCC, agreed with other individuals or upheld decisions made by the institution. It thus appears that these individuals have been named as defendants solely on the basis of their supervisory positions. Accordingly these defendants must be dismissed pursuant to 28 U.S.C. 1915A(b)(1) for failure to state a claim. On July 14, 2015 (Dkt. 65), the court held the affidavits do not show that these inmates were similarly situated to plaintiff. The inmates do not attest that they had beards like plaintiff's that did not comply with VDOC Operating Procedures. The mere fact that these other inmates have beards - a fact which itself is not conclusively established - is not sufficient to show that these other inmates are similarly situated to plaintiff. *Id.* Plaintiff therefore cannot meet his threshold burden of proving that he is being treated differently from similarly situated individuals. *Id.* The defendants are entitled to summary judgment. On July 15, 2016 the district court entered a preliminary injunction, (Dkt. 93) directing the defendants to allow plaintiff to grow a 1/4-inch to 1/2-inch beard without substantial burdens imposed and further losses and harms as a result of his religious exercise and 133 charge. *Id.*

On February 14, 2017, the court dismissed the action as moot, see (Dkt. 115). The district held plaintiff was not entitled to monetary damages pursuant to *Rendelman v Rouse* 569 F.3d 182 (4th Cir. 2009). The lower court further held plaintiff's retaliation claim is not properly before the court. Lastly the

district court held, pursuant to Rule 201 of the Federal Rules of Evidence, the Court takes judicial notice that effective August 1, 2016, VADOC O.P. 864.1, was amended to allow beards up to $\frac{1}{4}$ -inch in length and the beard must cover the offender's natural facial hair area (those areas in which the offender is able to grow hair facial) with no shapes or designs cut into the beard, VDOC O.P. 864.1, (1)(v)(X)(i)(c)(xi). In addition, defendant Robinson's affidavit, which is attached to defendant's Motion for Summary Judgment, states that "it is understood by VDOC that an offender's beard is between $\frac{1}{4}$ -inch to $\frac{1}{2}$ -inch in length at almost any point in time, Def. Mot. Summ. Jud. at Ex. 1. Therefore even when the preliminary injunction in this matter is superseded by Final judgment, plaintiff will still be allowed to grow a $\frac{1}{4}$ -inch to $\frac{1}{2}$ -inch beard without substantial burdens based on the current language of VDOC O.P. 864.1 and VDOC's understanding regarding the length of inmates' beards. In addition, VDOC restored plaintiff's ESC level (from level 2 to level 1) reclassified plaintiff's security level (from 5 to 2) and transferred plaintiff to a security level 2/3 facility. Thus not only has VDOC changed its policy to one that is consistently applied to inmates based on their natural ability to grow a beard, it has taken affirmative steps to roll back disciplinary actions imposed on plaintiff based on VDOC's former policy. Accordingly, VDOC has made it clear that it is reasonable to expect that they will not reinstate the previous version of VDOC O.P. 864.1.

Petitioner appealed to the U.S. Court of Appeals for the Fourth Circuit who affirmed. See Appendix A. Petitioner now petitions this Court for writ of cert. and application for an injunction.

REASONS FOR GRANTING THE PETITION

QUESTIONS PRESENTED No.1

A. Conflicts with Decisions of Other Courts

The courts below have reached different conclusions and are conflicting as to whether liability exists against individuals acting under color of state law in their individual capacity. The courts in Mack v Warden, 839 F.3d 286(2016), Sharp v Johnson, 669 F.3d 144,154-55 (3d Cir 2012), Wood v Yordy, 753 F.3d 899 (9th Cir. 2014), Haight v Thompson, 763 F.3d 554(6th Cir 2014), Holland v Goord, 558 F.3d 215(2d 2014), Rendelman v Rouse, 569 F.3d 182,189(4th Cir 2009), McCreary v Richardson, 738 F.3d 651(2013, 5th Cir.), Washington v Gonyea, 731 F.3d 143,45-46(2nd Cir. 2013), Stewart v Beach, 701 F.3d 1322,1334-35(10th Cir. 2012), Smith v Allen, 502 F.3d 1255,1271-75(11th Cir. 2007) and Nelson v Miller, 570 F.3d at 886-89 (7th Cir. 2009). The holdings and conclusions of these courts are not only in conflict with each other but the conclusions and reasons of the courts below. Their conclusions have focused on that because the statute was enacted pursuant to the spending clause it should be interpreted as not imposing liability on persons acting under color of state law or because the persons acting under state law were not on notice that they could be sued under RLUIPA or that because persons acting under state law are not the direct recipients of funds then they cannot be liable or even though the same language defining persons acting under color of law that is contained in the RLUIPA is contained in RFRA and §1983 it is subject to a different interpretation.

The Ninth Circuit assumed in Cambell v Almeida, 295 Fed. Appx. 130,131 (9th Cir.2008), because it upheld the district court's granting of qualified immunity to the defendants under RLUIPA, that damages liability attached to persons acting outside the scope of their office. The Fourth Circuit concluded in Lovelace v Lee, 472 F.3d 174 (4th Cir.2006), that because the defendant had had notice and the RLUIPA incorporates the Free Exercise Clause and the basic protections then tort liability that existed under the First Amendment existed under RLUIPA as long as it was clearly established law.

The courts above never considered whether the law was clearly established, even though intentional violations occurred.

B. Importance of the Question Presented

The question presented is of great public importance because it affects institutionalized persons in all (50) states as well as applied to the arbitrary burdens petitioner was placed under, and in view of the amount of

litigation over rights under the RLUIPA, and the free exercise protections and the proper enforcement mechanisms.

Proper interpretation is also important because throughout petitioner's assertion of his free exercise as a practicing muslim to wear a beard and to seek redress, he suffered substantial losses of liberties, loss of property and its economic use, arbitrary retaliation, losses of benefits offered by the state, transfer to a maximum security prison to be housed in a restrictive pod for no compelling interests, and to only interfere with petitioner's free exercise of religion. To say that Congress's intent and the drafters in enacting the RLUIPA was to provide a mechanism but no remedies would not appear to be true based upon the scope, intent and language of the RLUIPA.

There is a fundamental question of whether when Congress enacted the RLUIPA it sought to limit the remedies and protections afforded by the Free Exercise Clause of the First Amendment that are available for its violations, because both free exercise clauses in the RLUIPA and First Amendment are identical, even though RLUIPA was enacted under Article I. §8. Clause 1.

The RLUIPA is still in its infancy. Almost all lower courts have considered its parameters for the last (17) years, differing on how to apply Congress's intent and whether because the RLUIPA was enacted as spending clause legislation then whether the contract analogy applies to assign fault and responsibility.

If as the lower courts have concluded that actors under state law in the RLUIPA and the First Amendment in §1983 claims and RFRA claims are different then the Act itself does not afford the maximum protection to the maximum extent of the Constitution and its goal can never be achieved. See 42 U.S.C §2000 cc-3 (g).

In evaluating whether the RLUIPA would apply would depend on whether there was notice, whether the language is subject to previous interpretations or whether when Congress enacted the RLUIPA it enacted it against the background of common law which this Court has concluded Congress is understood to legislate against. Briscoe v LaHue, 460 U.S. 325, 103 S.Ct. 1108, 75 L.Ed.2d 96 (1983). The understanding by this Court is where Congress was well aware of the legal backdrop against which it legislated and where it did not enunciate changes, it is a presumption it meant to keep the same law. Fargher v City of Boca Raton, 524 U.S. 775, 792 (1998). This Court has concluded in other cases, which would apply here equally that where legal rights have been invaded and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done. Bell v Hood, 327

U.S. 678(1946),if a statute gives a right,the common law will give a remedy to maintain the right. Ashby v White,1 Sak.19,21,87 Eng. Rep.[503 U.S. 67] 808, 816(Q.B. 7702),and even liability created by statute without a remedy may be enforced by a common law action. Dooley v United States,182 U.S. 222,229,215 S.Ct. 762 (1901)

This Court has ruled on important issues of Spending Clause legislation and it's application to the persons it speaks to in at least four cases ,in Pennhurst State School and Hospital v Halderman,451 U.S. 1, 67 L.Ed. 2d 694, 101 S.Ct. 1531(1981); Gebser v Lago Vista Independent School Dist,524 U.S. 274 118 S.Ct. 1989(1998); Franklin v Gwinnett County Public Schools,503 U.S. 60,112 S.Ct. 1028(1992), Davis Next Friend Lashonda D. v Monroe County Bd,526 U.S. 629 119 S.Ct. 1669(1999),including Sossamon v Texas ,563 U.S. 277 (2011),which sought damages against the state for violating RLUIPA. There has been no occasion when the Court has settled not only the different conflicts,but on appropriate relief against an official acting under color of state law in his/her individual capacity.

It should be cleare that the same atandards that apply in Pennhurst,Gebser, Franklin and Nextfriend Lashonda D.,applying the contract analogy does not apply when legislation is structured aimed at the prison system and prison officials as identified by this Court in Sossamon.

Even though this Court intended to make clear not to imply that suits un under the Spending Clause are suits in contract or that contract-law principles apply to all issues they raise,Sossamon,quoting Barnes,supra at 188 n. 2,122 S.Ct. 2097 or to rely on that analogy to expand liability beyond what would ex exist inder non-spending statutes,much less extend monetary damages against the states.

This Court did make clear in Sossamon that appropriate relief against the state itself comes under what relief is traditionally available against the state itself, Sossamon. This Court in no way concluded that persons acting under color of state law are not liable.

The lower courts interpreted Sossamon as being a contract analogy suit and any cases that followed would be determined on it,without an express ruling. The lower courts have construed the ruling in Sossamon to mean that because the states are not liable in the context of the statute for money damages then persons acting under color of law are not liable,however it would make little to no sense to include persons acting under color of state law,but not to

provide the only remedy that would prevent and/or deter future violations and to remedy wrongs and losses for violating clearly established federal law, under The RLUIPA.

The lower court's holding that Rendelman v Rouse, 569 F.3d 182,189(4th Cir. 2009) notice requirement was not met is not convincing to deny petitioner appropriate relief against the respondents for several reasons which were offered in the lower court and is reason to grant the certiorari.

The respondents were on notice, the language of the RLUIPA and the scope and intent of the Act makes clear that the same appropriate relief under the First Amendment in 1983 claims for violation of the Free Exercise Clause is available, if the law was clearly established.

It is undisputed that the law was clearly established in The Fourth Circuit in Couch v Jabe, 679 F.3d 197 (4th Cir.2012), holding that muslim's maintenance of a beard is a qualifying religious exercise under The RLUIPA. Then this Court's further conclusions reached in Holt v Hobbs, 574 U.S. 135 S.Ct. (2015). Petitioner's claims arose after Couch which holding came against the same Department of Corrections who imposed the intentional substantial burdens on him, before Holt, then continued to occur after Holt.

1. RLUIPA tracks the same language of 42 U.S.C. §1983 and RFRA, it is more than reasonable based off the parallel language that liability can be imposed under all three statutes. The Ninth Circuit explained it well in Sutton v Providence St Joseph Med. Ctr., 192 F.3d 826,834-35(9th Cir.1999), when a legislature borrows an already judicially interpreted phrase from an old statute to use in a new statute, it is presumed that the legislature intends to adopt not merely the old phrase but the judicial construction of that phrase. Under this presumption, RLUIPA like RFRA and 42 U.S.C. § 1983), provides for relief from individual government conduct whether or not it is undertaken pursuant to an official rule or policy.

The statute speaks to the respondents as well as petitioner in its enforcement mechanism, however if there is no relief against actor under state law in their individual capacity, then respondents and other employees will continue to violate the Free Exercise provisions intentionally without repercussions. See 146 Cong. Record, Exhibit 1, Summary and Purpose, which was enacted with the law itself (Joint statement of Sens. Hatch and Kennedy) (persons residing in institutions are subject to the authority of one or a few local

officials)(whether from indifference,ignorance,bigotry,or lack of resources, some institutions restrict religious liberty in egregious and unnecessary ways).

Previous rulings of this Court should have made clear that prison officials sued in their individual capacity were only subject to qualified immunity such as Procunier v Navarette ,434 U.S. 555(1978),which focused on and held that prison officials are only entitled to qualified rather than absolute immunity and that under applicable standard,whereby the immunity defense would be unavailing to the officials if (1) the constitutional rights allegedly infringed by them were clearly established at the time of their challenged conduct,they knew or should have known that their conduct violated constitutional norms or (2) they acted with malicious intention to deprive the prisoner of constitutional rights or to cause him other injury. Procunier is further backed by Harlow v Fitzgerald , 457 U.S. 800 (1982)

The lower courts reasoning that persons acting under color of state law did not have notice or cannot be liable because it is spending clause legislation and the contract law analogy applies is belied by the fact RLUIPA is phrased in terms as speaking to those persons being regulated,both as to claims and defenses. 42 U.S.C. §2000cc-1 states:

no government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution as defined in Section 2 of the Civil Rights of Institutionalized Persons Act(42 U.S.C. §1997),even if that burden results from a rule of general applicability unless the government demonstrates that imposition of that burden on that person(1) is in furtherance of a compelling government interest and (2) is the least restrictive means of furthering that compelling government interest.

It was undisputed fact that petitioner is a person confined to an institution defined in CRIPA.

For purposes of RLUIPA,Government is defined in 42 U.S.C. §2000 cc-5(4)(A) as:

- (i) a state,county,municipal,or other governmental entity created under the authority of the state;
- (ii) any other branch,department,agency,instrumentality or official of an entity listed in clause (i);
- (iii)any other person acting under color of state law.

For persons who are an official of an entity listed in clause (i) or any other person acting under color of state law in clause (ii),to claim that they are not liable for intentional and malicious violations as well as to deliberate indifference to federal protections of petitioner is akin to claiming absolute immunity like the state itself.

2. The respondents accepted all agreements including constitutional and statutory provisions when they took their oath of office to support laws and became sworn state employees as actors. By being a willful participant in state operations to which the statute applied made them subject to the substantive and remedial provisions. To act under color of state law does not require that the accused be an officer of the state. It is enough that he is a willful participant in joint activity with the state or its agents. Lugar v Edmonson Oil, Co, 457 U.S. 922 (1982). Even more so, an agreement can exist although not all parties to it have knowledge of every detail of the arrangement, as long as each party is aware of its essential nature. Blumenthal v United States, 332 U.S. 539, 557-58 (1947)).

3. For further proof that notice and the same language that exists under parallel statutes was incorporated to provide the same relief and claims that the lower courts failed to recognize as Congress's intent is that the Act incorporated the Free Exercise Clause from The First Amendment in express terms which would also incorporate those same remedies from First Amendment violations and any other injuries resulting therefrom. 42 U.S.C. §2000 cc-2, Judicial Relief, §2000cc-2(b) states:

Burden of Persuasion. If a plaintiff produces prima facie evidence to support a claim alleging a violation of The Free Exercise Clause or a violation of section 2[42 U.S.C. 2000cc] the government shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

RLUIPA goes on to explain the Free Exercise Clause as that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion. 42 U.S.C. §2000 cc-5 (3).

Congress did not alter any laws, it only modified the burden of proof by the government on its substantial burdens on institutionalized persons and limited the scope of review to institutionalized persons and land use regulation.

The respondents were on notice that the same free exercise protections and liability remained in effect from The First Amendment.

4. Further appropriate relief against a Government was expressly made against in this context on an official in his individual capacity and/or acting under color of state law when inserting the proper definiteness according to 42 U.S.C. §2000 cc-2(a) and 42 U.S.C. § 2000 cc-5(A)(ii) and (iii).

This Court noted the word appropriate relief is inherently context-dependent. Sossamon v Texas, 563 U.S. 161 (2011) and the context where the defendant is a sovereign suggests, if anything, that monetary damages are not suitable or proper.

However, in this context, this Court would never have held that respondents acting under color of state law and abuses its power are on the same footing as the sovereign itself.

42 U.S.C. § 2000 cc-2(e) with respect to prisoners state :

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act)

18 U.S.C. § 3626(h) defines civil action, prisoner and prisons with respect to PLRA and 18 U.S.C. § 3626 defines appropriate remedies with respect to prison conditions. 18 U.S.C. § 3626(g)(a) states

The term relief means all relief in any form that may be granted or approved by the court, and includes consent decrees, but does not include private settlement.

The respondents and the lower courts have been on notice of the provisions of the PLRA for 20 years now and cannot claim that they are not now liable for appropriate relief under RLUIPA since its enactment in 2000, which incorporates the PLRA.

Persons acting under color of state law are simply not on the same footing as the sovereign with respect to appropriate relief.

5. Other express provisions which give clear notice of the respondents liability is the Act expressly states there is no preemption or repeal.

42 U.S.C. § 2000 cc-3(h), Rules of Construction state:

Nothing in this Act shall be construed to preempt state law or repeal federal law that is equally as protective of religious exercise as or more protective of religious exercise than this Act.

This would mean that commonly tort liability that follows from the Free Exercise Clause, incorporated in RLUIPA is available against the respondents.

Under 42 U.S.C. § 2000 cc-2(a) Judicial Relief, Cause of Action states:

A person may assert a violation of this Act as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under article III of the Constitution

The statute has its own scheme to bring a claim or defense under RLUIPA and

neither expressly limits plaintiff's ability to bring his claim or defense under 42 U.S.C. § 1983 also. When Congress expressly enumerated a judicial proceeding, it necessarily implied plaintiff may bring a claim under either or both enforcement mechanisms, even though 1983 enforces rights contained elsewhere and RLUIPA contains substantive provisions and enforcement mechanisms. If Congress foreclosed such remedy under 1983 and the comprehensive scheme under RLUIPA is sufficient, then because of the broad protection, the same remedies apply to tort judicial proceedings.

This Court has further held that apart from some exceptions, 1983 remains a generally and presumptively available remedy for claimed violations of federal law. *Dennis v. Higgins*, 498 U.S. 739, 443, 112 L.Ed.2d 969, 111 S.Ct. 865 (1991) and that 1983 provides a cause of action for violations of federal statutes as well as the Constitution. See *Maine v. Thiboutat*, 448 U.S. 1, 4, 65 L.Ed.2d 555, 100 S.Ct. 2502 (1980).

The lower court's ruling did not place and allow the respondents to provide a defense that Congress foreclosed a remedy under 1983. The state had an obligation to show the Congress foreclosed a remedy, when precluded by petitioner that RLUIPA did not support a remedy nor 1983 supported a claim and remedy for violation of RLUIPA against persons acting under color of state law.

Petitioner is seeking the enforcement of the Free Exercise Clause in the RLUIPA, which is a federal constitutional right incorporated into the statute. When petitioner sought enforcement under 1983 redress, he asserted a violation of a federal right, not merely federal law. See *Blessing v. Freestone*, 520 U.S. 329, 137 L.Ed.2d 569. Three principle factors determine whether the plaintiff is an intended beneficiary of the statute, (2) whether the plaintiff's asserted interests are not so vague and amorphous as to beyond the competence of the judiciary to enforce and (3) whether the

statute imposes a binding obligation on the state. See e.g. *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498

6. Last, but not least the RLUIPA expressly states 42 U.S.C. § 2000d-1(b), Scope of application applies in any case in which (1) the substantial burden is imposed in a program or activity that receives Federal Financial assistance. Programs or activity and program are defined in 42 U.S.C. § 2000d-4a. Those definitions encompass correctional officers as being an entity.

The district courts seriously misinterpreted *Sassamon v. Texas*, 563 U.S. 277 (2011) and the extent to which the RLUIPA's liability attaches to persons acting under color of state law for intentional violating RLUIPA's substantive provisions under clearly established law.

QUESTIONS PRESENTED No. 2

A. Conflicts with Decisions of Other Courts

The courts below have reached different conclusion on the application of Rule 201 that the Fourth Circuit and the application of Rule 56 of Federal Rules of Evidence and Civil Procedure respectively.

Rule 201(e) of Fed. R. E., states that a plaintiff is entitled to an opportunity to be heard before judgment. Rule 201(b) of Fed. R. E., states courts may take judicial notice of facts which are not subject to reasonable dispute because they are either (1) generally known within the territorial jurisdiction of the trial court or

(2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

In Akers v. Watts, 589 F.Supp. 2d 12, 15 (D.D.C., 2008), concluded that Courts can take notice of their own records and those of other courts, at least for matters such as the fact that a case was filed or what its disposition was. In Hardy v. Jones-Manville Sales Corp, 681 F.2d 334 (5th Cir. 1982), the court concluded the court may not take judicial notice pursuant to Fed. R. E. 201(b) (2) and (c) of matters subject to dispute and which are not self-evident, and in Reed v. Rhodes, 607 F.2d 714 (6th Cir. 1979), the court concluded lower court's findings based on evidence outside record which is not received under provisions for judicial notice contained in Rule 201 are to be ignored on appeal. In Cambell v. Mircey, 7413 F.Supp. 16 (1975), concluded state regulations are beyond scope of judicial notice provided for in Federal Rules of Evidence. [REDACTED]

The Fourth Circuit affirmed that the district court may not only take judicial notice of facts in dispute, but also plaintiff did not need to be provided with notice for judgment, it did not matter that neither party submitted the materials that the court took judicial notice of, specifically the Operating Procedure 864.1 amended and that plaintiff did not need notice nor time to respond under Fed. R. Civ. P. 56(f).

B. Importance of the Question Presented,

There is no doubt both rules 201 and 56 were enacted to protect substantive and procedural rights of litigants

It is further important that a pro se prisoner is given the same opportunity to present his case and submit facts that dispute any alleged amendment to a policy and whether the amendment actually alleviated the substantial burdens on his religious exercise.

Petitioner nor the respondents submitted the judicially noticed regulation that was amended to the court. Petitioner has a substantial and procedural right to both rules being followed because the error was not harmless and the claims arose under the RLUIPA and not only did petitioner present and continues to present evidence that the Department and its officers were not mandated to follow the Operating Procedure, nor any alleged concessions, but also the defendants admitted it would not grant relief.

This is a question that should be easily answered by this Court without resort to argument and that is how can a lower court take judicial notice of a material fact that is disputable, accept motions for summary judgment and opposition brief, however issue judgment on different grounds not raised by neither party without notice and an opportunity to respond to the court's evidence outside the record before judgment, when the substantive and procedural rights of petitioner are at risk? The answer is according to the Rules of Evidence and Civil Procedure a lower court is not permitted to do neither. This is especially true for a pro se prisoner, like petitioner who are charged with proceedings without the aid of counsel and the resources of a financially strapped person.

The lower district and circuit courts seriously violated Fed. R. Evidence 201 and Fed. R. Civ. P. 56(F), in the ruling in Appendix — p

QUESTIONS PRESENTED No.3

A. Conflicts with Decisions of the U.S. Supreme Court.

This Court has held in Mesquite v Aladdins Castle, Inc, 455 U.S. 283, 71 L.Ed. 2d 152, 102 S.Ct. 1070, that the fact that a phrase was eliminated from the ordinance while the case was pending in the Court of Appeals did not render the case moot and that appellant's repeal of the objectionable language would not preclude a return to the previous practices. Along with its power to hear the case, the court's power to grant injunctive relief survives discontinuance of the illegal conduct. Cashen Mfg. Co. v Hubert A. Myers Mfg. Co., 242 U.S. 202, 37 S.Ct. 105, 161 L.Ed. 2d 248 (1916) and DeFunis v Odegaard, 416 U.S. 313, 317-18, 94 S.Ct. 1704, 1706-07, 40 L.Ed. 2d 164 and United States v W.T. Grant Co., 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1959) concluded that voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e. it does not make the case moot.

The Fourth Circuit in its affirmance of the district court's holding reached a contrary conclusion. See Appendix A and Appendix B p. 4-5

B. Importance of the Question Presented.

First, this Court has an obligation to maintain uniformity and supremacy of its rulings.

Second, The Public interest in having the legality of practices settled militates against a mootness conclusion. United States v Trans Missouri Freight Ass'n, 166 U.S. at 309, 310, 17 S.Ct. 546, 547.

Third, In the absence of definitive court action, petitioner's case would produce nothing binding on the respondents

and their successors.

The lower court's ruling flies in the face and contradicts a pre-judgment order issuing a preliminary injunction and the relief petitioner sought as well as the affidavits and declaration submitted by respondent A. David Robinson and petitioner. See (Dist. Ct. Dkt. 104, Ex. I. and Dist. Ct. Dkt. 110) respectively

The preliminary injunction granted petitioner the relief he sought with respect to growing a $\frac{1}{2}$ -inch without the substantial burdens after the Fourth Circuit reversed the district court's denial. See Appendix L, [G] and E.

The second amended complaint, (Dist. Ct. Dkt. 60, p. 33) asked relief to grow a $\frac{1}{4}$ -inch to $\frac{1}{2}$ -inch beard among other relief. The District Court granted that relief in Appendix E.

However, after the substantial burdens were removed as a result of the preliminary injunction, the respondents moved again for summary judgment by conceding petitioner had a sincere religious exercise and that he had been substantially burdened. See (Dist. Ct. Dkt. 104), then disputed that petitioner should not be able to grow a $\frac{1}{2}$ -inch beard, but would be allowed to grow a $\frac{1}{4}$ -inch in his facial hair area and that it was an understanding in VA.DOC that beards would be between $\frac{1}{4}$ -inch to $\frac{1}{2}$ -inch at any time.

The lower court accepted this argument, took judicial notice that Operating Procedure 864.1, IV.F. had been amended by crossing out entire facial hair area and changing to natural facial hair area.

1. The whole purpose of the mootness doctrine is not to

continue an action when there is no longer a controversy and the injury suffered would no longer continue.

It is undisputed that the respondents only conceded after litigation and the preliminary injunction was issued, however with no guarantee that the action would not continue against petitioner. The respondents neither submitted any evidence to support its assertion that it was an understanding by VADOC that beards are understood to be between $\frac{1}{4}$ -inch to $\frac{1}{2}$ -inch. To top things off the lower court came back in its final order in (Appendix B) and stated petitioner never requested to grow a $\frac{1}{2}$ -inch beard.

Both (Dkt. 66) and Appendix G and E support factually the petitioner be allowed to grow a $\frac{1}{2}$ -inch.

2. If there was an understanding that petitioner could grow a beard between $\frac{1}{4}$ -inch and $\frac{1}{2}$ -inch beard, the respondents would not have been disputing it in their entire brief for summary judgment in (Dist. Ct. Dkt. 104)

Notwithstanding the Question Presented in No. 2 there were not only monetary damage claims but a continuing controversy as demonstrated by the briefings. It is not the judiciary's job to moot an action when no evidence has been shown that future injuries will not occur nor when facts are being disputed against petitioner's relief.

Petitioner easily presented in motion to the Fourth Circuit and this Court in a preliminary injunction that practices and procedures still exist that places irreparable harms (substantial) burdens on petitioner.

3 An appropriate order should have been entered indicating plaintiff is entitled to prevail to the extent provided in the preliminary injunction order and the policy violated RLUIPA.

The record demonstrates and the lower court's ruling reflect petitioner was charged with numerous offenses for refusing to shave and only one charge was expunged, while the others are still on his record and negatively affects him.

Being that petitioner was housed in isolation for (8) months and then a maximum security prison for another (11) months, because he refused to shave and his free exercise as a Muslim was used as a defense and showing that punishment was arbitrary and unless matter is clarified it could prejudice petitioner's chance for early release

4 The question of whether a live controversy continued and still continues is whether the respondents have presented evidence and assured that the burdens have been eliminated. The answer is yes, a controversy continued. Petitioner's opposition to summary judgment, precluded judgment "in the respondents favor. Once the respondents conceded without a compelling interest nor least restrictive means, petitioner was entitled to a ruling in his favor.

This is considering, the fact that, petitioner's punishment had come after Coch v. Jabe, 679 F.3d 1197 (4th Cir. 2012) and after Holt v. Hobbs, 574 U.S. 135 S.Ct. (2015). Even though Coch establish a recognized right under RLUIPA and Holt recognized a right as applied. The respondents argument and the lower court ruling reflected Holt held no weight.

Petitioner had enough and continues to have enough interest in the outcome, for the case not to be moot, especially on judicially noticed grounds not submitted into evidence by any party. A case is only moot when the issues presented are no longer 'live' or the parties lack allegedly cognizable interest in the outcome. *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 23 L.Ed. 2d 491 (1969)

The importance of the mootness issue and the issue being settled are reasons to grant this writ. Further, because of the material disputed facts, the conflicts with this Court's holdings and the voluntary cessation only because of the preliminary injunction also are reasons to grant this petition.

QUESTIONS PRESENTED No. 4

A. Conflicts with Decisions of the U.S. Supreme Court and Federal Rules of Civil Procedure

The lower court's decision conflicted with Federal Rules of Civil Procedure Rule 8(a)(1) and (2), Rule 8(e) and Rule 15(b). The lower court's ruling was further in conflict with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed. 2d 929 (1989) and this Court's ruling in *Swierkienke v. Sorema N.A.*, 534 U.S. 506, 122 S.Ct. 992 (2002)

B. Importance of Question Presented

The lower court's ruling subjects petitioner and the

persons to whom the RLUIPA was enacted to protect to a heightened pleading standard when claims of retaliation are alleged that seek to stop petitioner and other persons affected like petitioner from seeking redress as First Amendment protection to bring his claim in a judicial proceeding.

1. Congress legislated to the Public as representatives and RLUIPA was enacted pursuant to the Constitutional authority to provide broader protection than the Free Exercise of the First Amendment. So when bringing a claim under the RLUIPA and 1983 as a redress under the First Amendment, there is no heightened pleading rule that forces petitioner to allege in a heading that he was retaliated against as long as he alleged a chronology of events that show retaliation, then all inferences can be drawn.

2. Under the Federal Rules of Civil Procedure the rules are designed to excuse petitioner from technical glitches. Rule 8(a)(2) only provides that a complaint must include only a short and plain statement of the claim showing that the pleader is entitled to relief. Rule 8(d)(1) states that no technical forms of pleading or motions are required and Rule 8(e) states that all pleadings shall be construed to do substantial justice.

The lower courts used a heightened pleading standard when deciding whether petitioner alleged a retaliation claim, not whether the facts and chronology of events establish retaliation, but whether there was a heading alleging retaliation.

This Court concluded in *Swierkiewicz v. Sorema N.A.*, 534

U.S. 506 (2002), that a heightened pleading standard conflicts with Federal Rules of Civil Procedure

According to these Rules petitioner was not required to state the precise magical words in order to plausibly plead he was retaliated against. A formulaic recitation of the elements of a cause of action will not do. *Bell Atlantic Corp. v Twombly*, 550 U.S. 544 (2007)

There is no doubt petitioner's access to the courts, access to the grievance procedure to access the court to redress violations of his protections under the First Amendment and The RLUIPA is protected conduct.

3. This is also taking into account that the lower court's did not liberally construe petitioner's pleadings as represented in (Dist. Ct. Dkt. 7, para's 43-63 and 86-95), (Dist. Ct. Dkt. 27), (Dist. Ct. Dkt. 66), P. 12-13, para's 37 (g), which expressly alleged retaliation), (Dist. Ct. Dkt. 66, P. 10-15, para's 33-40)

After considering petitioner's allegations he squarely raised a retaliation claim and the lower court's ruling was in conflict with this Court's holding that there is no heightened pleading rule.

QUESTIONS PRESENTED No. 5

A. Conflicts with Decisions of the U.S. Supreme Court and other Courts.

The court's below reached different conclusions as to how to apply the equal protection clause and in the prison context

to be similarly situated and determine whether protection under equal protection of the law was violated or not. Under City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985), for plaintiff to succeed on an equal protection claim, he must first demonstrate that he has been treated differently from others with whom he is similarly situated and that unequal treatment was the result of intentional or purposeful discrimination. Once this showing is made, the court proceeds to determine whether the disparity in treatment can be justified under the requisite level of scrutiny. In Reed v. Faulkner, 842 F.2d 960, 963 (7th Cir. 1988), the lower court concluded that Rastafarians suffered arbitrary disparate treatment from the Indians for no reason at all and the reason offered was that because Rastafarians preached superiority they could not grow their dreadlocks even though the Indians grew their hair long. This was purposeful discrimination for similarly situated persons within the same prison.

1. The lower court's ruling in Appendix J p. 7-8 is in conflict with the application and interpretation and therefore effects petitioner's protections under the equal protection clause as applied to the free exercise under the RLUIPA.

B. Importance of the Question Presented.

The interpretation of the equal protection clause in the prison context affects approximately 2 million inmates and its application when deciding summary judgment motions depends on whether petitioner, when drawing all facts and inferences in his favor, he should move forward.

Even though petitioner had submitted affidavits in (Dist. Ct. Dkt. 7, Ex. W.) and (Dist. Ct. Dkt. 33, Ex. D.) of inmates who grew beards in their facial hair area and in the exercise of their religion or for any other reason they were allowed to grow beards, but petitioner could not grow his beard and was punished for not shaving because he grew a natural goatee, which is his facial hair area. The court granted summary judgment to the respondents, because the affidavits submitted by the similar situated inmates did not state they had beards like petitioner, so they were not similar situated.

1. In all respects petitioner was similarly situated with other Muslims, other religions and the entire population that were allowed to grow beards for any reason. This Court nor the application of this Court's precedent mandate in order for petitioner's religious exercise to be protected by the equal protection clause and be similarly situated his religious exercise has to be the same as the next person or that in this context his beard had to grow in the same definitions as the next person or the persons in the affidavits above, in order to have protections.

2. The Facts alleged in the amended complaint, (Dist. Ct. Dkt. 7, para. 68-80), (Dist. Ct. Dkt. 27, para. 72-82) and the above exhibits make at a prima facie case that appellant suffered disparate treatment for no apparent reason, which continued throughout the process until a preliminary injunction was issued.

It is critical to settle and lay down the proper application of the equal protection clause in the prison context

because it affects thousands of litigated cases every year when brought by pro se prisoners and this High Court is charged with constant proper application of the Constitutional provisions.

QUESTION PRESENTED No. 6

A. Conflicts with Decisions of the U.S. Supreme Court, other courts and the scope and intent of the RLUIPA.

For purposes of RLUIPA, a defendant will be liable if first he/she fits the statutory definition of government, 42 U.S.C. section 2000a-5(4)(A) and they imposed a substantial burden on a religious exercise not in furtherance of a compelling government interest nor least restrictive means.

A person or defendant will be found personally liable for purposes of 1983 liability when the defendant directly participated in the infraction. Williams v. Smith, 781 F.2d 319, 323 (2nd Cir. 1986). This Court in Shever v Rhodes, 416 U.S. 232 (1974) concluded that liability is determined by pinpointing the persons in the decision making chain whose deliberate indifference permitted the constitutional abuses to continue unchecked.

See other conflicting cases in Cobin v. Coughlin, 58 F.3d 865 (2d Cir. 1995); Valdes v. Crosby, 1450 F.3d 1231 (11th Cir. 2006) and Hard v. District of Columbia, 601 F.Supp. 2d 182 (D.C. Dist. 2009), Lucky v. Harris, 860 F.2d 1012, 1015-16 (11th Cir. 1988).

B. Importance of the Question Presented

Without holding the persons liable under RLUIPA who the statute speaks to, who are responsible for procedure and practice decisions regulating petitioner's free exercise and prison treatment of the Free Exercise under the RLUIPA and First Amendment, the laudable goal of the enactment of that law will not be achieved and those who make policy decisions and decisions to allow practices that violate Federal statutory law and constitutional law, will continue to use their badge of authority as an excuse to suppress religious practices and will not be held to account for the scope and intent of the RLUIPA.

When the proper supervising persons and not just the subordinate lower class officers are held liable then the substantial burdens will not only disappear, but they will also think twice about ignoring substantial issues of religion.

On top of the above, of being directly involved can involve a decision of a superior, who ignored and accepted and accented to the actions of their subordinates by upholding informal complaints, grievances, approval of false disciplinary actions, making decisions to keep petitioner in segregation because of the disciplinary infractions for the exercise of a religious belief as a muslim, after learning of the violations, the laws that are involved and then taking no action to correct them.

1. The ruling by this Court in Ashcraft v Tabor, 129 S.Ct. 1937 (2009) divided the lower courts on whether there are new limits to a prisoner's ability to sue a supervisor who ignored

information about a constitutional wrongdoing, as opposed to participating in the action himself/herself

Further, what would be considered direct participation and deliberate indifference by the officials. The lower court's conclusion that it appeared that the defendants, that were dismissed had been named as defendants, solely on the basis of their supervisory positions. See (Dist. Ct. Dkt. 9, p. 2)

2. As David Robinson, was initially dismissed, however was named because he was the chief of corrections operations and was the top person responsible for the regulation throughout the VADOC to make official changes. Making this more of an serious error to dismiss him, he later submitted an affidavit on behalf of the entire Department disputing material facts and he carried the preliminary injunction in effect until its expiration.

The remaining dismissed defendants made decisions that would effect the arbitrary enforcement, retaliation, the issuance and upholding of a disciplinary offense as superiors before, during and after the filing and briefing in the initial action. Then expressly stating in their grievance decisions that because petitioner refused to share on religious beliefs he would be treated as a threat and security risk without a compelling nor legitimate interest.

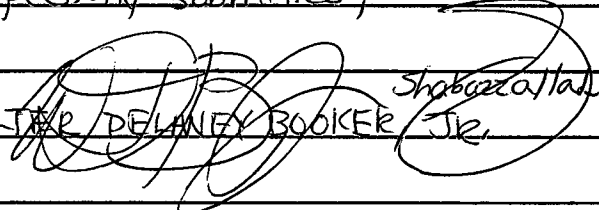
The purpose of the RLUIPA was to make officials liable same as 42 U.S.C. 1983 and not just to make the subordinates liable when the supervisory is responsible for continuing conduct after notice.

Conclusion

This district court's judgment and court of appeals affirmance should be vacated and reversed

Wherefore, petitioner respectfully pray that a writ of certiorari be granted,

Respectfully submitted,

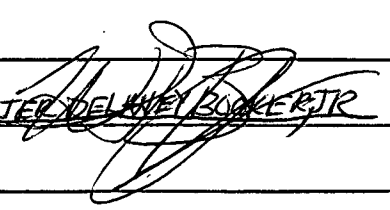

WALTER DELANEY BOOKER JR.

Date: the 1st day of January, 2018

CERTIFICATE OF MAILING

I declare that I placed an original petition for writ of certiorari, a motion for injunction a declaration in support of motion for injunction, an application to proceed in forma pauperis in the institutional mailing system on the 2nd day of January, 2018 to be mailed to Office of the Clerk, Supreme Court of the United States, 1 First Street, N.E., Washington, D.C. 20543-001 and a copy to J. Michael Parsons, AAG, Office of the Attorney General, 202 North 9th Street, Richmond, Virginia 23219, pursuant to 28 U.S.C. 1746, under penalty of perjury.

Executed on the 2nd day of January, 2018

Signed:  WALTER DELANEY BOOKER JR.