APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 23-919

SANJAY TRIPATHY,

Plaintiff-Appellant,

v.

JEFF MCKOY, Deputy Commissioner, DOCCS, RYAN BROTZ, Psychologist, SOCTP, BRIAN MCALLISTER, Director, SOCTP, ANTHONY ANNUCCI, Commissioner,

Defendants-Appellees.

August Term 2023

Argued: April 30, 2024

Decided: May 29, 2024

Appeal from the United States District Court
for the Western District of New York
No. 22-cv-6469, Frank P. Geraci, Jr., *Judge*.

Before: JACOBS, SULLIVAN, and NARDINI, *Circuit Judges*.

Sanjay Tripathy, a former inmate in the New York correctional system, appeals a judgment of the district court (Geraci, *J.*) dismissing his claims against state prison officials alleging that they (1) compelled him to enroll in a sex-offender program that required him to

accept responsibility for his crimes in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the First Amendment, (2) assigned him to a more intensive tier of that program in violation of his due process rights, and (3) retaliated against him after he challenged the sex-offender program by filing grievances and this lawsuit. We agree with the district court that Tripathy's claim for damages under RLUIPA is barred by our precedent holding that the statute does not permit individual-capacity damages; we likewise agree that his demands for injunctive and declaratory relief became moot when his state convictions were vacated and he was released from prison. With respect to his constitutional claims brought pursuant to 42 U.S.C. § 1983, the district court properly concluded that Tripathy's free exercise claim under the First Amendment is barred by qualified immunity, that he lacks standing to seek damages for his due process claim under the Fourteenth Amendment, and that he fails to state a claim for retaliation in violation of the First Amendment. Tripathy abandoned his remaining claims by failing to adequately raise them in his opening brief. We therefore AFFIRM the judgment of the district court.

AFFIRMED.

SARAH M. STERNLIEB, Weil, Gotshal & Manges LLP, New York, NY, *for Plaintiff-Appellant*.

SARAH L. ROSENBLUTH, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Andrea Oser, Deputy Solicitor General, *on the brief*), *for* Letitia James, Attorney General of the State of New York, Albany, NY, *for Defendants-Appellees*.

RICHARD J. SULLIVAN, *Circuit Judge*:

Sanjay Tripathy, a former inmate in the New York correctional system, appeals a judgment of the district court (Geraci, *J.*) dismissing his claims against state prison officials alleging that they (1) compelled him to enroll in a sex-offender program that required him to accept responsibility for his crimes in violation of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") and the First Amendment, (2) assigned him to a more intensive tier of that program in violation of his due process rights, and (3) retaliated against him after he challenged the sex-offender program by filing grievances and this lawsuit. We agree with the district court that Tripathy's claim for damages under RLUIPA is barred by our precedent holding that the statute does not permit individual-capacity damages; we likewise agree that his demands for injunctive and declaratory relief became moot when his state convictions were vacated and he was released from prison. With respect to his constitutional claims brought pursuant to 42 U.S.C. § 1983, the district court properly concluded that Tripathy's free exercise claim under the First Amendment is barred by qualified immunity, that he lacks standing to seek damages for his due process claim under the Fourteenth Amendment, and that he fails to state a claim for retaliation in violation of the First Amendment. Tripathy abandoned his remaining claims by failing to adequately raise them in his opening brief. We therefore AFFIRM the judgment of the district court.

I. BACKGROUND

A. Facts

In May 2018, a New York state court jury found Tripathy guilty of a criminal sexual act in the first degree, sexual abuse in the first degree, and related offenses.[1] He was sentenced to a term of seven years' imprisonment, part of which he served at Collins Correctional Facility ("Collins"). While incarcerated there, Tripathy was assigned to the Sex Offender Counseling Treatment Program ("SOCTP"). Inmates who successfully complete this program receive good time credits and, upon their release, become eligible for lighter parole and registration requirements applicable to sex offenders under New York law. Participants are assigned to one of three SOCTP levels based on a risk-scoring system administered by the program's directors.

Tripathy asserts that he received a risk score of "1," which should have placed him in the low-risk tier of SOCTP. However, that placement was "overridde[n]" by Dr. Ryan Brotz – the lead SOCTP psychologist at Collins – who instead placed Tripathy in the moderate-risk program. J. App'x at 68 (explaining that Dr. Brotz recommended moderate-risk placement due to the "extreme violence" involved in Tripathy's offense). Moderate-risk SOCTP was twice as long as the low-risk level – up to twelve months as opposed to six – and, as Tripathy argues in his brief, carried the potential for harsher parole and registration conditions down the line. And unlike participants in the low-risk program, those assigned to moderate-risk SOCTP

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[1] These facts are drawn from Tripathy's complaint and are accepted as true for the purposes of this opinion. *See Clark v. Hanley*, 89 F.4th 78, 84 n.4 (2d Cir. 2023).

were required to "accept responsibility for [their] sexually offending behavior" as part of their counseling. *See id.* at 61, 67, 73 (alleging that only the moderate-risk program entailed "Level 2" curriculum, which required acceptance of responsibility). A devout Hindu, Tripathy objected to this requirement on religious grounds, arguing that he was innocent of the crimes for which he was convicted and that accepting responsibility for his crimes would require him to make a false statement, in violation of the "core" Hindu "tenet[]" against lying. *Id.* at 65.

In light of these concerns, Tripathy filed grievances challenging both his enrollment in moderate-risk SOCTP and its requirement that he accept responsibility for his crimes. Prison officials thereafter subjected him to a "system[at]ic pattern of retaliation, harassment, and retribution," which Tripathy attributes to his complaints over SOCTP. *Id.* at 76. In particular, Tripathy asserts that he was disciplined for petty infractions (such as calling a staff member by her first name and assisting another inmate with legal research), that his cell was searched unnecessarily, and that he was moved to a different cell block without explanation. *Id.* at 77–78.

B. Procedural History

Proceeding *pro se*, Tripathy brought suit against several prison officials ("Defendants") under various federal constitutional and statutory provisions. His operative complaint alleged that subjecting him to moderate-risk SOCTP was a violation of his free exercise and due process rights under the First and Fourteenth Amendments pursuant to 42 U.S.C. § 1983, as well as the statutory protections secured by

RLUIPA, 42 U.S.C. § 2000cc.[2] Tripathy also alleged under section 1983 that Defendants retaliated against him in violation of the First Amendment after he sought to challenge his placement in SOCTP by filing grievances, and that the retaliation continued after he filed his original complaint in federal court. Finally, he included claims for conspiracy under 42 U.S.C. §§ 1983 and 1985, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1964(c), and the False Claims Act ("FCA"), 31 U.S.C. § 3730.[3] Tripathy sought both injunctive and declaratory relief as well as money damages.

Defendants moved to dismiss the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The district court granted that motion, and this appeal followed. Although Tripathy filed his appellate briefs *pro se*, he retained counsel in advance of oral argument.

C. Tripathy's Release

While Tripathy was incarcerated – and while this litigation was pending in the district court – he pursued postconviction relief in state court on his underlying convictions. In November 2022, the New York Supreme Court vacated Tripathy's convictions based on the ineffective assistance of his trial counsel.

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[2] Tripathy filed suit in the Southern District of New York, but the case was transferred to the Western District of New York, where Collins is located. Tripathy also amended his original complaint in May 2022 to assert First Amendment retaliation claims and to add Dr. Brotz as a defendant.

[3] Although the district court construed these claims as being brought under the New York False Claims Act, Tripathy's complaint expressly states that he asserted them under the federal FCA. *See* J. App'x at 56 (citing FCA, 31 U.S.C. § 3730).

See Tripathy Br. at 62, 64. He was released on his own recognizance, although state prosecutors indicated they might seek to retry him. Tripathy ultimately struck a deal whereby he pleaded guilty to assault in the second degree and served one day of imprisonment (in light of the four years he served under his since-vacated original convictions).

II. DISCUSSION

We review *de novo* a district court's grant of a motion to dismiss for failure to state a claim under Rule 12(b)(6). *See VIZIO, Inc. v. Klee*, 886 F.3d 249, 255 (2d Cir. 2018). We accept as true all well-pleaded factual allegations, draw all reasonable inferences in the plaintiff's favor, and assess the complaint to determine whether those allegations plausibly establish entitlement to relief. *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009).

A. Declaratory and Injunctive Relief

We agree with the district court that Tripathy's requests for declaratory and injunctive relief – which he sought in connection with each of his claims – were mooted by his release from prison. A person's "transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility." *Salahuddin v. Goord*, 467 F.3d 263, 272 (2d Cir. 2006), *abrogated on other grounds as recognized by Kravitz v. Purcell*, 87 F.4th 111, 119, 122 (2d Cir. 2023). And while we have recognized an exception where there exists a "demonstrated probability" that the challenged conduct will reoccur, *Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 396 (2d Cir. 2022) (internal quotation marks omitted), Tripathy cannot make that showing here. His initial convictions were vacated, and he has already served the one-day sentence imposed

following his subsequent plea to assault in the second degree. With his sentence fully discharged, there is no real likelihood that Tripathy will be subjected to SOCTP programming (or anything like it) any time soon. Lacking any basis to seek equitable relief, Tripathy can seek only monetary relief in connection with his claims for past violations.

B. RLUIPA

Tripathy brought several claims for money damages, chief among them his claim under RLUIPA – a Spending Clause statute that authorizes certain plaintiffs to sue state officers who "substantial[ly] burden" their free exercise of religion. 42 U.S.C. §§ 2000cc-1(a), 2000cc-2(a) (authorizing such suits when officers burden the religious exercise of institutionalized or incarcerated persons); *id.* §§ 2000cc(a)(1), 2000cc-2(a) (same for officers who burden religious exercise through land-use regulations). Tripathy contends that RLUIPA permits him to recover damages against Defendants in their *individual* capacities because they imposed a substantial burden on his Hindu faith by forcing him to lie as part of SOCTP.

Tripathy's argument runs headlong into our decision in *Washington v. Gonyea*, which held that "RLUIPA does not provide a cause of action against state officials in their individual capacities" for money damages. 731 F.3d 143, 145 (2d Cir. 2013). Because a published panel decision is generally binding on future panels unless and until it is overruled, Tripathy's only hope is to argue that *Gonyea* was abrogated by an intervening decision of the Supreme Court or our Court sitting *en banc*. *See In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010). To that end, Tripathy points to *Tanzin v. Tanvir*, in which the Supreme Court held that the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb

et seq. – RLUIPA's sister statute – authorizes individual-capacity suits for money damages against federal officials. 592 U.S. 43, 52 (2020). On Tripathy's read, *Tanzin* abrogated *Gonyea* and compels the conclusion that RLUIPA likewise authorizes individual-capacity damages, given that both RFRA and RLUIPA authorize "appropriate relief" against officers who substantially burden a plaintiff's religious rights. 42 U.S.C. §§ 2000cc-2(a), 2000bb-1(c).

We are not persuaded that *Tanzin* abrogated *Gonyea*, for the simple reason that RFRA and RLUIPA were enacted pursuant to different constitutional provisions. For a Supreme Court decision to abrogate one of our precedents, "there must be a conflict, incompatibility, or inconsistency" between the intervening decision and our precedent. *United States v. Afriyie*, 27 F.4th 161, 168 (2d Cir. 2022) (internal quotation marks omitted). Here, there is no such conflict between permitting individual damages under RFRA (as in *Tanzin*) on the one hand, and barring them under RLUIPA (as in *Gonyea*) on the other. In fact, we addressed this very issue in *Tanvir v. Tanzin* – our panel decision that the Supreme Court affirmed in *Tanzin*. 894 F.3d 449, 465 (2d Cir. 2018), *aff'd*, *Tanzin*, 592 U.S. at 43. There, we held that permitting individual-capacity damages under RFRA "does not conflict with our decision in *Washington v. Gonyea*." *Id.* As we went on to explain, RFRA and RLUIPA do not offer identical damages remedies because they were enacted under different "constitutional bas[e]s." *Id.* RLUIPA was enacted pursuant to the Spending Clause, which means that, like a contract, RLUIPA can impose "individual liability . . . only on those parties actually receiving state funds." *Id.* (quoting *Gonyea*, 731 F.3d at 145). Because RLUIPA funds are disbursed to the "state prison," and not its officials, those officials are not "contracting

part[ies]" and thus cannot be held liable for violating the conditions – *i.e.*, RLUIPA's provisions – that attach to the funds. *Id.* at 465–66.

By contrast, RFRA is not Spending Clause legislation and has no such limits on who may be sued for violating its provisions. *See Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 695 (2014) ("As applied to a federal agency, RFRA is based on the enumerated power that supports the particular agency's work."). Put differently, RFRA does not "implicate the same concerns" about nonrecipient liability as RLUIPA, since RFRA operates like a normal statute – not a contract – and can impose liability on whoever violates its provisions. *Tanvir*, 894 F.3d at 466 (internal quotation marks omitted). It is therefore "entirely consistent" for RFRA to permit the recovery of individual-capacity damages from federal officials while RLUIPA bars the same from those who serve a state. *Id*.

Against this backdrop, Tripathy maintains that our Spending Clause analysis in *Gonyea* and *Tanvir* was flawed because we overlooked the Supreme Court's prior decision in *Sabri v. United States*, 541 U.S. 600 (2004). In that case, the Supreme Court reviewed the criminal conviction of a real estate developer who was convicted of federal funds bribery in violation of 18 U.S.C. § 666(a)(2), another Spending Clause statute that makes it a crime to bribe any organization that receives federal funds. *See id.* at 602–04. The defendant argued that this provision was constitutionally overbroad because it criminalized *all* bribes to a federally funded organization, even if the specific bribe did not influence the spending of the federal funds. *See id.* at 603–04. The Supreme Court rejected that challenge and upheld the federal funds bribery statute as a lawful exercise of Congress's spending power

which, pursuant to the Necessary and Proper Clause, inherently includes the ability to ensure that congressional grants are not diverted through bribery and graft. *See id.* at 605.

According to Tripathy, *Sabri* proves that Congress can impose Spending Clause liability on nonrecipients, since the individuals paying bribes are not the ones who receive the federal funds. But *Sabri* is easily distinguishable from this case: unlike RLUIPA, the federal funds bribery provision does not impose the *conditions* of the federal funds on nonrecipients. The Spending Clause gives Congress the power to offer conditional funding to state and private actors, which necessarily includes the power to ensure that others do not interfere with the disbursement of those funds. *See id.* But it does not follow that Congress can impose the *conditions* attached to those funds on anyone it wishes. Because they operate like contracts, Spending Clause statutes can impose their conditions only on those who accept the funds, akin to a privity requirement. *See Tanvir*, 894 F.3d at 465–66.[4] So even though

[4] To be clear, this requirement would still permit Spending Clause legislation to authorize *official*-capacity damages against officers even if it is the state that accepts the funds, since in such cases the suit is effectively against the state itself. *See Kentucky v. Graham*, 473 U.S. 159, 165–66 (1985). Nor do we mean to suggest that nonrecipients of federal funding may never face liability under Spending Clause statutes. As with third parties to contracts, there may be scenarios in which nonrecipients become bound by Spending Clause conditions "according to ordinary principles of contract and agency" that authorize enforcement of contracts against third parties. *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995) ("[W]e have recognized five theories for binding nonsignatories to [a contract]: 1) incorporation by reference; 2) assumption; 3) agency; 4) veil-piercing/alter ego; and 5) estoppel."). But Tripathy does not argue, and the record does not reflect, that the individual defendants took acts

Congress can punish nonrecipients who attempt to siphon away federal dollars, it cannot bind nonrecipients to the conditions attached to those funds. We therefore see no conflict between *Sabri* and *Gonyea*'s holding that RLUIPA cannot impose its conditions on nonrecipient state officers in their individual capacities.[5]

In sum, we already determined in *Tanvir* that there is no "conflict" between the holdings of *Gonyea* (barring individual-capacity damages under RLUIPA) and *Tanzin* (authorizing individual-capacity damages under RFRA). *Id.* at 465. Nor is there any reason to find that *Gonyea* ran afoul of antecedent Supreme Court precedent like *Sabri*. Accordingly, under our prior panel rule, we remain bound by *Gonyea*'s holding that RLUIPA does not permit individual-capacity damages against state officers. *See Afriyie*, 27 F.4th at 168. The district court therefore properly dismissed Tripathy's damages claim under RLUIPA.[6]

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that could so bind them, so we need not address the existence or scope of this potential exception.

[5] At least three of our sister Circuits have reached the same conclusion. *See Sharp v. Johnson*, 669 F.3d 144, 155 n.15 (3d Cir. 2012); *Wood v. Yordy*, 753 F.3d 899, 903–04 (9th Cir. 2014); *Landor v. La. Dep't of Corr. & Pub. Safety*, 82 F.4th 337, 344–45 (5th Cir. 2023). *But see Landor v. La. Dep't of Corr. & Pub. Safety*, 93 F.4th 259, 263–67 (5th Cir. 2024) (Oldham, *J.*, dissenting from denial of rehearing *en banc*) (arguing that RLUIPA can impose liability on nonrecipients).

[6] Tripathy also argues that he brought his RLUIPA claims under a particular subsection of the statute that was enacted pursuant to the Commerce Clause as opposed to the Spending Clause. Tripathy Br. at 38 (citing 42 U.S.C. § 2000cc-1(b)). In theory, such a claim could seek individual-capacity damages against nonrecipients, given that this subsection was not enacted pursuant to the Spending Clause. Still, this special provision applies only to claims of substantial religious burden that "affect[] . . .

C. Free Exercise

Tripathy also urges us to revive the religious freedom claim he brought under section 1983, which alleged that his "mandatory" enrollment and compelled acceptance of responsibility in SOCTP violated his First Amendment right to free exercise. J. App'x at 61. The district court dismissed this claim as barred by qualified immunity, finding that SOCTP's requirement that participants accept responsibility for their misconduct did not violate clearly established law. We agree.

As a threshold matter, the district court properly concluded that Tripathy's claims for equitable relief and official-capacity damages are barred. As already discussed, Tripathy's equitable claims were mooted by his release from prison. *See Salahuddin*, 467 F.3d at 272. And his request for damages against Defendants in their official capacities is barred by the Eleventh Amendment. *See Davis v. New York*, 316 F.3d 93, 101–02 (2d Cir. 2002). Tripathy therefore may seek only individual-capacity damages against Defendants, which implicates the doctrine of qualified immunity. *See Jackler v. Byrne*, 658 F.3d 225, 244 (2d Cir. 2011) (explaining that this defense is available when officers are sued in their individual capacities).

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional

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commerce with foreign nations [and] among the several states." 42 U.S.C. § 2000cc-1(b); *see also Gonyea*, 731 F.3d at 146 (finding that plaintiff "has pled no facts indicating that the restriction of his religious rights had any effect on interstate or foreign commerce"). And while Tripathy alleged that his *incarceration* imposed financial costs on out-of-state and foreign family members, he nowhere alleged that SOCTP itself led to those costs. He therefore has not stated a RLUIPA claim under this provision either.

rights." *Mullenix v. Luna*, 577 U.S. 7, 11 (2015) (internal quotation marks omitted). "To be clearly established, a right must be sufficiently clear that every reasonable official would have understood that what he is doing violates that right." *Reichle v. Howards*, 566 U.S. 658, 664 (2012) (alterations and internal quotation marks omitted). "In making this determination, we consider Supreme Court and Second Circuit precedent as it existed at the time of the challenged conduct." *McGowan v. United States*, 825 F.3d 118, 124 (2d Cir. 2016). "We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011).

Even accepting Tripathy's allegations as true, we cannot agree that Defendants violated his clearly established rights by enrolling him in SOCTP. To our knowledge, no binding precedent establishes that a generally applicable program violates the Free Exercise Clause by requiring an inmate who is an incarcerated felon to accept responsibility for the conduct underlying his conviction. In fact, the only appellate authority we are aware of that addresses this type of challenge (1) is not binding and (2) concluded that such acceptance-of-responsibility programs did *not* violate an inmate's religious freedom. *See Searcy v. Simmons*, 299 F.3d 1220, 1228 (10th Cir. 2002). Other decisions of the Supreme Court and our sister Circuits have similarly upheld these programs against challenges premised on other constitutional rights, such as due process and free speech. *See McKune v. Lile*, 536 U.S. 24, 29 (2002) (rejecting claim based on Fifth Amendment right against self-incrimination); *Newman v. Beard*, 617 F.3d 775, 781 (3d Cir. 2010) (rejecting claim based on First Amendment right to free speech). Because Tripathy does not offer, and we are not aware of, any

authority for the proposition that Defendants violated his clearly established rights by enrolling him in SOCTP, we affirm the district court's decision dismissing his First Amendment claims as barred by qualified immunity.

D. Due Process

Tripathy also challenges the dismissal of his Fourteenth Amendment due process claim, brought pursuant to section 1983, which alleged that Defendants improperly placed him in the moderate-risk SOCTP tier instead of the low-risk program. J. App'x at 67–68. The district court dismissed this claim, concluding that Tripathy could not assert a procedural due process violation because his SOCTP placement did not implicate a cognizable liberty interest. We affirm that dismissal, but do so on a different ground – namely, that Tripathy lacks standing to sue for any alleged procedural due process violation tied to his SOCTP placement.

"We are required to address a standing issue even if the court below has not passed on it." *Thompson v. County of Franklin*, 15 F.3d 245, 248 (2d Cir. 1994) (alterations and internal quotation marks omitted). As plaintiff, Tripathy bears the burden of establishing Article III standing by showing three elements: (1) "that he suffered an injury in fact," (2) "that the injury was likely caused by the defendant," and (3) "that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). And Tripathy must show that these elements are met "at all stages of [the] litigation" and that he has standing "for each claim that [he] press[es] and for each form of relief that [he] seek[s] (for example, injunctive relief and damages)." *Id.* at 431.

Applying this framework, we conclude that Tripathy lacks standing to sue for damages because his enroll-

ment in moderate SOCTP programming subjected him to only a "mere *risk* of future harm," which cannot by itself support a damages claim. *Id.* at 436 (emphasis added) (explaining that a risk of future harm is insufficient unless it "materializes" into a "*separate* concrete harm"). Here, Tripathy argues that his placement in moderate-risk SOCTP exposed him to a greater risk of future consequences, given that New York state law imposes "more onerous sex-offender registration requirements . . . [and] more onerous parole conditions" on higher-risk offenders. Tripathy Br. at 55. Because those injuries were nothing more than a "future risk of harm," Tripathy lacks standing to seek damages for any due process violation.[7]

E. Retaliation

Tripathy's complaint also alleged that, after he filed this lawsuit, Defendants retaliated against him in various ways in violation of the First Amendment. The district court analyzed each of the six allegedly retaliatory incidents and concluded that none was sufficient to state a claim. On appeal, Tripathy does not challenge the district court's analysis of any of the six retaliatory incidents and instead argues that the

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[7] Tripathy also asserted a substantive due process claim based on his SOCTP assignment, again maintaining that his placement in the moderate-risk program burdened his religious beliefs by requiring him to falsely accept responsibility for conduct he did not commit. But "where another provision of the Constitution provides an explicit textual source of constitutional protection, a court must assess a plaintiff's claims under that explicit provision and not the more generalized notion of substantive due process." *Conn v. Gabbert*, 526 U.S. 286, 293 (1999) (internal quotation marks omitted). Consequently, we must analyze Tripathy's claim of religious burden under the First Amendment, which we already did and rejected based on qualified immunity.

district court erred in failing to treat those incidents as a "systematic pattern" of retaliation. *Id.* at 57.

Even construing Tripathy's argument liberally, we cannot agree that his complaint stated a retaliatory pattern claim. To be sure, "[o]ur precedent allows a combination of seemingly minor incidents to form the basis of a constitutional retaliation claim once they reach a critical mass." *Phillips v. Bowen*, 278 F.3d 103, 109 (2d Cir. 2002) (acknowledging pattern retaliation claims for public employees who allege that their employer created a hostile work environment in retaliation for protected conduct). "But incidents that are relatively minor and infrequent will not meet th[at] standard," which instead requires retaliatory conduct so severe that it manifests as a "pattern of nearly constant harassment." *Deters v. Lafuente*, 368 F.3d 185, 189 (2d Cir. 2004) (alterations and internal quotation marks omitted). Tripathy's allegations do not rise to that level. All told, Tripathy points to intermittent incidents in which he received counseling notifications or disciplinary infractions that resulted in no punishment, along with an occasion when his cell was searched and another when he was moved to a different dorm. *See* J. App'x at 41–46. Whether viewed in isolation or in tandem, these incidents fall short of the "pattern of nearly constant harassment" required to bring a retaliatory pattern claim of this type. *Deters*, 368 F.3d at 189 (internal quotation marks omitted).

F. RICO, Equal Protection, Conspiracy, and FCA

Tripathy's complaint also asserted claims for racketeering under RICO, religious discrimination under the Equal Protection Clause of the Fourteenth Amendment, conspiracy under 42 U.S.C. §§ 1983 and 1985(3), and the submission of false claims under the FCA. Tripathy abandoned these claims, however, by failing to adequately

present arguments challenging their dismissal in his opening appellate brief. Although we construe *pro se* filings liberally, "we need not manufacture claims of error for an appellant proceeding *pro se*." *LoSacco v. City of Middletown*, 71 F.3d 88, 93 (2d Cir. 1995); *see Gerstenbluth v. Credit Suisse Sec. (USA) LLC*, 728 F.3d 139, 142 n.4 (2d Cir. 2013) (explaining that a *pro se* litigant forfeited challenge to district court's ruling that was mentioned "obliquely and in passing").[8] "[I]t is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed [forfeited]." *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (internal quotation marks omitted). It is likewise settled that an appellant forfeits any argument not raised in his opening brief. *See JP Morgan Chase Bank v. Altos Hornos de Mex., S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005). Tripathy either failed to mention these claims in his opening brief or mentioned them only in passing; he thus failed to articulate any specific reasons as to why the district court erred in dismissing them. *See Schlosser v. Kwak*, 16 F.4th 1078, 1080 n.1 (2d Cir. 2021) ("A vague sentence fragment that notes an issue without advancing an argument relating to that issue is ordinarily not sufficient to preserve an argument on appeal."). For this reason, we conclude that Tripathy abandoned any challenge to the dismissal of these claims.

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[8] We have not yet decided whether we continue to "liberally construe" *pro se* filings when, as here, a *pro se* plaintiff later retains counsel. *Nicholas v. Bratton*, 15-cv-9592 (JPO), 2019 WL 2223407, at *3 (S.D.N.Y. May 23, 2019) (collecting in-circuit district court cases). Because Tripathy abandoned these claims even under the generous *pro se* standard, we assume without deciding that his *pro se* filings continue to receive a liberal construction.

III. CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court. We also DENY Tripathy's motion to reverse and remand as moot.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

Case # 6:22-cv-06469-FPG

SANJAY TRIPATHY,

Plaintiff,

v.

RYAN BROTZ, *et al.*,

Defendants.

DECISION AND ORDER

INTRODUCTION

Plaintiff Sanjay Tripathy, proceeding *pro se*, brings claims under 42 U.S.C. §§ 1983 and 1985; the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc; the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961; and the New York False Claims Act ("NYFCA"), State Finance Law, §§187-194, against Anthony Annucci, Jeff McKoy, New York Department of Corrections and Community Services ("DOCCS") Deputy Commissioner of Programs, and Brian McCallister, Director of the DOCCS Sex Offender Counseling and Treatment Program ("SOCTP") and Dr. Ryan Brotz, the SOCTP psychologist for Collins Correctional Facility ("Collins").

Plaintiff was previously incarcerated at Fishkill Correctional Facility and then transferred to Collins prior to being released on his own recognizance on

November 23, 2022 after his conviction was vacated. Plaintiff alleges his statutory and constitutional rights were violated by Defendants' administration of the SOCTP at Collins, and Defendants retaliated against him for bringing this lawsuit challenging the program.

Before the Court is Defendants' motion to dismiss Plaintiff's claims under Rule 12(b)(6) for failure to state a claim. For the reasons set forth below, the motion to dismiss is GRANTED.

BACKGROUND

On May 30, 2018, a jury convicted Plaintiff of criminal sexual act in the first degree, sexual abuse in the first degree, and related offenses in New York State Supreme Court, New York County, and the court thereafter sentenced him to seven years' imprisonment. His conviction was affirmed by the Appellate Division, First Department, and the Court of Appeals denied leave to appeal. On November 22, 2022, Plaintiff's judgment of conviction was vacated pursuant to CPL § 440.10 and was released on his own recognizance pending a new trial.

Plaintiff began this lawsuit in June 2021 while incarcerated at the Fishkill Correctional Facility. Plaintiff was transferred to Collins in October 2021, and in January 2022, Plaintiff amended his complaint to name Dr. Brotz as a Defendant in this action. According to Plaintiff, Dr. Brotz, the psychologist responsible for administering the SOCTP at Collins, repeatedly infringed plaintiff's statutory and constitutional rights. Plaintiff alleges Dr. Brotz rejected his requests to participate in the SOCTP without having to lie. He also claims Dr. Brotz improperly "overrode" an initial assessment that found Plaintiff belonged in a "low-risk" tier of the SOCTP, and decided the nature

of Plaintiff's crimes instead warranted placement in the longer, "moderate-risk" tier. Finally, Plaintiff contends Dr. Brotz retaliated against him for objecting to her conduct via letters, grievances, and the instant lawsuit, by charging Plaintiff with disciplinary infractions.

Plaintiff seeks monetary damages, as well as a declaratory judgment that Defendants violated his constitutional and statutory rights.

LEGAL STANDARD

To survive a motion to dismiss, a complaint must plead "enough facts to state a claim to relief that is plausible on its face," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), and "allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). When addressing a motion to dismiss, a district court must accept as true all factual statements alleged in the complaint and draw all reasonable inferences in favor of the nonmoving party. *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co*., 517 F.3d 104, 115 (2d Cir. 2008).

DISCUSSION

I. RLUIPA

Plaintiff complains that his religious faith was substantially burdened by the Defendants during his participation in the SOCTP while incarcerated at Collins. As redress for this alleged infringement upon his religious exercise, Plaintiff brings a claim under RLUIPA seeking monetary damages against Defendants, as well as injunctive and declaratory relief.

A person's "transfer from a prison facility generally moots claims for declaratory and injunctive relief against officials of that facility." *Salahuddin v. Goord*,

467 F.3d 263 (2d Cir. 2006); *see* ECF No. 69. However, there are exceptional situations, where review would be required if "(1) the plaintiff [has] a reasonable expectation that [they] will be subject to the same challenged action again, and (2) the challenged conduct [is] of too short a duration to be fully litigated before its cessation." *Exxon Mobil Corp. v. Healey*, 28 F.4th 383, 395 (2d Cir. 2022).

Plaintiff was released from DOCCS custody as of November 23, 2022, and therefore, his claims for injunctive and declaratory relief are moot. Further, since Plaintiff does not allege that he anticipates being subjected to SOCTP again in the future,[1] there is no "demonstrated probability of recurrence." *Id.* Accordingly, Plaintiff's claims for injunctive and declaratory relief are moot without exception.

Moreover, "RLUIPA does not authorize claims for monetary damages against state officers in either their official or individual capacities." *Holland v. Goord*, 758 F.3d 215, 224 (2d Cir. 2014) (citing *Washington v. Gonyea*, 731 F.3d 143, 145–46 (2d Cir.2013) (per curiam)); *see also Sossamon v. Texas*, 563 U.S. 277, 293 (2011). Plaintiff's claims for monetary damages are, therefore, not cognizable.

Because Plaintiff's claims for injunctive and declaratory relief under RLUIPA are moot without exception and Plaintiff's claims for monetary damages are not cognizable, all of Plaintiff's claims under RLUIPA are dismissed.

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[1] Although Plaintiff awaits a new trial, he maintains his innocence and confidence that he will be exonerated. Accordingly, an assertion that he would be subject to SOCTP anew would be inconsistent with the position he maintains regarding his innocence.

II. Free Exercise

Plaintiff claims to be a "life-long Hindu" who believes that one of "Hinduisms core tenets . . . is to neither lie, provide untrue facts, commit perjury or falsity . . . in conduct of one's life, interactions and spiritual journey." ECF No. 52 at 12. Plaintiff alleges that his Hindu faith was substantially burdened during his participation in SOCTP because SOCTP required Plaintiff to:

> "openly and honestly discuss the behavior that resulted in [his] incarceration and referral to the program, demonstrate acceptance of responsibility for the conduct that resulted in [his] criminal conviction, and demonstrate an understanding of [his] sexual offending behavior and cycle of abuse."

Id. at 13 (quoting letter response from Defendant McKoy regarding requirements of the SOCTP). Plaintiff alleges that these program requirements substantially burden his Hindu faith because he is "an innocent man illegally incarcerated," ECF No. 52 at 1, and "accept[ing] responsibility for the (alleged) sexual assault is clearly a lie (untrue fact, falsity, perjury)." *Id.* at 14.

Arising from these facts, Plaintiff brings claims against Defendants for monetary damages as well as injunctive and declaratory relief under the Free Exercise clause of the First Amendment. As discussed, *supra*, as a consequence of Plaintiff's release from DOCCS custody, Plaintiff's equitable claims are moot. To the extent he seeks prospective injunctive relief if he is convicted anew following the new trial, such a claim is unripe for determination because Plaintiff may not be returned to Collins to participate in the SOCTP with these Defendants. Plaintiff's claims would not evade review as he could file a new claim

should he be returned to a correctional facility in the future. The Court will, therefore, only consider the claim for monetary damages against Defendants in their individual capacities.[2]

To state a free exercise claim under the First Amendment, "[t]he prisoner must show at the threshold that the disputed conduct substantially burdens his sincerely held religious beliefs." *Salahuddin v. Goord*, 467 F.3d 263, 274–75 (2d Cir. 2006). "The defendants then bear the relatively limited burden of identifying the legitimate penological interests that justify the impinging conduct," although "the burden remains with the prisoner to show that these articulated concerns were irrational." *Id.*

At this stage of the litigation, where Defendants have challenged, under Rule 12(b)(6), Plaintiff's pleading of his free exercise claims, the Court need not address whether Defendants may be able to make an adequate showing of a "legitimate penological interest" for their alleged conduct. *Lloyd v. City of New York*, 43 F. Supp. 3d 254, 264 (S.D.N.Y. 2014) ("This being a motion to dismiss, Defendants have not answered, and so have not yet articulated any "legitimate penological interest" or "compelling state interest" that would justify the alleged "substantial burden" on Plaintiffs' sincerely held religious beliefs under the Free Exercise Clause."). Rather, the Court need only consider Defendants' contention that, on its face, the Amended Complaint does not sufficiently plead that Defendants

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[2] Plaintiff also brings claims for monetary damages against Defendants in their official capacities, but those claims are not cognizable because the Eleventh Amendment precludes suits against state officials in their official capacities. *Davis v. New York*, 316 F.3d 93, 101–02 (2d Cir. 2002).

imposed a "substantial burden" on Plaintiff's exercise of his Hindu faith.

A. Substantial Burden

A substantial burden on religious exercise exists "when an inmate is required to choose between following the precepts of her religion and forfeiting benefits on the one hand, and abandoning one of the precepts of her religion ... on the other hand," in order to obtain the benefits. *Smith v. Goord*, 541 F. App'x 133, 134 (2d Cir. 2013) (summary order). In other words, a "substantial burden" need not involve the prohibition of religious practice (as in, for example, prohibiting attendance at a religious service). Rather, coercive conduct that, directly or indirectly, tends to force the individual to restrict the practice of his religion may well be sufficient. *See, e.g., Westchester Day Sch.*, 504 F.3d 338, 348 (2d Cir. 2007) (noting that a substantial burden will be found where, by denying benefits, "the state puts undue pressure on the adherents [of a religious belief] to alter their behavior and to violate their beliefs in order to obtain government benefits") (citing *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 709 (1981)); *accord Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir.1996).

Since, according to Plaintiff "accept[ing] responsibility for the (alleged) sexual assault," would be lying, and lying violates his religious beliefs, he was faced with the choosing between: (1) following his religion—not lying—and losing "benefits . . . including good time credits (go home earliest release date of 5/15/2024], lowest possible SORA registration level with minimal parole supervision conditions, and avoidance of potential civil confinement," on the one hand, ECF No. 52 at 13, and (2) abandoning the precepts of his religion in order to obtain the benefits of SOCTP on the other hand.

Accordingly, Plaintiff has sufficiently alleged a substantial burden on his religious exercise.

B. Qualified Immunity

The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal [pursuant to Rule 12(b)(6)] before the commencement of discovery." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

"In making this determination, we consider Supreme Court and Second Circuit precedent as it existed at the time of the challenged conduct." *McGowan v. United States*, 825 F.3d 118, 124 (2d Cir. 2016) (per curiam). The "clearly established" inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition," *Saucier v. Katz*, 533 U.S. 194, 201 (2001), and "turns on the objective legal reasonableness of the action, assessed in light of the legal rules that were clearly established at the time it was taken," *Pearson*, 555 U.S. at 244.

It is not "clearly established," either in the Second Circuit or elsewhere, that the "acceptance of responsibility" requirement of the SOCTP violates Plaintiff's right to free exercise of religion. Other circuits have found that similarly situated defendants are entitled to qualified immunity for similar free exercise claims related to inmate sexual offender treatment programs. *See Hydrick v. Hunter*, 500 F.3d 978, 992 (9th Cir.

2007), *judgment vacated on other grounds*, *Hunter v. Hydrick*, 556 U.S. 1256 (2009) ("To the extent that the claim relies on a First Amendment right not to participate in treatment sessions, the Defendants have qualified immunity, because the law on this point is not clearly established."); *Aruanno v. Spagnuolo*, 292 F. App'x. 184, 187, 2008 WL 2746229, *2 (3d Cir. 2008) ("[E]ven if we were to conclude that Aruanno had a right to refrain from disclosing his past sexual history and we have not so concluded, we could not hold that the right is clearly established under the First Amendment [right to refrain from speaking], and that it was one of which defendants should have been aware."). Similarly, another court in this district also found that defendants facing identical claims were entitled to qualified immunity. *See Bush v. Goord*, No. 03-CV-759S, 2009 WL 790358, at *9 (W.D.N.Y. Mar. 25, 2009). Accordingly, because Plaintiff's free exercise claim is not clearly established under Second Circuit or Supreme Court precedent, Defendants here are entitled to qualified immunity on Plaintiff's free exercise claim. Accordingly, Plaintiff's free exercise claims are dismissed.

III. Due Process

Plaintiff alleges that his procedural and substantive due process rights have been violated as a result of Defendants' decision to place him in the "moderate-risk SOCTP" rather than the "low-risk [SOCTP]." ECF No. 52 at 14. Plaintiff was placed in the moderate-risk SOCTP following a recommendation from Dr. Brotz. Plaintiff alleges that this risk determination was improper because Dr. Brotz increased his risk-level by relying on information in Plaintiff's Presentence Investigation Report, which Plaintiff disputes as incorrect. ECF No. 52 at 14-23. As a result of this

due process violation, Plaintiff's SOCTP participation would last 12 months, instead of 6 months. *Id.* at 14.

A. Procedural Due Process Claim

The Fourteenth Amendment[3] prohibits the government from depriving citizens of life, liberty or property without due process of law. *See e.g., Wilkinson v. Austin*, 545 U.S. 209 (2005). To state a claim for procedural due process under the Fourteenth Amendment, Plaintiff must demonstrate "(1) that Defendants deprived him of a cognizable interest in 'life, liberty, or property,' (2) without affording him constitutionally sufficient process." *Proctor v. LeClaire*, 846 F.3d 597, 608 (2d Cir. 2017).

Plaintiff's objection to the process employed in deciding to place him in the moderate-risk SOCTP does not assert any deprivation of a liberty interest. Rather, Plaintiff merely objects to the length of time that he must participate in the moderate-risk SOCTP, as opposed to the low-risk SOCTP, in order to obtain the benefits of SOCTP, including good time credits and conditions of parole supervision.

As a matter of first principles, inmates have no constitutional right to participate in prison programs which might expedite release. *Abed v. Armstrong*, 209 F.3d 63, 67 (2d Cir. 2000) (where good time credit is a discretionary matter, inmate has no liberty interest in

[3] Plaintiff brings his procedural due process claim under both the Fifth and Fourteenth Amendments, but the Fifth Amendment Due Process Clause applies only to the federal government, and not to state or municipal governments. *See Dusenbery v. United States*, 534 U.S. 161, 167 (2002) ("The Due Process Clause of the Fifth Amendment prohibits the United States, as the Due Process Clause of the Fourteenth Amendment prohibits the States, from depriving any person of property without due process of law.").

the opportunity to earn good time credit); *see* N.Y. Correct. Law § 803 (outlining New York's discretionary good time credit program). Because inmates do not have a constitutional right to participate in programs that award good time credits, inmates cannot have a constitutional right to participate in one such program over another.

Additionally, according to Plaintiff, his earliest possible release date would have been May 15, 2024. ECF No. 52 at 13. Meanwhile, his participation in the moderate-risk SOCTP was scheduled to be completed sometime between July 31 and October 31, 2022. *Id.* at 9. Therefore, even if Plaintiff had asserted a liberty interest, no additional time would have been added to his term of imprisonment as a result of his participation in the longer SOCTP.

Accordingly, because Plaintiff does not have a protected liberty interest in participating in any SOCTP and his participation in the longer program did not extend the length of his sentence, Plaintiff has not demonstrated a deprivation of a liberty interest and his due process claim relating to the decision to place him in the moderate-risk SOCTP is dismissed.

B. Substantive Due Process Claim

To demonstrate a violation of his substantive due process rights, Plaintiff must "identify the constitutional right at stake," and then "must demonstrate that the state action was so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Hurd v. Fredenburgh*, 984 F.3d 1075, 1087 (2d Cir. 2021) (quotation omitted).

Plaintiff asserts a constitutional right in obtaining liberty without being forced to participate in SOCTP. ECF No. 52 at 13.In other words, Plaintiff argues that

he should be able to obtain good time credits that entitle him to parole without having to participate in the SOCTP. However, "prisoners do not have a protected liberty interest in parole where the relevant statutory scheme endows prison authorities with discretion over the decision whether to grant it." *Edwards v. Goord*, 362 F. App'x 195, 196 (2d Cir. 2010) (summary order) (citing *Greenholtz v. Inmates of Nebraska Penal and Corr. Complex*, 442 U.S. 1, 7 (1979); *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001). Under New York law, good time credits "may be granted for . . . progress and achievement in an assigned treatment program," but "may [also] be withheld, forfeited or canceled in whole or in part for . . . failure to perform properly in the duties or program assigned." N.Y. Correct. Law § 803 (emphasis added). Thus, the award of good time credits that Plaintiff seeks was discretionary and not a constitutional right.

Because Plaintiff has not identified a constitutional right that was at stake, Plaintiff has not demonstrated a violation of his substantive due process rights. This claim is dismissed.

IV. Retaliation

Prisoner retaliation claims are approached "with skepticism and particular care, because virtually any adverse action taken against a prisoner by a prison official—even those otherwise not rising to the level of a constitutional violation—can be characterized as a constitutionally proscribed retaliatory act." *Davis v. Goord*, 320 F.3d 346, 352 (2d Cir. 2003).

Plaintiff alleges that Defendants have retaliated against him because he filed the present lawsuit. He alleges the following six instances of retaliation: (1) receipt of an Inmate Counseling Notification from

Dr. Brotz on December 30, 2022;[4] (2) receipt of an Inmate Misbehavior Report from Dr. Brotz on April 4, 2022;[5] (3) being subjected to a search of his cell on April 11, 2022; (4) having his cell moved involuntarily from D4 to D3 on April 19, 2022;[6] (5) receipt of a Behavioral Contract on May 6, 2022; and (6) that prison officials destroyed his grievance related to the April 4th Inmate Misbehavior Report.

To state a retaliation claim, a prisoner must allege "(1) that the speech or conduct at issue was protected, (2) that the defendant took adverse action against the plaintiff, and (3) that there was a causal connection between the protected speech and the adverse action." *Fabricio v. Annucci*, 790 F. App'x 308, 311 (2d Cir. 2019) (summary order) (quoting *Espinal v. Goord*, 558 F.3d 119, 128 (2d Cir. 2009)).

Alleged adverse actions must be sufficiently adverse to "deter a similarly situated individual of ordinary firmness from exercising [his] constitutional rights," *Fabricio*, 790 F. App'x at 311 (quoting *Davis*, 320 F.3d at 353). However, "[p]risoners may be required to tolerate more than . . . average citizens, before a

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[4] Inmate Counseling Notification at ECF No. 52-6 at 2. Grievance Denial, *Id*. at 11.

[5] ECF No. 52-6 at 13. Plaintiff filed a grievance related thereto at ECF No. 52-6 at 14-16 (COL-0132-22). Plaintiff's grievance was dismissed at ECF No. 52-6 at 29 pursuant to Directive 440 Section 701.5(b)(4)(i)(c)(4) and 701.3(e)(2) ("an individual decision or disposition resulting from a disciplinary proceeding...is not grievable). Following an investigation, Plaintiff was found not guilty of the charged activity in the disciplinary ticket, rendering the disciplinary action not grievable. Plaintiff filed another grievance relating to the dismissal of the underlying grievance, and the response was the same at ECF No. 52-6 at 31.

[6] ECF No. 52-6 at 36.

retaliatory action taken against them is considered adverse." *Dawes v. Walker*, 239 F.3d 489, 493 (2d Cir. 2001) *overruled on other grounds*, *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002). To sufficiently allege a causal connection, Plaintiff's allegations must support an inference that the protected conduct was "a substantial or motivating factor for the adverse actions taken by prison officials." *Dorsey*, 468 F. App'x at 27 (quoting *Bennett v. Goord*, 343 F.3d 133, 137 (2d Cir.2003).

In addressing the causal connection requirement, a court may consider the temporal proximity between the protected conduct and the alleged retaliatory act. *See Edwards v. Horn*, 2012 WL 760172, *17 (S.D.N.Y. 2012). However, "the temporal proximity must be very close," in order to support an inference of causality. *Clark Cnty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (collecting cases that demonstrate that a 3-month period between the protected activity and the adverse action is not close enough to infer causality).

The right to file a lawsuit is constitutionally protected, therefore, Plaintiff easily meets the first prong of the test with respect to each alleged act of retaliation. *See Graham v. Henderson*, 89 F.3d 75, 80 (2d Cir. 1996) ("The right to petition government for redress of grievances—in both judicial and administrative forums—is among the most precious of the liberties safeguarded by the Bill of Rights."). The Court will, therefore, proceed in analyzing whether each instance of alleged retaliation includes an adverse action and whether Plaintiff has sufficiently alleged a causal connection between his protected speech and the alleged adverse action.

A. Inmate Counseling Notification.

"Counseling sessions and counseling memos that do not place the employee in an 'active disciplinary process' do not constitute adverse employment actions 'as a matter of law.'" *Stallworth v. New York*, No. 16-CV-03059, 2017 WL 4355897, at *19 (S.D.N.Y. July 27, 2017), report and recommendation adopted, No. 16CIV3059, 2017 WL 4342148 (S.D.N.Y. Sept. 28, 2017) (quoting *Tepperwien v. Entergy Nuclear Operations, Inc.*, 663 F.3d 556, 570 (2d Cir. 2011)). Although this alleged retaliation happened in the context of a prison and not employment, prisoners are expected "to tolerate more than . . . average citizens, before a retaliatory action taken against them is considered adverse." *Dawes*, 239 F.3d at 493. Therefore, if a counseling memo in the employment context does not constitute an adverse action, it certainly cannot constitute an adverse action in the prison context. Like *Stallworth*, the Inmate Counseling Notification that Plaintiff complains of here did not initiate an active disciplinary process, so it cannot constitute an adverse action.

Even if the Inmate Counseling Notification did constitute an adverse action, Plaintiff has not sufficiently alleged a causal connection because he does not allege facts that suggest that his lawsuit was a substantial motivating factor in Dr. Brotz's decision to issue the Inmate Counseling Notification. On the face of the counseling notification that Plaintiff attaches to his Amended Complaint, Dr. Brotz explained that the Plaintiff was told not to use Dr. Brotz's first name citing Public Officers Law 87(2)(f), but Plaintiff did so anyway. ECF No. 52-6 at 2. Therefore, on the record before this Court, it appears that a substantial

motivating factor for issuing the counseling notification was Plaintiff's own insubordination.

While the counseling notification and the amendment of the lawsuit to name Dr. Brotz as a defendant are close in time, the counseling notification was issued first. The counseling memo was issued December 22, 2021, and then Plaintiff added Dr. Brotz as a defendant on January 3, 2022. Where the alleged adverse action takes place prior to the protected speech, a causal connection is not sufficiently alleged. *See Marrero v. Kirkpatrick*, No. 08-CV-6237, 2012 WL 2685143, at *5 (W.D.N.Y. July 6, 2012) ("[T]he counseling memo . . . was issued to Plaintiff *prior to his filing the first formal grievance*. . . . Thus, Plaintiff has not shown a causal connection between the grievances he filed and the October 15th counseling memo."). Accordingly, Plaintiff has not sufficiently alleged a causal connection between his protected speech and the inmate counseling memo.

B. Discipline Ticket.

A misbehavior report issued in retaliation for an inmate's exercise of a protected activity may constitute an adverse action. *See Gayle v. Gonyea*, 313 F.3d 677, 682 (2d Cir. 2002) ("An allegation that a prison official filed false disciplinary charges in retaliation for the exercise of a constitutionally protected right, such as the filing of a grievance, states a claim under [Section] 1983."). Nevertheless, Plaintiff does not allege any facts from which an inference of causality could be made. Plaintiff's only argument is that these adverse actions took place after he filed his lawsuit and he believes that the Defendants were trying to punish him for vindicating his rights. However, "[t]o infer causation from the very fact that one activity preceded another, however, is insufficient here to adequately

plead retaliatory intent." *Edwards v. Horn*, No. 10 CIV. 6194, 2012 WL 760172, at *17 (S.D.N.Y. Mar. 8, 2012). While temporal proximity may give rise to circumstantial evidence of causality, "the temporal proximity must be very close." *Breeden*, 532 U.S. at 273. Here, the timing of the adverse action is not sufficiently proximate to the protected activity. The discipline ticket was issued on April 4, 2022, more than three months after Dr. Brotz was added as a Defendant to the lawsuit and nearly 10 months after the lawsuit was originally filed in June 2021.

C. Dorm Transfer.

The transfer of a prisoner is not considered an adverse action unless it results in the prisoner being subjected to more onerous conditions. *See Coleman v. Sutton*, 530 F. Supp. 2d 451, 453 (W.D.N.Y.2008) (prisoner failed to state a retaliation claim where he did not allege that conditions into which he was transferred were more onerous than his original placement). Here, Plaintiff only alleges that he was moved from D4 to D3, but does not allege that he was subject to more onerous conditions in D3. Accordingly, this transfer that Plaintiff complains of is not an adverse action.

D. Cell Search.

The one instance that Plaintiff's cell was searched is not an adverse action. *See Dorsey v. Fisher*, 468 F. App'x 25, 27 (2d Cir. 2012) ("allegations that [defendant] ordered or otherwise conducted two searches of plaintiff's cell and two searches of his person over a six-month period are insufficient to show adverse action."). Moreover, the contention that the search was ordered by Dr. Brotz is speculative as Plaintiff asserts nothing more than his suspicion of Dr. Brotz's involvement without

any actual facts. Finally, in this claim, Plaintiff also asserts in speculative and conclusory fashion that he believes his legal papers were "potentially copied." ECF No. 52 at 24. Such allegations do not rise to the level of an adverse action because Plaintiff has not alleged that as a result of this search his "efforts to pursue a nonfrivolous claim" were frustrated. *Collins v. Goord*, 581 F. Supp. 2d 536, 573 (S.D.N.Y. 2008). On the contrary, Plaintiff could not plausibly allege that his efforts to pursue his claims have been frustrated because Plaintiff has multiple lawsuits pending before this Court and he frequently files voluminous letters to amend and litigate his allegations. The search of Plaintiff's cell was, therefore, not an adverse action.

E. Behavioral Contract.

Like the Inmate Counseling Notification, the Behavioral Contract did not place plaintiff in an active disciplinary process and therefore cannot constitute an adverse action. *See Stallworth*, No. 16CV03059, 2017 WL 4355897, at *19. The Behavioral Contract also suffers from the same temporal infirmities as the other alleged adverse actions—it was issued on June 6, 2022, six months after Dr. Brotz was added to the lawsuit. Plaintiff also does not allege any other facts showing that the lawsuit was a substantial motivating factor in Dr. Brotz's choice to issue the Behavioral Contract. Rather, on the face of the Behavioral Contract, it was issued in the normal course as a part of his participation in the SOCTP. ECF No. 60-1 at 5 (*Dr. Brotz's Response to Behavior Contract Grievance*, "Behavioral Contracts, like other interventions, are designed to act as interventions; specifically, a way to assist participants in getting back on track when they are struggling in a particular area."). For these reasons, the Behavioral Contract was not an adverse

action and was not causally related to Plaintiff's protected speech.

F. Destroying Grievances.

Plaintiff's allegation regarding grievances being destroyed is implausible on its face and frivolous. To support this claim, Plaintiff refers to the grievance he submitted regarding Dr. Brotz's disciplinary ticket relating to the assistance he provided to a fellow inmate to file a FOIL request. ECF No. 60-1 at 21. The relevant documentation related to this alleged adverse action shows that the disciplinary ticket at issue was resolved in Plaintiff's favor on April 5, 2022.[7] On April 14, 2022, Plaintiff was then notified that his grievance based on the disciplinary ticket was dismissed pursuant to Directive 440 Sections 701.5(b)(4)(i)(c)(4) and 701.3(e)(2) ("an individual decision or disposition resulting from a disciplinary proceeding...is not grievable"); ECF No. 52-6 at 29. Plaintiff appealed the dismissal on April 15, 2022, and the dismissal was upheld. ECF No. 52-6 at 31. Following the denial of his appeal, on April 18, 2022, Plaintiff filed a new grievance alleging that his grievance tickets were being improperly destroyed to protect Dr. Brotz. ECF No. 52-6 at 31. Plaintiff received a response to that grievance, which reiterated the reasons for dismissing the prior grievance. Plaintiff allegations are implausible on their face because he provides documentation that shows that his grievances are not being destroyed at all, but instead are being responded to and addressed repeatedly pursuant to official prison grievance policy.

In sum, Plaintiff's allegations of retaliation are meritless and frivolous. The Inmate Counseling Notification, the Dorm Transfer, the Cell Search, the

[7] ECF No. 52-6 at 25.

Behavioral Contract are not adverse actions. The alleged destruction of Plaintiff's grievance did not occur. While the disciplinary ticket may be considered an adverse action, Plaintiff fails to allege any facts that could form the basis of a reasonable inference of causation, other than stating his strong suspicion of causation. Without more, where, as here, the plaintiff alleges the ultimate fact of retaliation in a conclusory and speculative manner, he fails to state a claim for retaliation. *Dorsey v. Fisher*, 468 F. App'x 25, 27 (2d Cir. 2012) (summary order) (citing *Flaherty v. Coughlin*, 713 F.2d 10, 13 (2d Cir.1983)).

Because Plaintiff fails to allege any adverse action, other than the discipline ticket, but also fails to sufficiently allege a causal connection between the discipline ticket and his protected speech, Plaintiff has not sufficiently alleged a plausible claim of retaliation. Accordingly, Plaintiff's claims of retaliation are dismissed.

V. False Claims

Plaintiff argues that Defendants violated the New York False Claims Act ("NYFCA")[8] "when they created and used an unapproved document . . . to override Petitioner into moderate risk." ECF No. 60 at 13. Because this override resulted in a longer program duration, Plaintiff contends that Defendants did so intentionally in order to obtain more money from the government to pay for the longer program. ECF No. 52 at 23.

Because the NYFCA mirrors the federal False Claims Act ("FCA") in many respects, "it is appropriate

[8] Plaintiff does not specify whether he is relying on the federal FCA or the New York FCA, however, since the relevant government entity at issue is the State of New York Department of Corrections and Community Services which administers SOCTP, this Court has construed his claim under the New York FCA.

to look toward federal law when interpreting the New York act." *United States v. Cath. Health Sys. of Long Island Inc.*, No. 12-CV-4425, 2017 WL 1239589, at *7 (E.D.N.Y. 2017). To state a claim under the federal FCA, the plaintiff must show "the defendants (1) made a claim, (2) to the government, (3) that is false or fraudulent, (4) knowing of its falsity, and (5) seeking payment from the federal treasury." *Coyne v. Amgen, Inc.*, 717 F. App'x 26, 28 (2d Cir. 2017) (summary order).

The statue NYFCA defines a "claim" as "any request or demand, whether under a contract or otherwise, for money or property . . . that is presented to an officer, employee, or agent of the state or a local government." NY State Fin Section 188(1). The override decision at the center of Plaintiff's NYFCA claim involved analyzing Plaintiff's criminal risk to reoffend and resulted in a determination of which SOCTP program was most suitable to address those risks. Placing Plaintiff in the moderate-risk program did not result in any direct payment from the government's treasury. Therefore, this decision did not involve "any request or demand . . . for money or property." *Id.* Because the decision did not involve a request or demand for money or property, this decision was not a "claim" as defined in the statute. Since Plaintiff fails to allege any facts that Defendants made a "claim" and could not plausibly do so based on the facts alleged in the complaint, Plaintiff's claim under the NYFCA must be dismissed.

VI. RICO

Plaintiff alleges that "Defendants colluded as an organization (DOCCS employees) and did it in a pattern over time (systemic overrides) and Petitioner (via money lost/used by his family/friends business led to losses) borne financial losses demonstrating RICO

violation (by DOCCS Defendants/Employees)." ECF No. 52 at 32.

RICO provides a private cause of action for treble damages to "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter." 18 U.S.C. § 1964(c). Section 1962 specifies the prohibited criminal activities. 18 U.S.C. § 1962(a)-(d). Each prohibited criminal activity requires alleging a "pattern of racketeering activity" or the "collection of unlawful debt." *Id.*

In order for a plaintiff to state a claim for damages under RICO, he must allege the violation of "criminal RICO," 18 U.S.C. § 1962. *Moss v. Morgan Stanley Inc.*, 719 F.2d 5, 17 (2d Cir. 1983). In so doing, a plaintiff must allege the existence of seven constituent elements: "(1) that the defendant (2) through the commission of two or more acts (3) constituting a "pattern" (4) of "racketeering activity" (5) directly or indirectly invests in, or maintains an interest in, or participates in (6) an "enterprise" (7) the activities of which affect interstate or foreign commerce." *Id.* (citing 18 U.S.C. § 1962(a)-(c)) (citations omitted).

Plaintiff's RICO claim misses the mark by many miles because he fails to allege a critical element of the criminal RICO violation—a pattern of "racketeering activity." Plaintiff's sole allegation of a predicate racketeering act that allegedly violated criminal RICO was Defendants decision to override his placement in the low-risk SOCTP and place him in the moderate-risk SOCTP. ECF No. 52 at 32. However, such an act does not fall within the statutory definition of a "racketeering activity," which requires that the act be indictable under an enumerated section of the United States Code or involve "murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter,

or dealing in a controlled substance . . . which is chargeable under State law. . .” *See generally*, 18 U.S.C. § 1961. A prison administrator’s decision to override an inmate’s placement in a treatment program is a far cry from any potential “racketeering activity.” Further, Plaintiff also fails to sufficiently allege a “pattern.” The override that he complains of only once, and a “‘pattern of racketeering activity’ requires at least two acts of racketeering activity.” 18 U.S.C.A. § 1961.

Because Plaintiff fails to allege that Defendants have engaged in a pattern of racketeering activity, Plaintiff’s RICO claim must be dismissed.

VII. CONSPIRACY

Plaintiff brings claims under both Sections 1985(3) and 1983 alleging that Defendants conspired to deprive him of his rights in two ways. First, he asserts that “(Defendants) engaged in conspiracy, collusion when they forced Petitioner to lie (provide untrue facts and admit to sexually offending behavior) in violation of his core and sincerely held religious beliefs.” ECF No. 60 at 13. Next, he asserts that “they also engaged in a conspiracy when they deliberately, wrongly overrode Petitioner to Moderate (instead of risk) in systemic defraud of taxpayer funds.” *Id.*

A. Section 1985 Conspiracy

A conspiracy claim under Section 1985(3) requires a plaintiff to allege: “1) a conspiracy; 2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; and 3) an act in furtherance of the conspiracy; 4) whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.” *Dolan v. Connolly*, 794

F.3d 290, 296 (2d Cir. 2015) (quoting *Britt v. Garcia*, 457 F.3d 264, 269 n. 4 (2d Cir.2006)). The conspiracy must also be "motivated by some racial or perhaps otherwise class-based, invidious discriminatory animus." *Cine SK8, Inc. v. Town of Henrietta*, 507 F.3d 778, 791 (2d Cir. 2007).

Critically, Plaintiff fails to allege a class-based animus that motivated Defendants in the acts that they took toward him. Plaintiff asserts that he is Hindu and sincerely holds a religious belief that he cannot lie. However, merely asserting membership a particular class is insufficient to assert that Defendants were motivated by Plaintiff's membership in such class. *See Thomas v. Roach*, 165 F.3d 137, 147 (2d Cir. 1999) (Ruling that, although, plaintiff "who is black, is a member of a protected class" such assertion is not enough to "demonstrate that the officers selected their course of action because of his race.").

Because Plaintiff fails to allege that Defendants were motivated by a class-based discriminatory intent, Plaintiff's claim for conspiracy under Section 1985(3) must be dismissed.

B. Section 1983 Conspiracy

To state a claim for Section 1983 conspiracy, a plaintiff must allege "(1) an agreement between a state actor and a private party; (2) to act in concert to inflict an unconstitutional injury; and (3) an overt act done in furtherance of that goal causing damages." *Ciambriello v. Cty. of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002). A complaint that contains "only conclusory, vague, or general allegations that the defendants have engaged in a conspiracy to deprive the plaintiff of his constitutional rights," or "diffuse and expansive allegations," is properly dismissed; to be viable, a complaint must

allege "specific instances of misconduct." *Id.* at 325 (internal quotation marks omitted). A plaintiff is not required to list the place and date of defendants' meetings and the summary of their conversations when he pleads conspiracy, *see Fisk v. Letterman*, 401 F. Supp. 2d 362, 376 (S.D.N.Y. 2005), but at the very least the pleadings must present "specific facts tending to show agreement and concerted action." *Bacquie v. City of New York*, No. 99CIV.10951, 2000 WL 1051904, at *1 (S.D.N.Y. July 31, 2000). Without "a meeting of the minds, the independent acts of two or more wrongdoers do not amount to a conspiracy." *Fisk*, 401 F. Supp. 2d at 376.

Here, Plaintiff's complaint contains "only conclusory, vague, or general allegations." *Id.* The facts in Plaintiff's complaint amount to allegations of independent acts by the various Defendants. Respecting the override decision, Plaintiff states that it was "initiated by D-Brotz" and "approved by "D-Mcallister." ECF No. 52 at 15. However, Plaintiff also alleges that it was D-Brotz's role in administering the program to make a recommendation and D-Mcallister's role in administering the program to approve and deny D-Brotz's recommendation. *Id.* At no point does he allege a conversation or agreement between these two Defendants. Essentially, Plaintiff has merely alleged that the Defendants were independently executing the responsibilities of their respective roles within the prison administration. Respecting the alleged conspiracy to force Plaintiff to lie, he offers no facts whatsoever to support a claim of conspiracy.

Because Plaintiff fails to allege a meeting of the minds, his allegations respecting Defendants' independent acts do not amount to a conspiracy and his claim of a Section 1983 conspiracy is dismissed.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the Amended Complaint, ECF. No. 77, is GRANTED. Plaintiff's Amended Complaint, ECF No. 52, is DISMISSED in its entirety. Plaintiff's motion to refer this case to a magistrate judge, ECF No. 83, is DENIED as moot. The Clerk of Court is respectfully directed to enter judgment and close this case.

IT IS SO ORDERED.

Dated: June 15, 2023
Rochester, New York

/s/ Frank P. Geraci, Jr.
HON. FRANK P. GERACI, JR.
United States District Judge
Western District of New York

APPENDIX C

Constitutional and statutory provisions

U.S. Const. Art. I § 8, cl. 1

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; but all Duties, Imposts and Excises shall be uniform throughout the United States;

* * *

U.S. Const. Art. I § 8, cl. 18

The Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

42 U.S.C. 2000cc

Protection of land use as religious exercise

(a) Substantial burdens

(1) General rule

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution—

(A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application

This subsection applies in any case in which—

(A) the substantial burden is imposed in a program or activity that receives Federal financial assistance, even if the burden results from a rule of general applicability;

(B) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, even if the burden results from a rule of general applicability; or

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the govern-

ment to make, individualized assessments of the proposed uses for the property involved.

(b) Discrimination and exclusion

(1) Equal terms

No government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution.

(2) Nondiscrimination

No government shall impose or implement a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination.

(3) Exclusions and limits

No government shall impose or implement a land use regulation that—

(A) totally excludes religious assemblies from a jurisdiction; or

(B) unreasonably limits religious assemblies, institutions, or structures within a jurisdiction.

42 U.S.C. 2000cc-1

Protection of religious exercise of institutionalized persons

(a) General rule

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 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. 2000cc-2

Judicial relief

(a) Cause of action

A person may assert a violation of this chapter 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.

(b) 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 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff 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.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

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).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

(g) Limitation

If the only jurisdictional basis for applying a provision of this chapter is a claim that a substantial burden by a government on religious exercise affects, or that removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, the provision shall not apply if the government demonstrates that all substantial burdens on, or the removal of all substantial burdens from, similar religious exercise throughout the Nation would not lead in the aggregate to a substantial effect on commerce with foreign nations, among the several States, or with Indian tribes.

42 U.S.C. 2000cc-3

Rules of construction

(a) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

(b) Religious exercise not regulated

Nothing in this chapter shall create any basis for restricting or burdening religious exercise or for claims against a religious organization including any religiously affiliated school or university, not acting under color of law.

(c) Claims to funding unaffected

Nothing in this chapter shall create or preclude a right of any religious organization to receive funding or other assistance from a government, or of any person to receive government funding for a religious activity, but this chapter may require a government to incur expenses in its own operations to avoid imposing a substantial burden on religious exercise.

(d) Other authority to impose conditions on funding unaffected

Nothing in this chapter shall—

(1) authorize a government to regulate or affect, directly or indirectly, the activities or policies of a person other than a government as a condition of receiving funding or other assistance; or

(2) restrict any authority that may exist under other law to so regulate or affect, except as provided in this chapter.

(e) Governmental discretion in alleviating burdens on religious exercise

A government may avoid the preemptive force of any provision of this chapter by changing the policy or practice that results in a substantial burden on religious exercise, by retaining the policy or practice and exempting the substantially burdened religious exercise, by providing exemptions from the policy or practice for applications that substantially burden religious exercise, or by any other means that eliminates the substantial burden.

(f) Effect on other law

With respect to a claim brought under this chapter, proof that a substantial burden on a person's religious exercise affects, or removal of that burden would affect, commerce with foreign nations, among the several States, or with Indian tribes, shall not establish any inference or presumption that Congress intends that any religious exercise is, or is not, subject to any law other than this chapter.

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

(h) No preemption or repeal

Nothing in this chapter 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 chapter.

(i) Severability

If any provision of this chapter or of an amendment made by this chapter, or any application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this chapter, the amendments made by this chapter, and the application of the provision to any other person or circumstance shall not be affected.

42 U.S.C. 2000cc-4

Establishment Clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the first amendment to the Constitution prohibiting laws respecting an establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. In this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

42 U.S.C. 2000cc-5

Definitions

In this chapter:

(1) Claimant

The term "claimant" means a person raising a claim or defense under this chapter.

(2) Demonstrates

The term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion.

(3) Free Exercise Clause

The term "Free Exercise Clause" means that portion of the first amendment to the Constitution that proscribes laws prohibiting the free exercise of religion.

(4) Government

The term "government"—

(A) means—

(i) a State, county, municipality, or other governmental entity created under the authority of a State;

(ii) any branch, department, agency, instrumentality, or official of an entity listed in clause (i); and

(iii) any other person acting under color of State law; and

(B) for the purposes of sections 2000cc-2(b) and 2000cc-3 of this title, includes the United States, a branch, department, agency, instrumentality, or

official of the United States, and any other person acting under color of Federal law.

(5) Land use regulation

The term "land use regulation" means a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land), if the claimant has an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest.

(6) Program or activity

The term "program or activity" means all of the operations of any entity as described in paragraph (1) or (2) of section 2000d-4a of this title.

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exer¬cise of religion, whether or not compelled by, or central to, a system of religious belief.

(B) Rule

The use, building, or conversion of real property for the purpose of religious exercise shall be considered to be religious exercise of the person or entity that uses or intends to use the property for that purpose.

42 U.S.C. 2000bb

Congressional findings and declaration of purposes

(a) Findings

The Congress finds that—

(1) the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution;

(2) laws "neutral" toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise;

(3) governments should not substantially burden religious exercise without compelling justification;

(4) in Employment Division v. Smith, 494 U.S. 872 (1990) the Supreme Court virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion; and

(5) the compelling interest test as set forth in prior Federal court rulings is a workable test for striking sensible balances between religious liberty and competing prior governmental interests.

(b) Purposes

The purposes of this chapter are—

(1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and

(2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

42 U.S.C. 2000bb-1

Free exercise of religion protected

(a) In general

Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability, except as provided in subsection (b).

(b) Exception

Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(c) Judicial relief

A person whose religious exercise has been burdened in violation of this section may assert that violation 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.

42 U.S.C. 2000bb-2

Definitions

As used in this chapter—

(1) the term "government" includes a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States, or of a covered entity;

(2) the term "covered entity" means the District of Columbia, the Commonwealth of Puerto Rico, and each territory and possession of the United States;

(3) the term "demonstrates" means meets the burdens of going forward with the evidence and of persuasion; and

(4) the term "exercise of religion" means religious exercise, as defined in section 2000cc-5 of this title.

42 U.S.C. 2000bb-3

Applicability

(a) In general

This chapter applies to all Federal law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after November 16, 1993.

(b) Rule of construction

Federal statutory law adopted after November 16, 1993, is subject to this chapter unless such law explicitly excludes such application by reference to this chapter.

(c) Religious belief unaffected

Nothing in this chapter shall be construed to authorize any government to burden any religious belief.

42 U.S.C. 2000bb-4

Establishment clause unaffected

Nothing in this chapter shall be construed to affect, interpret, or in any way address that portion of the First Amendment prohibiting laws respecting the establishment of religion (referred to in this section as the "Establishment Clause"). Granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter. As used in this section, the term "granting", used with respect to government funding, benefits, or exemptions, does not include the denial of government funding, benefits, or exemptions.

42 U.S.C. 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.