No. 21-1719

In the United States Court of Appeals for the Sixth Circuit

JULIA CATLETT, *et al.*

Plaintiffs-Appellees,

v.

HEIDI WASHINGTON, *et al.*

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Michigan, No. 2:20-cv-13283

BRIEF THE SIKH COALITION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLEE AND AFFIRMANCE

NICHOLAS R. REAVES
CHRIS PAGLIARELLA
YALE LAW SCHOOL
FREE EXERCISE CLINIC
1919 Pennsylvania Ave. NW
Ste. 400
Washington, DC 20006

GORDON D. TODD
Counsel of Record
DANIEL J. HAY
DEREK A. WEBB
CHRISTOPHER S. ROSS
SIDLEY AUSTIN LLP
1510 K St NW, Ste. 600
Washington, DC 20005
(202) 736-8000
gtodd@sidley.com

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Sixth Circuit Rule 26.1, *Amicus* the Sikh Coalition states that it has no parent company, that it is not a subsidiary or affiliate of a publicly owned corporation, and that it is not aware of any publicly owned company not a party to the appeal has a financial interest in the outcome of this case.

Dated: April 21, 2022

/s/ Gordon D. Todd
Gordon D. Todd

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

INTEREST OF *AMICUS CURIAE*[1]

The Sikh Coalition is a nonprofit, nonpartisan organization founded in the wake of the September 11th attacks to counter misconceptions, promote cultural understanding, and advocate for the civil liberties of all people, especially Sikhs. It is the largest Sikh civil rights organization in the country, providing direct legal services in cases of hate crimes, racial profiling, bullying, workplace discrimination, and other religious rights violations. The Coalition also advocates for legislative change, educates the public about Sikhs and diversity, promotes local community empowerment, and fosters civic engagement amongst Sikh Americans. *See* 1 *Religious Organizations and the Law* § 1:23 (2d ed. 2021) (treatise chapter extensively citing Sikh Coalition legal work). The Sikh Coalition has also advised both state and federal agencies on addressing discrimination and bias, including assisting the U.S. Department of Justice in developing its training on Sikh cultural competency.

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no one other than the *amicus curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief. This brief was prepared in part by a clinic operated by Yale Law School, but does not purport to present the School's institutional views, if any.

The Sikh Coalition has engaged in significant litigation regarding the religious rights of the incarcerated, including filing suit on behalf of a Sikh prisoner who was denied a religious accommodation to maintain unshorn facial hair as an article of faith. *See Basra v. Cate*, No. 2:11-cv-01676 (C.D. Cal. Feb. 25, 2011). The Sikh Coalition has also authored *amicus* briefs in the federal courts of appeals and the U.S. Supreme Court on related issues. *See, e.g.*, Brief of the Sikh Coalition and Muslim Public Affairs Council, *Holt v. Hobbs*, No. 13-6827 (U.S. May 29, 2014) (prisoners' rights under the Religious Land Use and Institutionalized Persons Act); Brief of the Sikh Coalition, *Sims v. Secretary*, No. 19-13745 (11th Cir. June 15, 2020) (standard for exhaustion of a prisoner's religious rights claim). The Sikh Coalition has also filed complaints with the Department of Justice's Office of Civil Rights regarding violations of religious rights in prison, including on behalf of a Sikh man whose turban was stripped and beard was cut for an identification photo, in violation of his sincere religious exercise. *See* Sikh Coalition et al., *Surjit Singh* (May 24, 2021), https://perma.cc/854A-BCAJ.[2]

[2] Counsel gratefully acknowledge the contributions of Yale Law School Free Exercise Clinic students Jacq Oesterblad, Jonathan Feld, and Areeb Siddiqui to this brief.

INTRODUCTION & SUMMARY OF ARGUMENT

This premature appeal misunderstands the well-reasoned decision it challenges. More importantly, it misunderstands the Free Exercise Clause's well-established protections for the incarcerated. This Court should clarify those protections, particularly for the many religious persons (including Sikhs) for whom the physical presentation of their faith is sacred.

No party disputes that the Free Exercise Clause prevents prison systems from "imping[ing] on" religious practice absent "legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987); *see Maye v. Klee*, 915 F.3d 1076, 1083 (6th Cir. 2019) (denying qualified immunity because "substantially burden[ing]" religious practice qualifies as *Turner* impingement). That is a two-element rule, and when qualified immunity is invoked against a *Turner* claim, it becomes a two-part question. First, was the government action clearly established as impinging religious exercise, to include substantial burdens on same? Second, was the reason for the action clearly established as not a legitimate penological interest?[3]

[3] To be sure, a *Turner* claim may prevail even where a policy is "connect[ed]" to a legitimate penological interest, as other factors may (*continued on next page*)

Here, in a rush to reach this Court at the complaint stage, the State expressly sets aside whether its hijab-stripping policy supported a "legitimate penological interest"—since the complaint pleaded no such interest, and the State has as yet proffered no contrary evidence. State Br. 20. Absent such an interest, the State must argue that its policy of stripping Muslim women of their religious head-covering did not, under clearly established law, impinge their free exercise rights. But the Supreme Court has long held that being put to the "choice" between "serious disciplinary action," on the one hand, and "conduct that seriously violates [one's] religious beliefs," on the other, "substantially burdens … religious exercise." *Holt v. Hobbs*, 574 U.S. 352, 361 (2015).

What is the State's response? To assert that *Holt* and like cases do not address stripping religious "*headgear*" and therefore do not apply here. State Br. 23-24 (emphasis added). On the State's telling, it matters not whether well-settled case law establishes that compelling or preventing a practice, including by removing other indicators of one's

---

show a policy to nevertheless be "not reasonable." *Flagner v. Wilkinson*, 241 F.3d 475, 484 (6th Cir. 2001) (citation omitted). But if a legitimate penological interest is *absent*, that alone dooms a policy that substantially burdens religion. *Id.*

faith (such as a beard) or taking away other sacred items (such as a rosary or Sikh *kanga*), substantially burdens (and thus impinges on) religious practice. If the case does not relate to a hijab (or perhaps other "headwear"), according to the State, it is irrelevant. There is, however, no basis for applying qualified immunity on a garment-by-garment basis.

Amicus writes to advocate for a proper understanding of when a substantial burden is clearly established. To contend, as the State does, that a substantial burden is clearly established only where case law addresses the very same religious *practice* down to the precise article of clothing—rather than the same form of *burden* or *coercion* discussed in *Holt*—is both legally mistaken and especially dangerous for adherents of minority faiths. Minority faith practices are by definition less common than majority faith practices and are much less likely to be addressed directly by prior case law. The State's proposed approach would enshrine in the law a test inherently discriminatory against such faiths.

Courts have long proceeded by analogizing prior cases to new, and the approach here should be no different. Providing equal protection for unfamiliar faiths means that if precedent establishes that compelling a Muslim to shave his beard or an Orthodox Jew to remove his yarmulke

is a substantial burden, it likewise establishes that compelling a Sikh to shave his *kesh* (unshorn hair) or remove his *kara* (a bracelet and key article of faith) is also a substantial burden. As *Holt* shows in framing the rule, what should matter for this threshold question is the burden—an inquiry that "focuses only on the coercive impact of the government's actions." *Yellowbear v. Lampert*, 741 F.3d 48, 55 (10th Cir. 2014) (Gorsuch, J.); *see Holt*, 574 U.S. at 361. And where a prohibition is at issue, this Court's precedent holds the inquiry brief: "The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Haight v. Thompson*, 763 F.3d 554, 564-65 (6th Cir. 2014).

Again, this is a mere threshold question. As proceedings continue, the State will be permitted to develop its factual defenses, including whether its policy advances a legitimate penological interest, and whether additional facts beyond the pleadings support a need for removing hijabs. But these possible defenses only underscore why, as this Court has repeatedly noted, the motion-to-dismiss stage is often a premature time to decide qualified immunity—particularly for claims (like free-exercise *Turner* claims) that turn on a "fact-intensive inquiry"

as to the state's interest as proven by its evidence. *Crawford v. Tilley*, 15 F.4th 752, 765 (6th Cir. 2021). The Court should reject this appeal.

I. Protecting the Rights of All Religions Requires a Fact-Intensive Approach to Qualified Immunity.

Numbering around 700,000, American Sikhs are among the largest non-Christian faith communities in the United States, *see* 1 *Religious Organizations and the Law* § 1:23, yet remain unfamiliar to most other Americans. Relevant to this case, devout Sikhs maintain a daily "uniform of their beliefs" deriving from the teachings of Guru Gobind Singh, the tenth Sikh Guru. *Id.* This uniform includes five key articles of faith set forth in the *Rehat Maryada*: *kesh* (unshorn, uncut hair all over the body), *kanga* (a small comb), *kara* (a steel bracelet), *kirpan* (a religious article resembling a knife), and *kachera* (soldier-shorts, worn as undergarments). *Id.*; *see* Shiromani Gurdwara Parbandhak Committee, *Sikh Rehat Maryada in English*, https://perma.cc/2BBM-CWJ8 (last visited Apr. 20, 2022). Sikhs must also wear a turban (*dastaar*) over their unshorn hair. Alternatively, some women cover their heads with a long scarf called a *chunni*. The *dastaar* or *chunni* remains one of the most visibly distinctive features of Sikh practice; this headwear is considered "a part of a Sikh's body" and to be removed only in private and necessary

settings, such as bathing in one's home. *See* Sikh Coalition, *Frequently Asked Questions*, https://perma.cc/6L2P-NZM4 (last visited Apr. 20, 2022). For the Sikh, the turban and articles of faith publicly and visibly signify an individual's commitment to Sikhism and to the highest ideals of love and service to humanity. *See* Karamvir Dhaliwal, *The Balance of Safety and Religious Freedom: Allowing Sikhs the Right to Practice Their Religion and Access Courthouses*, 18 Seattle J. for Soc. Just. 305, 307 (2020) (describing the religious significance of the "five Ks").

This public uniform also signifies courage: FBI hate crime statistics consistently identify Sikhs among the top five most targeted religious groups in the United States. *See* Fed. Bureau of Investigation, U.S. Dep't of Justice, *2019 Hate Crime Statistics* (2020), https://ucr.fbi.gov/hate-crime/2019/topic-pages/victims; *see also* U.S. Dep't of Justice, *Combating Religious Discrimination Today: Final Report* 20 (July 2016), https://perma.cc/X96G-ZLN2 (discussing "elevated levels" of violence against Sikhs and other minority faith groups after September 11). Indeed, just weeks before this brief was filed, an elderly Sikh man wearing the turban and *kesh* was the victim of an assault "being investigated as a hate crime" in Queens, New York. *See* Erica Brosnan,

NYPD: Sikh Man Visiting from India Brutally Attacked in Queens, N.Y. One (Apr. 4, 2022), https://perma.cc/FLF9-VYQN. Yet Sikh Americans courageously continue to practice their faith in a visible manner.

The Sikh religious practices discussed above are unfamiliar to most Americans and are addressed in only a handful of federal court decisions. Nevertheless, the few cases addressing Sikh practices often observe that the applicable rule is well-settled, even if developed in the factual context of another religious practice. The Fifth Circuit, for example, explained that there was no "serious hurdle" to show a substantial burden by being put to the choice between one's job and wearing the Sikh *kirpan*—since the U.S. Supreme Court held the same burden substantial when applied to the Sabbath practice of a Jehovah's Witness. *Tagore v. United States*, 735 F.3d 324, 330 (5th Cir. 2013) (citing *Sherbert v. Verner*, 374 U.S. 398 (1963)); *see also, e.g.*, *Singh v. Carter*, 168 F. Supp. 3d 216, 230-31 (D.D.C. 2016) (analogizing actions taken toward Sikh soldier seeking beard accommodation that "pressure[d] the plaintiff … to conform behavior and forego religious precepts" to coercion placed on Muslim prisoner's diet in *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1316 (10th Cir. 2010)).

The State's theory here suggests that qualified immunity would *always* attach *whenever* a federal court had not addressed the specific religious practice facing government coercion or compulsion. And that would be so even where the same form of compulsion, pursued with the same justification (or lack of justification), would clearly be unlawful as applied to another religious practice. That rule would be an encouragement to ignore well-established religious freedom principles where a minority faith is at issue. Fortunately, as discussed below, it is not what the law requires.

II. Qualified Immunity Is Premature.

A. The "clearly established" prong of qualified immunity usually requires fact development, particularly for a free-exercise *Turner* claim.

While courts should resolve qualified immunity defenses at the "earliest possible point," such resolution "usually" requires some fact development beyond the complaint. *Wesley v. Campbell*, 779 F.3d 421, 433-34 (6th Cir. 2015). For that reason, "it is generally inappropriate for a district court to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity." *Id.* at 433.

As this Court has noted in repeatedly reaffirming this rule, "[t]he reasoning for [that] general preference is straightforward." *Moderwell v.*

Cuyahoga Cnty., 997 F.3d 653, 660-61 (6th Cir. 2021) (quoting *Guertin v. Michigan*, 912 F.3d 907, 917 (6th Cir. 2019)). At the motion to dismiss stage, the court both "accept[s] all well-pleaded factual allegations as true" and "construe[s] the complaint in the light most favorable to the plaintiff." *Solo v. UPS Co.*, 819 F.3d 788, 793 (6th Cir. 2016). So often, "[a]bsent any factual development beyond the allegations in a complaint, a court cannot fairly tell whether a case is 'obvious' or 'squarely govern[ed]' by precedent, which prevents us from determining whether the facts of this case parallel a prior decision or not." *Evans-Marshall v. Bd. of Educ.*, 428 F.3d 223, 235 (6th Cir. 2005) (Sutton, J., concurring); *see Guertin*, 912 F.3d at 917 (quoting same). This is particularly true where a constitutional harm is considered against a countervailing governmental interest. *Evans-Marshall*, 428 F.3d at 235 (Sutton, J., concurring). In those cases, the court must know, in considerable factual detail, the exact nature of the harm and the precise nature of the governmental interest at stake—"what is being balanced against what." *Id.*

This Court's decisions have repeatedly and recently affirmed the principle articulated in *Wesley*, "generally den[ying] qualified immunity

at the motion to dismiss stage in order for the case to proceed to discovery, so long as the plaintiff states a plausible claim for relief." *Marvaso v. Sanchez*, 971 F.3d 599, 605-06 (6th Cir. 2020); *see, e.g.*, *Moderwell*, 997 F.3d at 660-61; *Hart v. Hillsdale Cnty.*, 973 F.3d 627, 635 (6th Cir. 2020); *Guertin*, 912 F.3d at 917. Yet the State argues that "the district court improperly relied on this Court's holding in *Wesley*," arguing that *Wesley* (1) is inconsistent with Supreme Court precedent requiring qualified immunity to be decided early; and (2) "runs counter" to this Court's recent decision in *Crawford*, 15 F.4th 752. State Br. 8. Neither argument has merit.

First, the "earliest *possible* stage" does not mean "the earliest stage." As this Court often states, there is no contradiction between "stress[ing] the importance of resolving immunity questions at the earliest possible stage in litigation," as the Supreme Court has done, and acknowledging that the earliest possible stage is often summary judgment. *Kaminski v. Coulter*, 865 F.3d 339, 344 (6th Cir. 2017). Neither is there a contradiction between *Wesley* and the State's cited precedent. The Supreme Court has explained that "the *Harlow* Court refashioned the qualified immunity doctrine in such a way as to 'permit the resolution

of many insubstantial claims on *summary judgment*" to avoid "the costs of trial or … the burdens of broad-reaching discovery" unnecessary to the qualified immunity question. *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (emphasis added). *Crawford-El v. Britton*, 523 U.S. 574 (1998), cited by the State, likewise emphasizes that it is "summary judgment" that "serves as the ultimate screen to weed out truly insubstantial lawsuits prior to trial." *Id.* at 600. Other Supreme Court cases briefly cited by the State likewise involved the resolution of qualified immunity at summary judgment. *See Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (per curiam); *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996); *Wilkie v. Robbins*, 551 U.S. 537, 548 (2007); *Pearson v. Callahan*, 555 U.S. 223, 231-32 (2009).

Second, *Crawford v. Tilley* not only does not undermine the *Wesley* principle but expressly underscores *Wesley*'s relevance to the *Turner* case before the Court. *Crawford* describes the general preference for resolving qualified immunity claims on summary judgment is "at best imprecise" when applied to a defense that no constitutional right was violated *at all*. 15 F.4th at 763; *id.* at 764-65 (stating the preference has less "vitality" in this context). But *Crawford* did not purport to critique the *Wesley* rule

where—as here—the qualified immunity question centers on whether the violation was "clearly established." *Id.* at 765. Rather, "[d]ismissing for qualified immunity on this ground is sometimes difficult because the clearly established inquiry may turn on case-specific details that must be fleshed out in discovery." *Id.* And the Court noted that while this rule was first developed in a "balancing test" case requiring "a fact-intensive inquiry," it logically extends to all rules that turn on close "factual distinctions." *Id.* (collecting cases).[4]

Properly read, *Crawford* undercuts the State's brief. In its own words, the State is "crystal clear" that it raised only a "second prong" defense—whether the violation was clearly established—and did not contest that a violation occurred. State Br. 15. *Crawford* states that early resolution remains difficult in such cases. That rule has special force where, as here, the State has *also* disclaimed any argument on a key fact-

[4] Even if *Crawford* had purported to overrule *Wesley*—and as explained, it did not—*Wesley* would still bind this panel. "When a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case." *United States v. Reid*, 888 F.3d 256, 258 (6th Cir. 2018) (citation omitted). And while the State once describes the *Wesley* principle as "dicta"—despite its continued restatement in precedential decisions—it acknowledges elsewhere that the district court was relying on "this Court's holding in *Wesley*." State Br. 8, 15.

intensive aspect of the test—a reasonable connection to a legitimate penological interest.

The State misunderstands the significance of that omission by saying "[t]he *Turner* test would only be relevant … if the Defendants had argued that they were entitled to qualified immunity based on the first prong of the test," that is, whether a constitutional violation existed at all. State Br. 21. But qualified immunity is not a check for identical facts divorced from legal rules. The core question in this case is whether the defendant's conduct was a clearly established free-exercise *Turner* violation. As discussed further below, compulsory stripping of religious garb is clearly established as a substantial burden. And taking the complaint as true, and accepting the state's waiver, the absence of a legitimate penological interest is conceded. That does not doom the State's defenses following factual development on its actual interest and conduct. But it does put this premature appeal squarely in the heartland of cases for which it is "generally inappropriate … to grant a 12(b)(6) motion to dismiss on the basis of qualified immunity," as the district court recognized. *Wesley*, 779 F.3d at 433.

B. Flatly prohibiting physical religious expression is clearly established as a substantial burden.

Here, plaintiffs have "allege[d] facts that plausibly make out a claim that the defendant's conduct" placed a substantial burden or otherwise impinged on religious exercise under "clearly established law at the time." *Cahoo v. SAS Analytics Inc.*, 912 F.3d 887, 898 (6th Cir. 2019) (alterations omitted).[5] The key facts are as follows:

1. Plaintiffs alleged that their faith dictates that they wear a hijab, that wearing their hijab was core to their religious identity, and that they believed that exposing their uncovered hair, head, or neck to men outside of their immediate family violated the commandments of modesty that stemmed ultimately from the *Qu'ran*. Amended Complaint ¶¶ 21-25.

2. Plaintiffs alleged that they were "forced," pursuant to policy, "to remove [their] religious head cover" for photographs to be placed on identification cards and a publicly available website. *Id.* ¶¶ 30, 49-51.

3. Plaintiffs alleged they were compelled to maintain, on their person, identification cards with their unadorned heads

[5] For clarity, *Turner*'s threshold showing requires only that a policy "impinges on" free exercise rights, 482 U.S. at 89, and that standard may encompass harms that would not otherwise qualify as a substantial burden. But this Court has held that, at a minimum, substantial burdens qualify as impingement under *Turner*. *Maye*, 915 F.3d at 1083. And plaintiffs have pleaded (factually and legally) a substantial burden on their religious exercise. Amended Complaint ¶¶ 49-51, 84. So *amicus* focuses on the standard for a substantial burden, while also citing to precedents applying *Turner*'s general impingement standard where appropriate.

visible, and present those cards to male and female guards alike. *Id.*

4. Plaintiffs alleged that they raised verbal objections to the policy based on their religious beliefs, but were nevertheless compelled to comply, consistent with a policy that allowed no religious exceptions. *Id.*

Taking these allegations as true, as the district court was required to do on a motion to dismiss, the State's policy unambiguously placed a substantial burden on plaintiffs' religious practice, because it directly required plaintiffs to "engage in conduct that seriously violates [their] religious beliefs." *Holt*, 574 U.S. at 361. Specifically, it compelled plaintiffs with expressed religious objection to: (1) expose their uncovered hair, head, and neck contrary to their religious practice; (2) provide that exposure in service of continued broad view by the public, serving an end contrary to their religious practice; and (3) maintain a card displaying that exposure and present it to male guards, contrary to religious commandment. The State's policy both prohibited a religious practice (maintaining the hijab and religious modesty) and compelled a forbidden practice (exposing one's uncovered hair, head, and neck, both through a

booking process which facilitates continued view online and through an identification card process that requires constant exposure on request).[6]

Holt clearly establishes that compelling religiously forbidden behavior in the prison context, with its attendant coercive power, constitutes a substantial burden. 574 U.S. at 361; *see Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2022 (2017) ("outright prohibitions" necessarily qualify as burdens on free exercise rights (citation omitted)). That is because the threshold substantial burden inquiry, when based on a claim of compulsion or coercion, "focuses *only* on the coercive impact of the government's actions." *Yellowbear*, 741 F.3d at 55 (emphasis added). Sufficient coercion includes "(1) requir[ing] the plaintiff to participate in an activity prohibited by a sincerely held religious belief, (2) prevent[ing] … an activity motivated by a sincerely held religious belief, or (3) plac[ing] considerable pressure on the plaintiff to violate a sincerely held religious belief." *Id.*

[6] These policies, if applied to a Sikh prisoner, would similarly violate Sikh practices. *See supra* pp.7-8. However, by the State's logic, a ruling that the violation here was clearly established might be limited only to cases involving a Muslim hijab, rather than a Sikh turban or *chunni*—underscoring the practical problem with their argument.

Where a prohibition is at issue, this Court treats a substantial burden as logically entailed: "The greater restriction (barring access to the practice) includes the lesser one (substantially burdening the practice)." *Haight*, 763 F.3d at 564-65 (barring access to powwow foods). Accordingly, this Court has not hesitated to find a substantial burden where a religious practice is flatly prohibited or a religiously prohibited practice is compelled. In *Maye*, for example, this Court held that prohibiting a Muslim prisoner from celebrating Eid al-Adha constituted a substantial burden and impinged on free exercise freedoms under *Turner*. 915 F.3d at 1083. The Court cited its prior decision in *Whitney v. Brown*, 882 F.2d 1068, 1073 (6th Cir. 1989), where a prison's ban on group gatherings for the Passover seder likewise established impingement under *Turner*. *Id.* Outside the prison context, this Court recently found it "plainly" "substantially burden[ed]" religious exercise to directly "prohibit[ ]" religious gatherings under COVID-19 orders. *Maryville Baptist Church, Inc. v. Beshear*, 957 F.3d 610, 613 (6th Cir. 2020) (per curiam) (noting "[a]ll [parties] accept" that premise, despite disputing what defenses might allow the burden).

And, returning to the prison context, the federal circuits uniformly hold compulsion of religiously forbidden practice or prohibition of religious practice to be a substantial burden, irrespective of the exercise at issue. *See, e.g.*, *Yellowbear*, 741 F.3d at 55 (Tenth Circuit; prohibition on use of sweat lodge); *Warsoldier v. Woodford*, 418 F.3d 989, 995-96 (9th Cir. 2005) (punishing inmate for declining to "cut his hair," contrary to Native religious practice, constituted substantial burden); *Davila v. Gladden*, 777 F.3d 1198, 1205 (11th Cir. 2015) (prohibition on wearing of certain "beads and shells" with significance in Santeria constituted substantial burden).[7]

Further, even if an analogous religious exercise *were* required—a holding that would be detrimental to the Sikh community and other minority faiths—it would be satisfied in this case.

---

[7] While postdating the policy at issue here, the Supreme Court recently reaffirmed *Holt*'s understanding of how to measure a substantial burden in *Ramirez v. Collier*, 142 S. Ct. 1264 (2022). There, the Court considered a claim of substantial burden by a death-row inmate based on limits placed on his minister's prayer practices in the death chamber. Even though the prohibition was more directly applied to a third party (the minister), the Court had no trouble seeing that the inmate's religious practice of praying *with* his minister was being prohibited, and that this qualified as a substantial burden. *Id.* at 1278 (citing *Holt*, 574 U.S. at 361, and noting Texas had conceded the point).

First, many faiths place significant emphasis on adherents' hair. For a Sikh, unshorn hair (*kesh*) constitutes as much a part of the "uniform of their beliefs" as the turban or the *kara*. 1 *Religious Organizations and the Law* § 1:23. And it is clearly established that requiring a prisoner to shave a beard or cut one's hair contrary to their faith is a substantial burden. *Holt*, 574 U.S. at 361; *Warsoldier*, 418 F.3d at 995-96; *Benjamin v. Coughlin*, 905 F.2d 571, 576-77 (2d Cir. 1990) (compelled haircut of Rastafarian inmates infringed free exercise rights under *Turner*); *see also A.A. ex rel. Betenbaugh v. Needville Indep. Sch. Dist.*, 611 F.3d 248, 264 & n. 64 (5th Cir. 2010) (finding, pre-*Holt*, that forcing student to cut hair would "likely constitute a substantial burden," given prior precedent on haircutting in prison). And the claim here closely relates to hair—had the policy simply required exposing hair while leaving the hijab undisturbed, it would still have violated plaintiffs' faith as pleaded. Amended Complaint ¶¶ 21-25.[8]

[8] One out-of-circuit district court has reasoned in a qualified immunity case that haircuts might be distinguishable from stripping a hijab, on the ground that the haircut's duration would be a "more invasive and longer-lasting intrusion." *Bah v. City of New York*, No. 20-cv-263, 2022 WL 955924, at *4 (S.D.N.Y. Mar. 30, 2022). That fact does not change the *nature* of the government coercion: using direct force to compel a plaintiff

(*continued on next page*)

Second, other longstanding case law extends this principle to garments or garb, including headwear. For example, the Tenth Circuit found that temporarily depriving an Orthodox Jewish prisoner of a yarmulke (and tallit katan undergarment) impinged on his religious practice under *Turner*. *Boles v. Neet*, 486 F.3d 1177, 1179 (10th Cir. 2007). As here, the Tenth Circuit found qualified immunity was inappropriate where no legitimate penological interest had yet been established on the record. *Id.* at 1184. The Eighth Circuit has likewise held under *Turner* that a prohibition on wearing fezes that had "religious significance for members of the Moorish Science Temple" religion in certain prison rooms "infringe[d] upon the plaintiffs' religious practice" under *Turner*, though it found the State had successfully demonstrated a legitimate penological need related to the hiding of weapons in such headgear. *Butler-Bey v. Frey*, 811 F.2d 449, 451 (8th Cir. 1987). Post-*Holt*, state defendants more often concede the burden imposed by stripping

---

to forego a religious exercise. *See Maye*, 915 F.3d at 1083 (prohibition only on participation in annual Eid ceremony). But even if duration mattered, the policy alleged here is distinguishable by compelling *indefinitely continued* violation of religious belief: requiring plaintiffs to maintain and continually present the exposed image on an identification card. Amended Complaint ¶¶ 49-51.

religious headwear. *See, e.g.*, *Ali v. Stephens*, 822 F.3d 776, 784 (5th Cir. 2016) (state declined to "challenge the trial court's holding" that prohibiting a Muslim's *kufi* cap "substantially burden[ed] [his] religious exercise" after *Holt*). The same principles apply to other garb. The Eleventh Circuit has found a prohibition on wearing specific "beads and shells" substantially burdened a Santeria practitioner's religious exercise. *Davila*, 777 F.3d at 1205. The Seventh Circuit found the same with the confiscation of a Wiccan medallion. *Knowles v. Pfister*, 829 F.3d 516, 519 (7th Cir. 2016). So even if prior decisions had to relate to headwear or garb, a "robust consensus of cases of persuasive authority" established that requiring the removal of such garb, or confiscating the same, was a substantial burden and impingement on religious practice. *See Plumhoff v. Rickard*, 572 U.S. 765, 780 (2014) (internal quotation marks and citation omitted).[9]

[9] While the district court pointed to other district court decisions as well as Supreme Court authority, precedential appellate decisions alone show this robust consensus, without reference to other well-reasoned nonprecedential opinions or district court decisions. *See, e.g.*, *Barnes v. Furman*, 629 F. App'x 52, 56 (2d Cir. 2015) (denying qualified immunity where Jewish inmate was denied ability to wear Tsalot-Kob headwear, as "prohibit[ion] [of] a sincere religious practice without some legitimate penological interest" was clearly established as a *Turner* violation);
(*continued on next page*)

Notably, even some of the State's own out-of-circuit district court authorities *support* this consensus. For example, in *Al-Kadi v. Ramsey County*, the district court found a booking process requiring the removal of a hijab was "substantially similar to the facts of *Holt*" and thus supported a claim of "substantial burden"; but it found, *on summary judgment*, that the security interests shown by Minnesota were not "clearly established" as insufficient to support a *Turner* defense. No. 16-cv-2642, 2019 WL 2448648, at *10, *13 (D. Minn. June 12, 2019) (citing *Butler-Bey*, 811 F.2d at 451).

This Court should confirm what is clear from *Holt,* circuit precedent, and persuasive appellate authority: that flat prohibitions in prison on sincere religious exercise are clearly established as substantial burdens, regardless of the religious exercise at issue. That holding would place no limit on states' ability to develop their defenses as to why the burden was permissible or—for qualified immunity—not clearly established as impermissible, in light of the interests served. But in the

---

Pleasant-Bey v. Shelby Cnty. Gov't, No. 2:17-cv-02502, 2019 WL 5654993, at *4 (W.D. Tenn. Oct. 31, 2019) (no qualified immunity defense available where preventing Muslim inmate from wearing kufi or turban clearly impinged religious exercise and no legitimate penological interest in the record supported the ban).

alternative, the Court may reserve the question of whether an analogous exercise is required, given that a robust consensus of cases *do* address analogous exercise regarding religious hair, garb, and headwear.

C. Plaintiffs adequately alleged no legitimate penological interest, and the State has expressly waived that issue on appeal.

Plaintiffs' complaint not only alleges that the challenged policy serves no legitimate penological interest, but also makes numerous allegations about government identification policies (including Michigan's) within and outside prison systems. These allegations allowg an inference of no legitimate interest in compelling the removal of religious headwear (that would otherwise be worn in the prison system). Amended Complaint ¶¶ 32-42. Accepting these "well-pleaded factual allegations as true" and "constru[ing] the complaint in the light most favorable to the plaintiff," plaintiffs have alleged a lack of a legitimate penological interest. *Solo*, 819 F.3d at 793.

As the district court noted, the State did not attempt to argue or introduce evidence below that its policy served a legitimate penological interest. On appeal, the State makes its waiver express, saying it is "not required" to satisfy *Turner*'s requirement of a "legitimate penological

interest." State Br. 20. But where free exercise rights are clearly impinged, a connection to a legitimate penological interest is needed: "Without this, the policy is unconstitutional, and the other factors [of *Turner*] do not matter." *ACLU Fund of Mich. v. Livingston Cnty.*, 796 F.3d 636, 646 (6th Cir. 2015) (quoting *Muhammad v. Pitcher*, 35 F.3d 1081, 1084 (6th Cir. 1994)).

For this reason, a qualified immunity defense to a free-exercise *Turner* claim commonly fails when it precedes the government's presentation of evidence as to its legitimate penological interest. *See, e.g.*, *Maye*, 915 F.3d at 1084, 1087 (denying qualified immunity where state offered no "valid penological justification" and both a district court order and longstanding precedent—including *Turner*—established the restriction on free exercise was otherwise unlawful); *Boles*, 486 F.3d at 1184 (no legitimate penological interest in denying yarmulke in record); *Ford v. McGinnis*, 352 F.3d 582, 598 (2d Cir. 2003) (Sotomayor, J.) ("premature" to grant qualified immunity regarding denial of religious feast where district court had not yet "tested the relationship" to "legitimate penological justifications"); *Luther v. White*, No. 5:17-CV-138-TBR, 2019 WL 511795, at *10 (W.D. Ky. Feb. 8, 2019) (denying qualified

immunity where "Defendants have put forward no interest to justify" restriction on religious incense); *Pleasant-Bey*, 2019 WL 5654993, at *4 (denying qualified immunity on kufi ban absent legitimate penological interest in the record).

The State strains to distinguish away cases like *Pleasant-Bey* as not involving the denial of the right to wear religious headwear in the specific context of an identification photo. State Br. 22. But as this Court has noted, "an action's unlawfulness can be apparent from direct holdings, from specific examples described as prohibited, or from the general reasoning that a court employs." *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003). And *Turner*'s general reasoning—as elaborated in numerous direct holdings—simply cannot sustain the claim that a reasonable officer could think it lawful to impinge religious exercise (by a means clearly established as impinging such exercise) with no legitimate penological justification.

And the State cites no case, from this circuit or any other, in which a court extended qualified immunity to prison officials on a motion to dismiss after expressly finding, based upon the undisputed allegations in a complaint, that a policy that impinged upon the First Amendment

rights of inmates had no reasonable relationship to *any* legitimate penological interest. To the contrary, many of its supporting district court cases discuss, and rely on, the state defendants' briefing on the nature of its interest. *See, e.g.*, *Al-Kadi*, 2019 WL 2448648, at *10, *13; *Carter v. Myers*, No. 15-2583, 2017 WL 8897155, at *9 (D.S.C. July 5, 2017), *report and recommendation adopted*, 2017 WL 3498878 (D.S.C. Aug. 15, 2017); *Soliman v. City of New York*, No. 15-cv-5310, 2017 WL 1229730, at *7 (E.D.N.Y. Mar. 31, 2017).[10] By contrast, the State here abandoned below, and knowingly waived on appeal, the opportunity to discuss how its hijab-stripping mandate actually serves legitimate identification or contraband interests.

Following well-established Sixth Circuit precedent, this Court should affirm and allow the qualified immunity claim to be further developed and taken up on summary judgment. There, the State can address the evidence that Plaintiffs have introduced tending to undercut the policy's connection to identification interests, including the less

[10] All three of these cases likewise address conduct that took place prior to the Supreme Court's 2015 *Holt v. Hobbs* decision, and subsequent circuit precedent applying same.

restrictive policies of other prison systems and Michigan's own practices in the context of drivers' licenses and county-level jail policies.

CONCLUSION

This Court should affirm the court's decision below denying the motion to dismiss.

Dated: April 21, 2022

Respectfully submitted,

/s/ Gordon D. Todd
GORDON D. TODD
Counsel of Record
DANIEL J. HAY
DEREK A. WEBB
CHRISTOPHER S. ROSS
SIDLEY AUSTIN LLP
1510 K St NW, Ste. 600
Washington, DC 20005
(202) 736-8000
gtodd@sidley.com

NICHOLAS R. REAVES
CHRIS PAGLIARELLA
YALE LAW SCHOOL
FREE EXERCISE CLINIC
1919 Pennsylvania Ave. NW
Ste. 400
Washington, DC 20006

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation for an *amicus* brief because it contains 5,854 words. *See* Fed. R. App. P. 29(a)(5). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface (Century Schoolbook 14-point type) using Microsoft Word 2016.

Dated: April 21, 2022

/s/ Gordon D. Todd
Gordon D. Todd

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Amicus Brief was filed this 21st day of April, 2021, through the Court's Electronic Filing System. Parties will be served, and may obtain copies electronically, through the operation of the Electronic Filing System.

Dated: April 21, 2022

/s/ Gordon D. Todd
Gordon D. Todd